Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 1 – The Senedd
Meeting date: 18 June 2018
Meeting time: 14.30

For further information contact:
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1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

14.30

Negative Resolution Instruments

2.1 **SL(5)225 – The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018**

(Pages 1 – 55)

CLA(5)-17-18 – Paper 1 – Report

CLA(5)-17-18 – Paper 2 – Regulations

CLA(5)-17-18 – Paper 3 – Explanatory Memorandum

3 Papers to note relating to Statutory Instruments

14.35

3.1 **SL(5)226 – The Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018**

(Pages 56 – 71)

CLA(5)-17-18 – Paper 4 – Regulations

CLA(5)-17-18 – Paper 5 – Explanatory Memorandum

CLA(5)-17-18 – Advice Note

3.2 **SL(5)220 – The Sea Fishing (Miscellaneous Amendments) Regulations 2018**

(Pages 72 – 76)

CLA(5)-17-18 – Paper 6 – Report including the Government response

CLA(5)-17-18 – Paper 7 – Draft letter

4 Papers to note

14.45

4.1 Welsh Government Evidence to the Commission on Justice in Wales

(Pages 77 – 99)

CLA(5)-17-18 – Paper 8 – Welsh Government Evidence to the Commission on Justice in Wales

4.2 Letter from the Counsel General: Implementation of Law Commission Proposals

(Pages 100 – 101)

CLA(5)-17-18 – Paper 9 – Letter from the Counsel General, 12 June 2018

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

14.50

6 Childcare Funding (Wales) Bill: Draft Report

(Pages 102 – 130)

CLA(5)-17-18 – Paper 10 – Draft Report

CLA(5)-17-18 – Paper 11 – Letter from the Chair of the Children, Young People and Education Committee

7 UK governance post-Brexit: Draft Inter-Institutional Agreement

(Pages 131 – 133)

CLA(5)-17-18 – Paper 12 – Draft Agreement

8 EU (Withdrawal) Bill: Update

(Pages 134 – 146)

CLA(5)-17-18 – Paper 13 – EU (Withdrawal) Bill: Update

Date of the next meeting

25 June 2018

SL(5)225 – The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018

Background and Purpose

These Regulations provide for loan support to eligible students undertaking designated postgraduate doctoral degree courses which being on or after 1 August 2018. The Regulations set out:

- the eligibility requirements for loan support;
- what constitutes a "designated" course;
- the formalities relating to applying for a loan;
- details of the amounts and payment of loans;
- details regarding loans to eligible prisoners; and
- information requirements.

Procedure

Negative.

Technical Scrutiny

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

1. **Standing Order 21.2(x): that there appears to have been unjustifiable delay in publishing it or laying it before the Assembly.**

   The Regulations were made on 23 May 2018 but were not laid until 1 June 2018 which is a delay of 9 days. The Government is asked to provide any justification for the 9 day delay in laying these Regulations after they were made.

Merits Scrutiny

One point is identified for reporting under Standing Order 21.3 in respect of this instrument.

1. **Standing Order 21.3(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.**

   Regulation 3(3)(a) provides that a person is not eligible for a postgraduate doctoral degree loan if they have reached the age of 60 on the first day of the academic year in which the course starts.

   The Committee raises the following human rights concern in respect of this age limit.

   Article 2 of Protocol 1 to the European Convention on Human Rights (ECHR) contains a free-standing right to education.

Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set out in the ECHR shall be secured without discrimination on various protected grounds, including age.[1]

The Committee believes that the issues raised by regulation 3(3)(a) relate to the right to education. Setting an upper age limit of 60 is discriminatory. It is therefore necessary to look at whether the upper age limit is justified. If it can be justified, there is no breach of the ECHR. The Supreme Court sets a fourfold test[2]:

a) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
b) Is the measure rationally connected to that aim?
c) Could a less intrusive measure have been used?
d) Has a fair balance been struck?

The Explanatory Memorandum provides justification as to the setting of the upper age limit on the basis that:

a) The aim of the scheme is to increase, in the context of finite resources, high level skills for the economy. The Government states that to ensure value for money, sustainable funding is required and the age limit of 60 mitigates against the risk that loans are disproportionately taken out by older students who will be unlikely to repay the loan amount in full or make significant repayments and who would have a limited number of working years in which their skills would be available to the economy. The Explanatory Memorandum sets out findings of analyses that the Government has carried out to bring it to this conclusion.
b) It is necessary to ensure value for money for the taxpayer and the Government takes the view that the imposition of the age limit is rationally connected to the aim.
c) The possibility of a less intrusive measure to achieve the aim was considered. The conclusion was that a system which required individual investigation and assessment would create a heavy administrative burden which could consume scarce resources. Such a system might also introduce scope for inconsistent decision-making.
d) Taking into account its evidence concerning not only repayment rates of loans but also employment rates (it is not the purpose of the loan to facilitate the uptake of doctoral degree courses by students who have no particular intention to return to the workplace), the Government considers that the age restriction strikes a fair balance and is justified.

We welcome the justification set out in the Explanatory Memorandum and that it appears the Government has given careful consideration to the justification of setting an upper age limit of 60 in these Regulations.

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[1] The European Court of Human Rights ECtHR has found that 'age' is included among 'other status' in Article 14 (Schwizgebel v Switzerland (No. 25762/07)).
[2] R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57

Implications arising from exiting the European Union

The eligibility requirements for student finance are drafted to take account of UK membership of the European Union. Therefore certain EU students will be eligible for support under the Regulations. It is not confirmed at this stage what effect Brexit will have on the mobility of students.

Government Response

A Government response is required to the technical scrutiny point raised in this report.

Legal Advisers
Constitutional and Legislative Affairs Committee
13 June 2018

WELSH STATUTORY INSTRUMENTS

2018 No. 656 (W. 124)

EDUCATION, WALES

The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for loan support to eligible students undertaking designated postgraduate doctoral degree courses which begin on or after 1 August 2018.

Part 2 of these Regulations deals with eligibility for loan support. To qualify for loan support under these Regulations, a student must be an "eligible student". To be an eligible student a person must satisfy the eligibility provisions in regulation 3. A person must fall within one of the categories listed in Part 2 of Schedule 1. The majority of those categories require the person to be ordinarily resident in Wales.

For the purposes of these Regulations a person who is ordinarily resident in Wales, England, Scotland, Northern Ireland, the Channel Islands or the Isle of Man as a result of having moved from one of those areas for the purpose of undertaking a designated course is considered ordinarily resident in the place from which that person has moved (Schedule 1, paragraph 1(3)). A person may qualify for loan support as an eligible student if they are an "eligible prisoner". A person is not an eligible student if, amongst other things, that person has already obtained a qualification equivalent to or higher than a doctoral degree. Regulation 5 provides for the period for which an eligible student may receive loan support under these Regulations, namely the student's "period of eligibility". Regulation 5 sets out the circumstances in which a student ceases to be an eligible student.

Loan support is only available under these Regulations in respect of "designated" courses within the meaning of regulation 4. One requirement under regulation 4(1) for a doctoral degree course to be a designated course is that the number of academic years

ordinarily required to complete the course is no less than three and no more than eight. Loan support is provided to eligible students undertaking a designated course wherever they study in the United Kingdom. Regulation 6 recognises that an eligible student may transfer to another course in certain circumstances. Regulations 7 and 8 set out the circumstances in which a student may qualify for loan support under these Regulations after the designated course has started.

Part 3 of these Regulations deals with the formalities of how an eligible student applies for a loan, including the application deadline.

Part 4 of these Regulations provides for the amount and payment of loan support; the effect of an eligible student's absence from or inability to complete the designated course; and the effect of an eligible student becoming or ceasing to be an eligible prisoner. Regulation 13 provides that the maximum loan amount an eligible student can receive is £25,000, other than in the case of an eligible prisoner, where the maximum amount is limited to the lesser of: (a) the fees payable in respect of the designated course; and (b) £25,000. Regulation 14 gives the Welsh Ministers the power to pay any loan in instalments. Regulation 14(5)(a) provides that loan payments in respect of any one academic year of an eligible student's designated course must not exceed £10,609. Under regulation 14(8), the Welsh Ministers are unable to make any loan payments in relation to an academic year of an eligible student's designated course unless they have received, in respect of that year, a confirmation from the relevant academic authority that, amongst other things, the student is in attendance or undertaking the course and that it is possible for the student to complete the course on schedule. If the relevant academic authority is able to do so, it should also confirm that the student is not, in connection with the course, in receipt of funds provided by a Research Council or by, or on behalf of, United Kingdom Research and Innovation. Regulation 15 gives the Welsh Ministers the power to make payment of the loan conditional upon the student providing them with a national insurance number. Regulation 16 enables the Welsh Ministers to cease further loan payments if they receive notice of a student's absence from the course or that the relevant academic authority no longer considers it possible for the student to complete the course within the period ordinarily required to do so.

Regulation 17 sets out how loan entitlement amounts change when an eligible student becomes or ceases to be an eligible prisoner. Regulation 18 sets out how the Welsh Ministers can recover any overpayments of a postgraduate doctoral degree loan.

Part 5 of these Regulations deals with information requirements.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Higher Education Division, Welsh Government, Cathays Park, Cardiff CF10 3NQ.

WELSH STATUTORY INSTRUMENTS

2018 No. 656 (W. 124)

EDUCATION, WALES

The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018

Made *23 May 2018*

Laid before the National Assembly for Wales *1 June 2018*

Coming into force *25 June 2018*

The Welsh Ministers, in exercise of the powers conferred upon the Secretary of State by sections 22 and 42(6) of the Teaching and Higher Education Act 1998(**1**) and now exercisable by them(**2**), make the following Regulations:

(**1**) 1998 c. 30; section 22 was amended by the Learning and Skills Act 2000 (c. 21), section 146 and Schedule 11, the Income Tax (Earnings and Pensions) Act 2003 (c. 1), Schedule 6, the Finance Act 2003 (c. 14), section 147, the Higher Education Act 2004 (c. 8), sections 42 and 43 and Schedule 7, the Apprenticeships, Skills, Children and Learning Act 2009 (c . 22), section 257, the Education Act 2011 (c. 21), section 76, S.I. 2013/1881 and the Higher Education and Research Act 2017 (c. 29), section 88. *See* section 43(1) of the Teaching and Higher Education Act 1998 for the definition of "prescribed" and "regulations".

(**2**) The functions of the Secretary of State under section 22 of the Teaching and Higher Education Act 1998 (except so far as they relate to the making of any provision authorised by subsection (2)(a), (c), (j) or (k), (3)(e) or (f) or (5) of section 22) were transferred, in relation to Wales, to the National Assembly for Wales by section 44 of the Higher Education Act 2004. Functions under subsection (2)(a), (c) and (k) became exercisable in relation to Wales by the National Assembly for Wales concurrently with the Secretary of State. The Secretary of State's function in section 42 was transferred, in so far as exercisable in relation to Wales, to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999, article 2, Schedule 1 (S.I. 1999/672). The functions of the National Assembly for Wales were transferred to the Welsh Ministers by virtue of paragraphs 30(1) and 30(2)(c) of Schedule 11 to the Government of Wales Act 2006 (c. 32).

PART 1

GENERAL

Title, commencement and application

1.—(1) The title of these Regulations is the Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018.

(2) These Regulations come into force on 25 June 2018 and apply in relation to Wales.

(3) These Regulations apply in relation to the provision of postgraduate doctoral degree loans to students in relation to courses which begin on or after 1 August 2018 whether anything done under these Regulations is done before, on or after 1 August 2018.

Interpretation

2.—(1) In these Regulations—

"the 1998 Act" ("*Deddf 1998*") means the Teaching and Higher Education Act 1998;

"the 2017 Master's Degree Loans Regulations" ("*Rheoliadau Benthyciadau at Radd Feistr 2017*") means the Education (Postgraduate Master's Degree Loans) (Wales) Regulations 2017(**1**);

"the 2017 Student Support Regulations" ("*Rheoliadau Cymorth i Fyfyrwyr 2017*") means the Education (Student Support) (Wales) Regulations 2017(**2**);

"the 2018 Student Support Regulations" ("*Rheoliadau Cymorth i Fyfyrwyr 2018*") means the Education (Student Support) (Wales) Regulations 2018(**3**);

"academic authority" ("*awdurdod academaidd*") means, in relation to an institution, the governing body or other body having the functions of a governing body and includes a person acting with the authority of that body;

"course" ("*cwrs*") means, unless the context otherwise requires, a taught programme of study, a programme of research, or a combination of both, which may include one or more periods of work experience, and which leads, on successful completion, to the award of a postgraduate doctoral degree, but a course which leads to a higher doctorate or a course which leads to a doctorate by publication is not a course;

(**1**) S.I. 2017/523 (W. 109), amended by S.I. 2017/712 (W. 169) and S.I. 2018/277 (W. 53).
(**2**) S.I. 2017/47 (W. 21), amended by S.I. 2018/191 (W. 42).
(**3**) S.I. 2018/191 (W. 42).

"course which leads to a doctorate by publication" ("*cwrs sy'n arwain at ddoethuriaeth drwy waith cyhoeddedig*") means a course which leads to a postgraduate doctoral degree awarded to a person ("P") on the basis of a thesis consisting of associated published research papers, whether or not P is required by the relevant academic authority to—

(a) register on the course;

(b) undertake a particular programme of study; or

(c) undertake a final examination;

"course which leads to a higher doctorate" ("*cwrs sy'n arwain at ddoethuriaeth uwch*") means a course which leads to a qualification awarded to a person ("P")—

(a) of an academic level which is higher than a postgraduate doctoral degree; and

(b) for distinction regarding P's contribution to the advancement of science or learning;

"designated course" ("*cwrs dynodedig*") means a course designated by regulation 4(1) or by the Welsh Ministers under regulation 4(5);

"Directive 2004/38" ("*Cyfarwyddeb 2004/38*") means Directive 2004/38/EC of the European Parliament and of the Council(**1**) on the right of citizens of the Union and their family members to move and reside freely in the territory of the Member States;

"distance learning course" ("*cwrs dysgu o bell*") means a course in relation to which a student undertaking the course is not required to be in attendance by the institution providing the course, other than to satisfy any requirement imposed by the institution to attend any institution—

(a) for the purpose of registration, enrolment or any examination;

(b) on a weekend or during any vacation; or

(c) on an occasional basis during the week;

"electronic signature" ("*llofnod electronig*") is so much of anything in electronic form as—

(a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and

(b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both;

(**1**) OJ No L158, 30.04.2004, p. 77-123.

"eligible prisoner" ("*carcharor cymwys*") means a prisoner—

(a) who begins a designated course or on after 1 August 2018;

(b) who is serving a sentence of imprisonment in the United Kingdom;

(c) who has been authorised by the prison Governor or Director or other appropriate authority within the custodial institution to study the designated course; and

(d) whose earliest release date is within 8 years of the first day of the first academic year of the designated course;

"eligible student" ("*myfyriwr cymwys*") has the meaning given in regulation 3;

"equivalent or higher qualification" ("*cymhwyster cyfatebol neu uwch*") means a qualification determined in accordance with paragraph (2) to be an equivalent or higher qualification;

"EU national" ("*gwladolyn UE*") means a national of a Member State of the EU;

"fees" ("*ffioedd*") has the meaning given in section 57(1) of the Higher Education (Wales) Act 2015(**1**);

"healthcare bursary" ("*bwrsari gofal iechyd*") means a bursary or award of similar description under section 63(6) of the Health Services and Public Health Act 1968(**2**) or Article 44 of the Health and Personal Social Services (Northern Ireland) Order 1972(**3**);

"immigration rules" ("*rheolau mewnfudo*") means the rules laid before Parliament by the Secretary of State under section 3(2) of the Immigration Act 1971(**4**);

"information" ("*gwybodaeth*") includes documents;

"Islands" ("*Ynysoedd*") means the Channel Islands and the Isle of Man;

"KESS 2 Scheme" ("*Cynllun KESS 2*") means the Knowledge Economy Skills Scholarships 2 Scheme which is funded, in part, by the European Social Fund(**5**);

"ordinary period of registration" ("*cyfnod arferol y cofrestriad*") means the number of academic years ordinarily required to complete a course;

(**1**) 2015 anaw 1.
(**2**) 1968 c. 46; section 63(6) was amended by the Health and Medicines Act 1988 (c. 49), section 20.
(**3**) S.I. 1972/1265 (N.I. 14).
(**4**) 1971 c. 77.
(**5**) The European Social Fund is established under Article 162 of the Treaty on the Functioning of the European Union.

"period of eligibility" ("*cyfnod cymhwystra*") has the meaning given in regulation 5 in relation to an eligible student;

"periods of work experience" ("*cyfnodau o brofiad gwaith*") means—

(a) periods of industrial, professional or commercial experience, including research, associated with the course at an institution, but at a place outside that institution;

(b) periods during which a student is employed and residing in a country whose language is one that the student is studying for that student's course (provided that the period of residence in that country is a requirement of that student's course and the study of one or more modern languages accounts for not less than one half of the total time spent studying on the course);

"person granted stateless leave" ("*person y rhoddwyd caniatâd iddo aros fel person diwladwriaeth*") means a person who—

(a) has extant leave to remain as a stateless person under the immigration rules; and

(b) has been ordinarily resident in the United Kingdom and Islands throughout the period since the person was granted such leave;

"person with leave to enter or remain" ("*person sydd â chaniatâd i ddod i mewn neu i aros*") means a person ("A" in this definition)—

(a) who has—

(i) applied for refugee status but has as a result of that application been informed in writing by a person acting under the authority of the Secretary of State for the Home Department that, although A is considered not to qualify for recognition as a refugee, it is thought right to allow A to enter or remain in the United Kingdom on the grounds of humanitarian protection or discretionary leave; or

(ii) not applied for refugee status but has been informed in writing by a person acting under the authority of the Secretary of State for the Home Department that it is thought right to allow A to enter or remain in the United Kingdom on the grounds of discretionary leave;

(b) who has been granted leave to enter or to remain accordingly;

(c) whose period of leave to enter or remain has not expired or has been renewed and the period for which it was renewed has not

expired or in respect of whose leave to enter or remain an appeal is pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002(**1**)); and

(d) who has been ordinarily resident in the United Kingdom and Islands throughout the period since A was granted leave to enter or remain;

"postgraduate doctoral degree loan" ("*benthyciad at radd ddoethurol ôl-raddedig*") means a loan payable to an eligible student under Part 4;

"prisoner" ("*carcharor*") includes a person who is detained in a young offender institution;

"private institution" ("*sefydliad preifat*") means an institution which is not publicly funded;

"public funds" ("*cronfeydd cyhoeddus*") means moneys provided by Parliament including funds provided by the Welsh Ministers;

"publicly funded" ("*a gyllidir yn gyhoeddus*", "*cael ei gyllido'n gyhoeddus*") means maintained or assisted by recurrent grants out of public funds, and related expressions are to be interpreted accordingly;

"refugee" ("*ffoadur*") means a person who is recognised by Her Majesty's government as a refugee within the meaning of the United Nations Convention relating to the Status of Refugees done at Geneva on 28 July 1951(**2**) as extended by the Protocol thereto which entered into force on 4 October 1967(**3**);

"Research Council" (*"Cyngor Ymchwil"*) means any of the following research councils—

(a) Arts and Humanities Research Council;

(b) Biotechnology and Biological Sciences Research Council;

(c) Economic and Social Research Council;

(d) Engineering and Physical Sciences Research Council;

(e) Medical Research Council;

(f) Natural Environment Research Council;

(g) Science and Technology Facilities Council;

"right of permanent residence" ("*hawl i breswylio'n barhaol*") means a right arising under Directive 2004/38 to reside in the United Kingdom permanently without restriction;

(**1**) 2002 c. 41. Section 104 was amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c. 19), Schedules 2 and 4, the Immigration, Asylum and Nationality Act 2006 (c. 13), section 9, S.I. 2010/21 and the Immigration Act 2014 (c. 22), Schedule 9, Part 4.

(**2**) Cmnd. 9171.

(**3**) Cmnd. 3906 (out of print).

"student loans legislation" ("*y ddeddfwriaeth ar fenthyciadau i fyfyrwyr*") means the Education (Student Loans) Act 1990(**1**), the Education (Student Loans) (Northern Ireland) Order 1990(**2**), the Education (Scotland) Act 1980(**3**) and regulations made under those Acts or that Order, the Education (Student Support) (Northern Ireland) Order 1998(**4**) and regulations made under that Order or the 1998 Act and regulations made under the 1998 Act;

"Turkish worker" ("*gweithiwr Twrcaidd*") means a Turkish national who—

(a) is ordinarily resident in the United Kingdom and Islands; and

(b) is, or has been, lawfully employed in the United Kingdom.

(2) The Welsh Ministers may determine that a qualification is an equivalent or higher qualification if—

(a) an eligible student holds a higher education qualification from any institution whether or not in the United Kingdom; and

(b) the qualification referred to in sub-paragraph (a) is a postgraduate doctoral degree from an institution in the United Kingdom or is of an academic level which, in the opinion of the Welsh Ministers, is equivalent to or higher than a qualification to which the designated course leads.

(3) An academic year, in respect of a course, is determined as follows—

identify the period in Column 2 of the Table within which the academic year actually begins;

the academic year is the period of 12 months beginning on the date specified in the entry in Column 1 of the Table corresponding to the period set out in Column 2.

Any reference in these Regulations to an "academic year" is a reference to the year determined in accordance with this paragraph.

(**1**) 1990 c. 6; repealed by the Teaching and Higher Education Act 1998 (c. 30), Schedule 4, with savings *see* the Teaching and Higher Education Act 1998 (Commencement No. 2 and Transitional Provisions) Order 1998 (S.I. 1998/2004) (C. 46) and amended by S.I. 2010/1158, Schedule 4, paragraph 5(2)(e).

(**2**) S.I. 1990/1506 (N.I. 11), amended by S.I. 1996/274 (N.I. 1), Article 43 and Schedule 5, Part II, S.I. 1996/1918 (N.I. 15), Article 3 and the Schedule and S.I. 1998/258 (N.I. 1), Articles 3 to 6 and revoked, with savings, by SR (N.I.) 1998 No. 306.

(**3**) 1980 c. 44.

(**4**) S.I.1998/1760 (N.I. 14) to which there have been amendments not relevant to these Regulations.

Table

Column 1 *Start date of academic year for the purposes of these Regulations*	*Column 2* *Period within which academic year begins*
1 September	On or after 1 August but before 1 January
1 January	On or after 1 January but before 1 April
1 April	On or after 1 April but before 1 July
1 July	On or after 1 July but before 1 August

PART 2

ELIGIBILITY

Eligible students

3.—(1) An eligible student qualifies for a postgraduate doctoral degree loan in connection with a designated course subject to and in accordance with these Regulations.

(2) Subject to paragraphs (3) to (9), a person is an eligible student in connection with a designated course if in assessing the person's application for a postgraduate doctoral degree loan under regulation 9 the Welsh Ministers determine that the person falls within one of the categories set out in Part 2 of Schedule 1.

(3) A person ("A") is not an eligible student if—

(a) A has reached the age of 60 on the first day of the academic year in which the designated course starts;

(b) A is in breach of any obligation to repay any loan;

(c) A has reached the age of 18 and has not ratified any agreement for a loan made with A when A was under the age of 18;

(d) A has, in the opinion of the Welsh Ministers, shown by A's conduct that A is unfitted to receive a postgraduate doctoral degree loan;

(e) A is a prisoner, unless A is an eligible prisoner;

(f) A is enrolled on a course which is—

(i) a designated course under regulation 5 (designated courses), 66 (designated distance learning courses) or 83 (designated part-time courses) of the 2017 Student Support Regulations and is

receiving support under those Regulations for that course;

(ii) a designated course under regulation 4 (designated courses) of the 2017 Master's Degree Loans Regulations and is receiving support under those Regulations for that course;

(iii) a designated course under regulation 5 (designated courses) of the 2018 Student Support Regulations and is receiving support under those Regulations for that course;

(g) A has already obtained an equivalent or higher qualification;

(h) A is already enrolled on a designated course and is in receipt of a postgraduate doctoral degree loan under these Regulations for that course;

(i) subject to paragraph (9), A has previously received a postgraduate doctoral degree loan under these Regulations;

(j) there has been bestowed on or paid to A in relation to A undertaking the course—

(i) a healthcare bursary;

(ii) any allowance under the Nursing and Midwifery Student Allowances (Scotland) Regulations 2007(**1**);

(iii) any allowance, bursary or award of similar description made under section 67(4)(a) of the Care Standards Act 2000(**2**) save to the extent that A is eligible for such a payment in respect of travel expenses;

(iv) any allowance, bursary or award of similar description made under section 116(2)(a) of the Regulation and Inspection of Social Care (Wales) Act 2016(**3**) save to the extent that A is eligible for such a payment in respect of travel expenses;

(k) subject to paragraph (9), A has previously received a loan in respect of a course other than under these Regulations, where that loan was provided out of funds provided by a government authority within the United Kingdom;

(**1**) S.S.I. 2007/151, as amended by S.S.I. 2007/503, S.S.I. 2008/206, S.S.I 2009/188, S.S.I. 2009/309, S.S.I. 2012/72, S.S.I. 2013/80, S.S.I. 2016/82 and S.S.I 2017/180.

(**2**) 2000 c. 14. Section 67(4)(a) was amended by the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2), section 185, Schedule 3, Part 2, paragraphs 40 and 43(d).

(**3**) 2016 anaw 2.

(l) A is, in relation to the course, in receipt of any allowance, bursary or award paid out of funds provided—

(i) by a Research Council;

(ii) by, or on behalf of, United Kingdom Research and Innovation(**1**); or

(m) there has been bestowed on or paid to A, in relation to the course, any allowance, bursary or award made under the KESS 2 Scheme.

(4) Where the eligible student is undertaking a designated course which is a distance learning course, the student does not qualify for support in respect of that course unless the Welsh Ministers consider that the student is undertaking the course in Wales on the first day of the first academic year of the course, whether the course is a designated course at that date or is designated on a later date.

(5) For the purposes of paragraph (4), a person ("A") is to be treated as undertaking the course in Wales for any period during which—

(a) A would have been undertaking the course in Wales but for the fact that—

(i) A,

(ii) A's spouse or civil partner,

(iii) A's parent,

(iv) where A is a dependent direct relative in the ascending line, A's child or child's spouse or civil partner,

is or was temporarily employed in England, Scotland or Northern Ireland as a member of the regular naval, military or air forces of the Crown; or

(b) A is treated as ordinarily resident in Wales by virtue of paragraph 1(4) of Schedule 1 on the basis of temporary employment falling within paragraph 1(5)(a) of Schedule 1.

(6) An eligible student ceases to be eligible for a postgraduate doctoral degree loan in respect of a distance learning course if the Welsh Ministers consider that the student is undertaking the course outside the United Kingdom notwithstanding whether that student has previously been considered by the Welsh Ministers to be undertaking their course within the United Kingdom.

(7) Paragraph (6) does not apply to a person who is treated as being ordinarily resident in the United

(**1**) United Kingdom Research and Innovation is a body corporate established by section 91 of the Higher Education and Research Act 2017 (c. 29). Sections 95 to 98 of that Act provide for United Kingdom Research and Innovation to make arrangements for the exercise of its functions on its behalf.

Kingdom by virtue of paragraph 1(4) of Schedule 1 on the basis of temporary employment falling within paragraph 1(5)(a) of Schedule 1.

(8) For the purposes of paragraph (3)(b) and (c), "loan" means a loan made under any provision of the student loans legislation.

(9) The Welsh Ministers may deem a person described in paragraph (3)(i) or (3)(k) to be an eligible student where the Welsh Ministers are of the view that the person had not been able to complete the course to which the previous loan related due to compelling personal reasons.

(10) The Welsh Ministers may only exercise their discretion under paragraph (9) once in respect of a particular student.

Designated courses

4.—(1) Subject to paragraphs (4) and (5), a course is a designated course for the purposes of section 22(1) of the 1998 Act and regulation 3 if —

(a) the duration of the ordinary period of registration for the course is—

(i) not less than three academic years; and

(ii) not more than eight academic years;

(b) it is one of the following—

(i) wholly provided by a publicly funded institution;

(ii) provided by a publicly funded institution situated in the United Kingdom on behalf of a publicly funded institution; or

(iii) provided by a publicly funded institution in conjunction with an institution which is situated outside the United Kingdom;

(c) it is substantially provided in the United Kingdom; and

(d) it is a course which—

(i) leads to a doctoral degree granted or to be granted by a body falling within section 214(2)(a) or (b) of the Education Reform Act 1988(**1**); and

(ii) the teaching and supervision which comprise the course has been approved by that body.

(2) For the purposes of paragraph (1)(b) and (c)—

(a) a course is provided by an institution if it provides the teaching and supervision which

(**1**) 1988 c. 40; section 214(2) was amended by the Further and Higher Education Act 1992 (c. 13), section 93 and Schedule 8 and the Higher Education and Research Act 2017 (c. 29), section 53.

comprise the course, whether or not the institution has entered into an agreement with the student to provide the course;

(b) a course is substantially provided in the United Kingdom where at least half of the teaching and supervision which comprise the course is provided in the United Kingdom;

(c) a university and any constituent college or institution in the nature of a college of a university is to be regarded as publicly funded if either the university or the constituent college or institution is publicly funded;

(d) an institution is not to be regarded as publicly funded by reason only that it receives public funds from the governing body of—

(i) a higher education institution in accordance with section 65(3A) of the Further and Higher Education Act 1992(**1**);

(ii) an eligible higher education provider as a qualifying connected institution in accordance with section 39 of the Higher Education and Research Act 2017(**2**); and

(e) a course is not to be regarded as provided on behalf of a publicly funded educational institution where a part of the course is provided by a private institution.

(3) The designated course may, but need not, be a distance learning course.

(4) A course is not a designated course for the purposes of regulation 3 if it is recognised as a designated course for the purposes of—

(a) regulations 5 or 83 of the 2017 Student Support Regulations;

(b) regulation 4 of the 2017 Master's Degree Loans Regulations;

(**1**) 1992 c. 13; section 65(3A) was inserted by the Teaching and Higher Education Act 1998 (c. 30), section 27 and amended by the Higher Education and Research Act 2017 (c. 29), section 122(1) and Schedule 11, paragraph 15(1) and (6). Despite that amendment, S.I. 2018/245 provides that, for the period which begins 1 April 2018 and ends 31 July 2019, section 65(1) to (4) of the Further and Higher Education Act 1992 continues to apply as if paragraph 15 of the Higher Education and Research Act 2017 had not been commenced but as if the reference to "matters within the responsibility of the Higher Education Funding Council for England" in section 62(6)(a) of that 1992 Act were a reference to "matters within the responsibility of the Office for Students and, where applicable, United Kingdom Research and Innovation". The Office for Students is body corporate established by section 1 of the Higher Education and Research Act 2017.

(**2**) 2017 c. 29. This provision is not yet in force.

(c) regulation 5 of the 2018 Student Support Regulations.

(5) For the purposes of section 22 of the 1998 Act(**1**) and regulation 3, the Welsh Ministers may designate courses of higher education which are not designated under paragraph (1).

(6) The Welsh Ministers may revoke or suspend the designation of a course which is designated under paragraph (5).

Period of eligibility

5.—(1) A student's status as an eligible student is retained in connection with a designated course until the status terminates in accordance with this regulation or regulation 3.

(2) The period for which an eligible student retains the status referred to in paragraph (1) is the "period of eligibility".

(3) Subject to the following paragraphs and regulation 3, an eligible student's ("A's") period of eligibility terminates—

(a) at the end of the academic year in which the ordinary period of registration of A's designated course ends; or

(b) when A's initial thesis in relation to that course is submitted to the relevant academic authority,

whichever is the earlier.

(4) A's period of eligibility terminates when—

(a) A withdraws from A's designated course in circumstances where the Welsh Ministers are not obliged under regulation 6 to transfer A's status as an eligible student to another course; or

(b) A abandons or is expelled from A's designated course.

(5) The Welsh Ministers may terminate the period of eligibility where A has shown by A's conduct that A is unfitted to receive a postgraduate doctoral degree loan.

(6) If the Welsh Ministers are satisfied that A has failed to comply with any requirement to provide information under these Regulations or has provided information which is inaccurate in a material particular, the Welsh Ministers may take such of the following actions as they consider appropriate in the circumstances—

(a) terminate A's period of eligibility;

(b) determine that A no longer qualifies for a postgraduate doctoral degree loan;

(**1**) 1998 c. 30.

(c) treat any postgraduate doctoral degree loan paid to the student as an overpayment which may be recovered under regulation 18.

(7) Where the period of eligibility terminates before the end of the academic year in which a student completes the designated course, the Welsh Ministers may, at any time, renew the period of eligibility for such period as they determine.

Transfer of status

6.—(1) Where an eligible student ("A") transfers from a designated course ("the old course") to another designated course ("the new course"), the Welsh Ministers must transfer A's status as an eligible student to the new course where—

(a) the Welsh Ministers receive a request from the eligible student to do so;

(b) the Welsh Ministers are satisfied that one or more of the grounds for transfer in paragraph (2) applies; and

(c) the period of eligibility has not terminated.

(2) The grounds for transfer are—

(a) on the recommendation of the academic authority A ceases the old course and starts to undertake the new course at the same institution; or

(b) A starts to undertake the new course at another institution.

(3) Where A transfers under paragraph (1), A is entitled to receive in connection with the new course, the remainder of the postgraduate doctoral degree loan, if any, in accordance with regulation 14 and, where relevant, regulation 17, in respect of the old course.

Students becoming eligible during a course

7. Where one of the events listed in regulation 8 occurs during the currency of a student's course, a student may qualify for a postgraduate doctoral degree loan, provided the student complies with the application provisions set out in Part 3.

Events

8. The events are—

(a) the student's course becomes a designated course;

(b) the student or the student's spouse, civil partner, parent, parent's spouse or parent's civil partner is recognised as a refugee or becomes a person granted stateless leave or a person with leave to enter or remain;

(c) a state accedes to the EU where the student is a national of that state or a family member (as defined in Part 1 of Schedule 1) of a national of that state;

(d) the student becomes a family member (as defined in Part 1 of Schedule 1) of an EU national;

(e) the student acquires the right of permanent residence;

(f) the student becomes the child of a Turkish worker;

(g) the student becomes a person described in paragraph 7(1)(a) of Schedule 1;

(h) the student becomes the child of a Swiss national; or

(i) the student commences a designated course after the start date of the designated course as the relevant academic authority has permitted the student to commence the course at this later start date.

PART 3

APPLYING FOR SUPPORT

Applications for a postgraduate doctoral degree loan

9.—(1) A person does not qualify for a postgraduate doctoral degree loan as an eligible student in relation to a designated course unless the person makes an application for that loan.

(2) An application under paragraph (1) must—

(a) be in such form and contain such information as the Welsh Ministers may specify;

(b) be accompanied by such documentation as the Welsh Ministers may require; and

(c) reach the Welsh Ministers within the time limit specified in regulation 11.

Welsh Ministers' decision on an application

10.—(1) The Welsh Ministers may take such steps and make such inquiries as they think necessary to make a decision on an application under regulation 9.

(2) Those steps may include requiring the applicant to provide such further information or documentation as the Welsh Ministers may require.

(3) The Welsh Ministers must notify the applicant of a decision on an application under regulation 9.

Time limits

11.—(1) Subject to paragraph (3), an application under regulation 9 must reach the Welsh Ministers no later than the end of the ninth month of the academic year of the course in which the ordinary period of registration ends.

(2) Subject to paragraph (3), an application to amend the amount of the postgraduate doctoral degree loan under regulation 13(3) must reach the Welsh Ministers no later than the end of the ninth month of the academic year of the course in which the ordinary period of registration ends.

(3) Paragraphs (1) or (2) do not apply where the Welsh Ministers consider that having regard to the circumstances of the particular case the time limit should not apply, in which case the application must reach the Welsh Ministers not later than such date as they specify in writing.

Requirement to enter into a contract for a loan

12.—(1) An eligible student may not receive a postgraduate doctoral degree loan unless the student enters into a contract for the loan with the Welsh Ministers.

(2) The contract—

(a) must be in such form and on such terms, and

(b) may be required to be signed in such manner (including electronically),

as the Welsh Ministers specify.

(3) The contract may require the eligible student to repay a postgraduate doctoral degree loan by a particular method.

(4) Where the Welsh Ministers have required the student's agreement as to the method of repayment, they may withhold any payment of postgraduate doctoral degree loan until the student provides what has been requested.

PART 4

THE LOAN

Amount of postgraduate doctoral degree loan

13.—(1) Subject to paragraph (2), a person may apply for a postgraduate doctoral degree loan of up to £25,000 towards the costs of undertaking a designated course.

(2) Subject to regulation 17(5), where an eligible prisoner applies for a postgraduate doctoral degree loan the amount of the loan must not exceed the lesser of—

(a) the fees payable in respect of the course, and

(b) £25,000.

(3) Except where regulation 17(5) and (6) applies an eligible student may apply to the Welsh Ministers to amend the amount of postgraduate doctoral degree loan for which the student has applied, provided that—

(a) in aggregate, the amounts of postgraduate doctoral degree loan applied for do not exceed the applicable amounts set out in paragraphs (1) and (2);

(b) such application is made in accordance with regulation 11(2).

(4) If the Welsh Ministers have determined under regulation 10 that the applicant is an eligible student, the Welsh Ministers must pay the amount for which the eligible student qualifies in accordance with regulation 14.

Payment of postgraduate doctoral degree loan

14.—(1) The Welsh Ministers may pay the postgraduate doctoral degree loan for which a student qualifies under these Regulations—

(a) either as a lump sum or by instalments; and

(b) at such times, and in such manner, as the Welsh Ministers consider appropriate.

(2) If the Welsh Ministers think it appropriate to make payments by transfer into a bank or building society account they may require an eligible student to provide details of such an account in the United Kingdom into which payments may be made.

(3) If the requirement described in paragraph (2) is imposed, the Welsh Ministers may not make any payment of postgraduate doctoral degree loan until the eligible student has complied.

(4) In the case of an eligible prisoner, the Welsh Ministers must pay the postgraduate doctoral degree loan for which an eligible prisoner qualifies to the institution to which the eligible prisoner is liable to make payment for the fees payable in connection with the designated course or to such third party that the Welsh Ministers consider appropriate for the purpose of ensuring the payment of such fees to the relevant institution.

(5) The Welsh Ministers must—

(a) not make a payment of postgraduate doctoral degree loan in excess of £10,609 in respect of any one academic year of an eligible student's designated course;

(b) in determining the amount of postgraduate doctoral degree loan for which an eligible student qualifies, disregard any completed academic years.

(6) In this regulation, "completed academic years" means academic years of the designated course completed by the eligible student prior to the Welsh Ministers' receipt of the student's application under regulation 9(1).

(7) The relevant academic authority must, as soon as reasonably practicable after being requested to do so, provide the Welsh Ministers with the date on which—

(a) an eligible student's designated course starts; and

(b) the ordinary period of registration for that course ends.

(8) Subject to paragraph (9), the Welsh Ministers must not make any payment of postgraduate doctoral degree loan in respect of an academic year of an eligible student's designated course unless, in respect of that year, they have received from the relevant academic authority confirmation (in such form as may be required by the Welsh Ministers) that—

(a) the student is not, in connection with the designated course, in receipt of any allowance, bursary or award paid out of funds provided—

(i) by a Research Council;

(ii) by, or on behalf of, United Kingdom Research and Innovation;

(b) the student is in attendance or is undertaking the designated course, or continues to attend or undertake that course (as applicable);

(c) at least half of the teaching and supervision that comprise the designated course is provided in the United Kingdom;

(d) the academic authority considers that it will be possible for the student to complete the designated course within the ordinary period of registration for the course;

(e) there has not been bestowed on or paid to the student, in connection with the designated course, any allowance, bursary or award made under the KESS 2 Scheme.

(9) An academic authority is not required to provide the confirmation described in paragraph (8)(a) if it is unable to do so.

(10) Where an event mentioned in paragraph (11) occurs in respect of an eligible student ("A"), the relevant academic authority must as soon as reasonably practicable after the event occurs—

(a) notify the Welsh Ministers; and

(b) provide such additional information about the event as the academic authority thinks the Welsh Ministers may require for the purposes of these Regulations.

(11) The events are—

(a) the academic authority becomes aware that A is, in connection with A's designated course, in receipt of any allowance, bursary or award paid out of funds provided—

(i) by a Research Council;

(ii) by, or on behalf of, United Kingdom Research and Innovation;

(b) A withdraws, is suspended or is expelled from A's designated course, or is otherwise absent;

(c) the academic authority no longer considers it possible for A to complete A's designated course within the ordinary period of registration for that course;

(d) A submits their initial thesis in connection with A's designated course before the ordinary period of registration for that course ends; and

(e) the academic authority becomes aware that there has been bestowed on or paid to A, in connection with A's designated course, any allowance, bursary or award made under the KESS 2 Scheme.

(12) For the purposes of paragraphs (8)(d) and (11)(c), the academic authority must have regard to—

(a) any increase in intensity of study that would be required for the student to complete the course within the ordinary period of registration;

(b) any parts of the course which the student has been required to repeat.

Provision of United Kingdom national insurance number

15.—(1) The Welsh Ministers may make it a condition of entitlement to payment of the postgraduate doctoral degree loan that an eligible student must provide them with the student's United Kingdom national insurance number.

(2) If that condition is imposed, the Welsh Ministers may not make any payment of the loan until the eligible student has complied, unless the Welsh Ministers are satisfied that, owing to exceptional circumstances, it would be appropriate to make a payment despite the condition not being complied with.

Absence from or inability to complete course

16.—(1) Subject to paragraphs (2) and (6), if the Welsh Ministers receive notice under regulation 14(10) or paragraph 2(a) to (c) of Schedule 2 of an eligible student's ("A's")—

(a) absence from A's designated course; or

(b) inability to complete A's designated course within the ordinary period of registration for that course,

the Welsh Ministers may not make any further payment of the postgraduate doctoral degree loan.

(2) Further payment may be made despite such notification if, in the opinion of the Welsh Ministers, payment would be appropriate in all the circumstances.

(3) Paragraph (4) applies where—

(a) the Welsh Ministers have received notice in relation to an eligible student ("A") which falls within paragraph (1)(a); and

(b) A recommences A's course.

(4) A must—

(a) notify the Welsh Ministers that A has recommenced A's course; and

(b) provide the Welsh Ministers with details of the length and cause of A's preceding absence from that course.

(5) The relevant academic authority must notify the Welsh Ministers if, further to a notice given to the Welsh Ministers under regulation 14(10) in connection with regulation 14(11)(c), it no longer considers that the student is unable to complete the designated course within the ordinary period of registration for that course.

(6) Where the Welsh Ministers receive notification under paragraphs (4) or (5), they must recommence payment of the postgraduate doctoral degree loan in accordance with regulation 14 if, in the opinion of the Welsh Ministers, they consider it would be appropriate in all the circumstances.

Effect of becoming, or ceasing to be, an eligible prisoner

17.—(1) Paragraph (2) applies where an eligible student who is in receipt of a postgraduate doctoral degree loan becomes an eligible prisoner and continues to undertake a designated course.

(2) The Welsh Ministers must—

(a) adjust future payment of the postgraduate doctoral degree loan so that the total of the postgraduate doctoral degree loan awarded does not exceed the amount to which the student, as an eligible prisoner, is entitled to under regulation 13(2); and

(b) pay any remaining sum of the postgraduate doctoral degree loan, in accordance with regulation 14.

(3) Paragraphs (4) to (6) apply where an eligible prisoner ("A") who is in receipt of a postgraduate doctoral degree loan ceases to be an eligible prisoner and remains an eligible student, and continues to undertake a designated course.

(4) The Welsh Ministers must pay the remaining sum of the postgraduate doctoral degree loan, or future instalments of the postgraduate doctoral degree loan, if any, in accordance with regulation 14.

(5) Where A would have qualified for a higher amount of postgraduate doctoral degree loan had A not been an eligible prisoner A may, subject to paragraph (6), apply for the amount of loan to be increased.

(6) The maximum amount of the increase in A's postgraduate doctoral degree loan for which A may apply under paragraph (5) is the amount which is calculated by reference to the following formula—

$$\frac{(F-R)}{M} \times T$$

where—

F equals the amount which A would have qualified for if A had not been an eligible prisoner;

R equals the amount which A qualifies for as an eligible prisoner;

T is the number of days of the ordinary period of registration for the course which remain when A ceases to be an eligible prisoner beginning with the day after the day on which A ceases to be an eligible prisoner; and

M is the total number of the days of the duration of the ordinary period of registration for the course.

Overpayments of a postgraduate doctoral degree loan

18.—(1) Any overpayment of a postgraduate doctoral degree loan is recoverable by the Welsh Ministers from—

(a) the institution or third party which received the monies of the postgraduate doctoral degree loan where payment was made to such institution or third party; or

(b) the student who received the postgraduate doctoral degree loan.

(2) A student must, if so required by the Welsh Ministers, repay any amount of the postgraduate doctoral degree loan paid to the student or paid in respect of the student, which for whatever reason exceeds the amount of loan to which the student is entitled.

(3) An overpayment of a postgraduate doctoral degree loan may be recovered from a student under

paragraph (1)(b) in whichever one or more of the following ways the Welsh Ministers consider appropriate in all the circumstances—

(a) by subtracting the overpayment from any amount of the postgraduate doctoral degree loan which remains to be paid to or in respect of the student;

(b) by subtracting the overpayment from any kind of grant or loan payable to the student from time to time pursuant to regulations made by the Welsh Ministers under section 22 of the 1998 Act;

(c) by requiring the student to repay the postgraduate doctoral degree loan in accordance with regulations made under section 22 of the 1998 Act;

(d) by taking such other action for the recovery of an overpayment as is available to them.

PART 5

INFORMATION REQUIREMENTS

Information requirements

19.—(1) Schedule 2 applies in respect of the provision of information by an applicant and an eligible student.

(2) The Welsh Ministers may at any time request from an applicant or eligible student information that the Welsh Ministers consider is required to recover a postgraduate doctoral degree loan.

(3) The Welsh Ministers may at any time request from an applicant or eligible student sight of their valid national identity card, valid passport issued by the state of which they are a national or their birth certificate.

(4) Where the Welsh Ministers have requested information under this regulation, the Welsh Ministers may withhold any payment of a postgraduate doctoral degree loan until the applicant or eligible student provides what has been requested or provides a satisfactory explanation for not complying with the request.

Kirsty Williams

Cabinet Secretary for Education, one of the Welsh Ministers
23 May 2018

SCHEDULE 1 Regulations 3 and 8

ELIGIBLE STUDENTS

PART 1

Interpretation

1.—(1) For the purposes of this Schedule—

"EEA frontier self-employed person" ("*person hunangyflogedig trawsffiniol AEE*") means an EEA national who—

(a) is a self-employed person in Wales; and

(b) resides in Switzerland or the territory of an EEA state other than the United Kingdom and returns to the national's residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

"EEA frontier worker" ("*gweithiwr trawsffiniol AEE*") means an EEA national who—

(a) is a worker in Wales; and

(b) resides in Switzerland or the territory of an EEA state other than the United Kingdom and returns to the national's residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

"EEA migrant worker" ("*gweithiwr mudol AEE*") means an EEA national who is a worker, other than an EEA frontier worker, in the United Kingdom;

"EEA national" ("*gwladolyn AEE*") means a national of an EEA state other than the United Kingdom;

"EEA self-employed person" ("*person hunangyflogedig AEE*") means an EEA national who is a self-employed person, other than an EEA frontier self-employed person, in the United Kingdom;

"employed person" ("*person cyflogedig*") means an employed person within the meaning of Annex 1 to the Swiss Agreement;

"European Economic Area" ("*Ardal Economaidd Ewropeaidd*") means the area comprised by the EEA states;

"family member" ("*aelod o deulu*") means (unless otherwise indicated)—

(a) in relation to an EEA frontier worker, an EEA migrant worker, an EEA frontier self-employed person or an EEA self-employed person—

(i) the person's spouse or civil partner;

(ii) direct descendants of the person or of the person's spouse or civil partner who are—

(aa) under the age of 21; or

(bb) dependants of the person or of the person's spouse or civil partner; or

(iii) dependent direct relatives in the ascending line of the person or that of the person's spouse or civil partner;

(b) in relation to a Swiss employed person, a Swiss frontier employed person, a Swiss frontier self-employed person or a Swiss self-employed person—

(i) the person's spouse or civil partner; or

(ii) the person's child or the child of the person's spouse or civil partner;

(c) in relation to an EU national who falls within Article 7(1)(c) of Directive 2004/38—

(i) the national's spouse or civil partner; or

(ii) direct descendants of the national or of the national's spouse or civil partner who are—

(aa) under the age of 21; or

(bb) dependants of the national or of the national's spouse or civil partner;

(d) in relation to an EU national who falls within Article 7(1)(b) of Directive 2004/38—

(i) the national's spouse or civil partner;

(ii) direct descendants of the national or of the national's spouse or civil partner who are—

(aa) under the age of 21; or

(bb) dependants of the national or of the national's spouse or civil partner; or

(iii) dependent direct relatives in the national's ascending line or that of the national's spouse or civil partner;

(e) in relation to a United Kingdom national, for the purposes of paragraph 10—

(i) the national's spouse or civil partner; or

(ii) direct descendants of the national or of the national's spouse or civil partner who are—

(aa) under the age of 21; or

(bb) dependants of the national or of the national's spouse or civil partner;

"self-employed person" ("*person hunangyflogedig*") means—

(a) in relation to an EEA national, a person who is self-employed within the meaning of Article 7 of Directive 2004/38 or the EEA Agreement, as the case may be; or

(b) in relation to a Swiss national, a person who is a self-employed person within the meaning of Annex 1 to the Swiss Agreement;

"settled" ("*wedi setlo*") has the meaning given by section 33(2A) of the Immigration Act 1971(**1**);

"Swiss Agreement" ("*Cytundeb y Swistir*") means the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation of the other, on the Free Movement of Persons signed at Luxembourg on 21 June 1999(**2**) and which came into force on 1 June 2002;

"Swiss employed person" ("*person cyflogedig Swisaidd*") means a Swiss national who is an employed person, other than a Swiss frontier employed person, in the United Kingdom;

"Swiss frontier employed person" ("*person cyflogedig trawsffiniol Swisaidd*") means a Swiss national who—

(a) is an employed person in Wales; and

(b) resides in Switzerland or in the territory of an EEA state other than the United Kingdom and returns to the national's residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

"Swiss frontier self-employed person" ("*person hunangyflogedig trawsffiniol Swisaidd*") means a Swiss national who—

(a) is a self-employed person in Wales; and

(b) resides in Switzerland or in the territory of an EEA state, other than the United Kingdom, and returns to the national's residence in Switzerland or that EEA state, as the case may be, daily or at least once a week;

"Swiss self-employed person" ("*person hunangyflogedig Swisaidd*") means a Swiss national who is a self-employed person, other than a Swiss frontier self-employed person, in the United Kingdom;

"worker" ("*gweithiwr*") means a worker within the meaning of Article 7 of Directive 2004/38 or the EEA Agreement, as the case may be;

(**1**) 1971 c. 77; section 33(2A) was inserted by paragraph 7 of Schedule 4 to the British Nationality Act 1981 (c. 61).

(**2**) Cm. 4904 and OJ No L114, 30.04.02, p. 6.

(2) For the purposes of this Schedule, "parent" ("*rhiant*") includes a guardian, any other person having parental responsibility for a child and any person having care of a child and "child" ("*plentyn*") is to be construed accordingly.

(3) For the purposes of this Schedule, a person who is ordinarily resident in Wales, England, Scotland, Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking—

(a) the designated course; or

(b) a course which, disregarding any intervening vacation, the student undertook immediately before undertaking the designated course,

is to be considered to be ordinarily resident in the place from which the person moved.

(4) For the purposes of this Schedule, a person ("A" in this sub-paragraph) is to be treated as ordinarily resident in Wales, the United Kingdom and Islands or in the territory comprising the European Economic Area, Switzerland and Turkey if A would have been so resident but for the fact that—

(a) A;

(b) A's spouse or civil partner;

(c) A's parent; or

(d) where A is a dependent direct relative in the ascending line, A's child or child's spouse or civil partner,

is or was temporarily employed outside Wales, the United Kingdom and Islands or the territory comprising the European Economic Area, Switzerland and Turkey.

(5) For the purposes of sub-paragraph (4), temporary employment outside Wales, the United Kingdom and Islands or the territory comprising the European Economic Area, Switzerland and Turkey includes—

(a) in the case of members of the regular naval, military or air forces of the Crown, any period which they serve outside the United Kingdom as members of such forces; and

(b) in the case of members of the regular armed forces of an EEA state or Switzerland, any period which they serve outside the territory comprising the European Economic Area and Switzerland as members of such forces; and

(c) in the case of members of the regular armed forces of Turkey, any period which they serve outside of the territory comprising the European Economic Area, Switzerland and Turkey as members of such forces.

(6) For the purposes of this Schedule an area which—

(a) was previously not part of the EU or the European Economic Area; but

(b) at any time before or after these Regulations come into force has become part of one or other or both of these areas,

is to be considered to have always been a part of the European Economic Area.

(7) For the purposes of this Schedule an eligible prisoner is to be considered ordinarily resident in the part of the United Kingdom where the prisoner resided prior to sentencing.

PART 2

Categories

Persons who are settled in the United Kingdom

2.—(1) A person who on the first day of the first academic year of the course—

(a) is settled in the United Kingdom other than by reason of having acquired the right of permanent residence;

(b) is ordinarily resident in Wales;

(c) has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course; and

(d) subject to sub-paragraph (2), whose residence in the United Kingdom and Islands has not during any part of the period referred to in paragraph (c) been wholly or mainly for the purpose of receiving full-time education.

(2) Paragraph (d) of sub-paragraph (1) does not apply to a person who is treated as being ordinarily resident in the United Kingdom and Islands in accordance with paragraph 1(4).

3. A person who—

(a) is settled in the United Kingdom by virtue of having acquired the right of permanent residence;

(b) is ordinarily resident in Wales on the first day of the first academic year of the course;

(c) has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course; and

(d) in a case where the person's ordinary residence referred to in sub-paragraph (c) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European

Economic Area and Switzerland immediately before the period of ordinary residence referred to in sub-paragraph (c).

Refugees and their family members

4.—(1) A person who—

(a) is a refugee;

(b) is ordinarily resident in the United Kingdom and Islands and has not ceased to be so resident since the person was recognised as a refugee; and

(c) is ordinarily resident in Wales on the first day of the first academic year of the course.

(2) A person who—

(a) is the spouse or civil partner of a refugee;

(b) was the spouse or civil partner of the refugee on the date on which the refugee made the application for asylum;

(c) is ordinarily resident in the United Kingdom and Islands and has not ceased to be so resident since being given leave to remain in the United Kingdom; and

(d) is ordinarily resident in Wales on the first day of the first academic year of the course.

(3) A person who—

(a) is the child of a refugee or the child of the spouse or civil partner of a refugee;

(b) on the date on which the refugee made the application for asylum, was the child of the refugee or the child of a person who was the spouse or civil partner of the refugee on that date;

(c) was under 18 on the date on which the refugee made the application for asylum;

(d) is ordinarily resident in the United Kingdom and Islands and has not ceased to be so resident since being given leave to remain in the United Kingdom; and

(e) is ordinarily resident in Wales on the first day of the first academic year of the course.

Persons granted stateless leave and their family members

5.—(1) A person granted stateless leave who—

(a) is ordinarily resident in Wales on the first day of the first academic year of the course; and

(b) has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

(2) A person—

(a) who—

(i) is the spouse or civil partner of a person granted stateless leave; and

(ii) on the leave application date, was the spouse or civil partner of a person granted stateless leave;

(b) who is ordinarily resident in Wales on the first day of the first academic year of the course; and

(c) who has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

(3) A person—

(a) who—

(i) is the child of a person granted stateless leave or the child of the spouse or civil partner of a person granted stateless leave; and

(ii) on the leave application date, was the child of a person granted stateless leave or the child of a person who, on the leave application date, was the spouse or civil partner of a person granted stateless leave;

(b) who was under 18 on the leave application date;

(c) who is ordinarily resident in Wales on the first day of the first academic year of the course; and

(d) who has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

(4) In this paragraph, "leave application date" means the date on which the person granted stateless leave made an application to remain in the United Kingdom as a stateless person under the immigration rules.

Persons with leave to enter or remain and their family members

6.—(1) A person—

(a) with leave to enter or remain;

(b) who is ordinarily resident in Wales on the first day of the first academic year of the course; and

(c) who has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

(2) A person—

(a) who is the spouse or civil partner of a person with leave to enter or remain;

(b) who was the spouse or civil partner of the person with leave to enter or remain on the date on which that person made—

(i) the application for asylum; or

(ii) the application for discretionary leave, where no application for asylum was made;

(c) who is ordinarily resident in Wales on the first day of the first academic year of the course; and

(d) who has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

(3) A person—

(a) who is the child of a person with leave to enter or remain or the child of the spouse or civil partner of a person with leave to enter or remain;

(b) who, on the date on which the person with leave to enter or remain made—

(i) the application for asylum; or

(ii) the application for discretionary leave, where no application for asylum was made,

was the child of that person or the child of a person who was the spouse or civil partner of the person with leave to enter or remain on that date;

(c) who was under 18 on the date on which the person with leave to enter or remain made—

(i) the application for asylum; or

(ii) the application for discretionary leave, where no application for asylum was made;

(d) who is ordinarily resident in Wales on the first day of the first academic year of the course; and

(e) who has been ordinarily resident in the United Kingdom and Islands throughout the three-year period preceding the first day of the first academic year of the course.

Workers, employed persons, self-employed persons and their family members

7.—(1) A person who—

(a) is—

(i) an EEA migrant worker or an EEA self-employed person;

(ii) a Swiss employed person or a Swiss self-employed person;

(iii) a family member of a person mentioned in sub-paragraph (i) or (ii);

(iv) an EEA frontier worker or an EEA frontier self-employed person;

(v) a Swiss frontier employed person or a Swiss frontier self-employed person; or

(vi) a family member of a person mentioned in sub-paragraph (iv) or (v);

(b) subject to sub-paragraph (2), is ordinarily resident in Wales on the first day of the first academic year of the course; and

(c) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the three-year period preceding the first day of the first academic year of the course.

(2) Paragraph (b) of sub-paragraph (1) does not apply where the person applying for support under these Regulations falls within paragraph (a)(iv), (v) or (vi) of sub-paragraph (1).

8. A person who—

(a) is ordinarily resident in Wales on the first day of the first academic year of the course;

(b) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the three-year period preceding the first day of the first academic year of the course; and

(c) is entitled to support by virtue of Article 12 of Council Regulation (EEC) No. 1612/68 on the freedom of movement of workers(**1**), as extended by the EEA Agreement.

Persons who are settled in the United Kingdom and have exercised a right of residence elsewhere

9.—(1) A person who—

(a) is settled in the United Kingdom;

(b) was ordinarily resident in Wales and settled in the United Kingdom immediately before leaving the United Kingdom and who has exercised a right of residence;

(c) is ordinarily resident in the United Kingdom on the day on which the first term of the first academic year actually begins;

(**1**) OJ No L257, 19.10.1968, p. 2 (OJ/SE 1968 (II) p. 475).

(d) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the three-year period preceding the first day of the first academic year of the course; and

(e) in a case where the person's ordinary residence referred to in paragraph (d) was wholly or mainly for the purposes of receiving full time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately before the period of ordinary residence referred to in paragraph (d).

(2) For the purposes of this paragraph, a person has exercised a right of residence if that person is a United Kingdom national, a family member of a United Kingdom national for the purposes of Article 7 of Directive 2004/38 (or corresponding purposes under the EEA Agreement or Swiss Agreement) or a person who has a right of permanent residence who in each case has exercised a right under Article 7 of Directive 2004/38 or any equivalent right under the EEA Agreement or Swiss Agreement in a state other than the United Kingdom or, in the case of a person who is settled in the United Kingdom and has a right of permanent residence, if that person goes to the state within the territory comprising the European Economic Area and Switzerland of which that person is a national or of which the person in relation to whom that person is a family member is a national.

EU nationals

10.—(1) A person—

(a) who is—

(i) an EU national on the first day of the first academic year of the course, other than a person who is a United Kingdom national who has not exercised a right of residence; or

(ii) a family member of such a person;

(b) who is attending or undertaking a designated course in Wales;

(c) who has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the three-year period preceding the first day of the first academic year of the course; and

(d) subject to sub-paragraph (2), whose ordinary residence in the territory comprising the European Economic Area and Switzerland has not during any part of the period referred to in paragraph (c) been wholly or mainly for the purpose of receiving full-time education.

(2) Paragraph (d) of sub-paragraph (1) does not apply to a person who is treated as being ordinarily resident in the territory comprising the European Economic Area and Switzerland in accordance with paragraph 1(4).

(3) Where a state accedes to the EU after the first day of the first academic year of the course and a person is a national of that state or the family member of a national of that state, the requirement in paragraph (a) of sub-paragraph (1) to be an EU national on the first day of the first academic year of the course is treated as being satisfied.

(4) For the purposes of this paragraph, a United Kingdom national has exercised a right of residence if that person has exercised a right under Article 7 of Directive 2004/38 or any equivalent right under the EEA Agreement or Swiss Agreement in a state other than the United Kingdom.

11.—(1) A person who—

(a) is an EU national other than a United Kingdom national on the first day of the first academic year of the course;

(b) is ordinarily resident in Wales on the first day of the first academic year of the course;

(c) has been ordinarily resident in the United Kingdom and Islands throughout the three-year period immediately preceding the first day of the first academic year of the course; and

(d) in a case where the person's ordinary residence referred to in paragraph (c) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately before the period of ordinary residence referred to in paragraph (c).

(2) Where a state accedes to the EU after the first day of the first academic year of the course and a person is a national of that state, the requirement in paragraph (a) of sub-paragraph (1) to be an EU national other than a United Kingdom national on the first day of the first academic year of the course is treated as being satisfied.

Children of Swiss nationals

12. A person who—

(a) is the child of a Swiss national who is entitled to support in the United Kingdom by virtue of Article 3(6) of Annex 1 to the Swiss Agreement;

(b) is ordinarily resident in Wales on the first day of the first academic year of the course;

(c) has been ordinarily resident in the territory comprising the European Economic Area and Switzerland throughout the three-year period preceding the first day of the first academic year of the course; and

(d) in a case where the person's ordinary residence referred to in sub-paragraph (c) was wholly or mainly for the purpose of receiving full-time education, was ordinarily resident in the territory comprising the European Economic Area and Switzerland immediately prior to the period of ordinary residence referred to in sub-paragraph (c).

Children of Turkish workers

13. A person who—

(a) is the child of a Turkish worker;

(b) is ordinarily resident in Wales on the first day of the first academic year of the course; and

(c) has been ordinarily resident in the territory comprising the European Economic Area, Switzerland and Turkey throughout the three-year period preceding the first day of the first academic year of the course.

SCHEDULE 2 Regulations 16 and 19

INFORMATION

1. Every applicant and eligible student must, as soon as reasonably practicable after being requested to do so, provide the Welsh Ministers with such information as the Welsh Ministers consider the Welsh Ministers require for the purposes of these Regulations.

2. Every applicant and eligible student must forthwith notify the Welsh Ministers and provide the Welsh Ministers with particulars if any of the following occurs—

(a) the applicant or student withdraws from, is suspended, abandons or is expelled from their course;

(b) the applicant or student transfers to any other course at the same or at a different institution;

(c) the applicant or student is absent from the course;

(d) the month for the start or completion of the course changes;

(e) the applicant or student's home or term-time address or telephone number changes;

(f) the applicant or student becomes, or ceases to be, a prisoner or eligible prisoner.

3. Information provided to the Welsh Ministers under these Regulations must be in the format that the Welsh Ministers require and, if they require the information to be signed by the person providing it, an electronic signature in such form as the Welsh Ministers may specify satisfies such a requirement.

EXPLANATORY MEMORANDUM TO THE EDUCATION (POSTGRADUATE DOCTORAL DEGREE LOANS) (WALES) REGULATIONS 2018

The Explanatory Memorandum has been prepared by the Higher Education Division and is laid before the National Assembly for Wales under Standing Order 27.1.

Cabinet Secretary's declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018. I am satisfied that the benefits justify the likely costs.

Kirsty Williams AM
Cabinet Secretary for Education

23 May 2018

Description

The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018 ('the Regulations') provide the basis for the system of financial support for students who are ordinarily resident in Wales (subject to some exceptions) and taking designated postgraduate doctoral degree courses in respect of academic years beginning on or after 1 August 2018. Support is provided through provision of loans.

Matters of special interest to the Constitutional and Legislative Affairs Committee

None.

Legislative background

Section 22 of the Teaching and Higher Education Act 1998 ('the 1998 Act') provides the Welsh Ministers with the power to make regulations authorising or requiring the payment of financial support to students studying courses of higher or further education designated by or under those regulations. In particular, this power enables the Welsh Ministers to prescribe amounts of financial support (grant or loan) and categories of attendance on higher education courses. This provision, together with sections 42(6) and 43(1) of the 1998 Act, provide the Welsh Ministers with the power to make the Regulations.

Section 44 of the Higher Education Act 2004 ('the 2004 Act') provided for the transfer to the National Assembly for Wales of the functions of the Secretary of State under section 22 of the 1998 Act (except insofar as they relate to the making of any provision authorised by subsections (2) (a), (c), (j) or (k), (3) (e) or (f) or (5) of section 22). Section 44 of the 2004 Act also provided for the functions of the Secretary of State in section 22(2) (a), (c) and (k) to be exercisable concurrently with the National Assembly for Wales.

The functions of the Secretary of State under sections 42(6) and 43(1) of the 1998 Act were transferred, so far as exercisable in relation to Wales, to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672).

The functions of the National Assembly for Wales were transferred to the Welsh Ministers by virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32).

Each year, a number of functions of the Welsh Ministers in regulations made under section 22 of the 1998 Act are delegated to the Student Loans Company under section 23 of the 1998 Act.

This instrument will follow the Negative Resolution procedure.

Purpose and intended effect of the legislation

The Welsh Ministers intend to support students undertaking postgraduate doctoral degree courses. Postgraduate doctoral degrees are the highest academic qualification that an institution can award following an agreed course of study. The most common form of doctorate in the UK is the PhD or DPhil. Providing support for postgraduate doctoral degree study will ensure that finance is a less significant barrier to study, allowing students to pursue their studies to the very highest level. Increased high level skills for the economy in a way which provides value for money for the taxpayer, resulting economic growth and the value employers place on a highly skilled workforce provide the rationale for this support.

These regulations provide student support for students ordinarily resident in Wales (subject to some exceptions) studying postgraduate doctoral degree courses. The regulations apply to courses beginning on or after 1 August 2018 in line with the commitment made in the response to the Review of Higher Education and Student Finance (’the Diamond Review’). To qualify, a student must be an ‘eligible student’ studying a designated postgraduate doctoral degree course. The maximum amount of loan an eligible student can receive is £25,000 over the period of the doctoral course. The loan is intended as a contribution to the cost of study, rather than to specifically cover tuition fees or living costs. Students may use this to support their studies as they see fit.

Eligible prisoners may also apply for support. Support for eligible prisoners is limited to the lesser of the fee payable by the prisoner in respect of the course and £25,000.

Other key aspects are set out below:

- Available to those settled in the UK and ordinarily resident in Wales; to an EU national or family member of an EU national, to those with a residency status as a refugee, to stateless persons granted leave to

remain, or those with leave to enter or remain, including their family members who are ordinarily resident in Wales.

- Available to students up to 59 years of age on the first day of the course.
- Students must not have an equivalent qualification or a higher level qualification (including qualifications obtained outside the UK).
- Subject to one exception, students must not have had a doctoral loan from Welsh Ministers or another UK administration previously.
- To prevent duplication of funding, students must not be in receipt of certain other sources of funding related to their postgraduate doctoral degree course.
- Available for the study of postgraduate doctoral degree courses offered by providers based in the UK which meet certain designation criteria.
- Courses must be postgraduate doctoral degrees which may be full-time, part-time, or distance learning and which are between three and eight years in length.
- Loans are not means-tested.
- Payments to be made in instalments across the number of years of the doctoral programme.
- Payments to be made to the student upon confirmation of attendance by the relevant academic institution.

A similar support policy will be available in England from August 2018.

IMPLEMENTATION

The Regulations provide the basis for the implementation of the Welsh Ministers' policy for support for postgraduate doctoral degree study for courses starting in the 2018/19 academic year, which enables the Welsh Government's delivery partner (the Student Loans Company) to implement system changes, and allows applications for support to commence during 2018.

CONSULTATION

The postgraduate doctoral degree policy was consulted on between 8 December 2017 and 2 March 2018 (Support for doctoral study, WG33258). Details of the consultation are included in the Regulatory Impact Assessment section below.

REGULATORY IMPACT ASSESSMENT

Options

Option 1: Do nothing

In the event of the Regulations not being made the principal implications are:

- there would be no student finance available to students who are ordinarily resident in Wales and who wish to study for a postgraduate doctoral degree and who do not secure competitively awarded studentships through established mechanisms; and
- such students would be disadvantaged compared to their counterparts from England.

Option 2: Make the Regulations

The support currently available for students wishing to study on a postgraduate doctoral degree course is generally in the form of fully funded scholarships and studentships, sponsored by research councils and other organisations, made available competitively to the strongest research proposals and most able students. Some students that are not successful in gaining a funded place choose to fund themselves through their doctoral studies. Making the Regulations will allow the Welsh Ministers to provide a loan to students who wish to study for a postgraduate doctoral degree, but have not obtained support through existing arrangements. It is proposed that repayment of the loan will be income contingent and ensures that only those that can afford to repay do so.

Costs and benefits

Option 1: Do nothing

Doing nothing would mean that no additional costs are incurred via the student support system. However, support that will be made available to students who are ordinarily resident in England will not be made available to students who are ordinarily resident in Wales and expected benefits to the economy not realised.

Option 2: Make the Regulations

Making the regulations will benefit those that do not have an alternative source of funding for their postgraduate doctoral degree studies and may otherwise not undertake such a course. Making the regulations will ensure parity of support between students from Wales and those from England. There is uncertainty around the size, characteristics and take-up behaviour among the eligible population. The eligible population has been estimated based on data from the Higher Education Statistics Agency Student Record for the 2016/17 academic year, using available variables relating to the eligibility criteria outlined above.

Around 200 new doctoral students are expected to be eligible for a loan in 2018/19, based on the latest population and existing funding routes. It is not known how many additional doctoral students will enrol as a result of the regulations being made. Forecasts for the introduction of postgraduate Master's loans in academic year 2017/18 assumed a 10% increase in participation. It is too early to draw any conclusion regarding the accuracy of this assumption and the context for the introduction of doctoral loans is not comparable with that for any other type of student loan previously introduced. This is because limited arrangements already (and will continue to) exist for the funding of the most competitive doctoral students and research projects. It is, therefore, difficult to estimate the scale of the anticipated increase in the number of doctoral students who will take out a loan.

Any additional demand, as a result of support being made available, could increase the estimate of the eligible number, which equates to between 15% and 20% of new doctoral research students. A 10% increase in demand (around 20 students on the basis of the estimated population) is within the inherent margin of uncertainty, with regards to eligibility and take-up. There is an equal gender split in the estimated eligible population. Around 90% are ordinarily resident in Wales, and the remainder are non-UK students from elsewhere in the EU, studying at universities in Wales. This estimate does not account for any effect on demand of the UK's exit from the EU.

Making the Regulations is intended to increase the number of students from Wales gaining postgraduate doctoral degrees. It is recognised that £25,000 is unlikely to alone be sufficient to cover all costs associated with a full doctoral study programme (tuition fees, living costs and research-related costs), which will be undertaken over a period of at least three years. As a comparison, Research Councils UK has announced a minimum doctoral stipend (in effect, the tax-free living costs allowance provided to research council funded

doctoral students) of £14,777, and an indicative fee level of £4,260[1], for the 2018/19 academic year. Over three years, these elements amount to almost £60,000 of funding. Whilst this is more generous than the doctoral loan, the loan will provide an alternative route to qualification for those who are not in receipt of the limited quantum of Research Council funding.

The subject profile of the estimated population eligible for doctoral loans is provided below (Table 1). Biological sciences are the largest subject area (16%), followed by Education (11%) and Subjects allied to medicine (10%).

Table 1: Subject profile of the estimated eligible population

Subject group	Proportion
Medicine and dentistry	6%
Subjects allied to medicine	10%
Biological sciences	16%
Agriculture and related subjects	2%
Physical sciences	5%
Mathematical sciences	1%
Computer science	2%
Engineering and technology	5%
Architecture, building and planning	4%
Social studies	8%
Law	4%
Business and administrative studies	6%
Mass communications and documentation	2%
Languages	7%
Historical and philosophical studies	6%
Creative arts and design	5%
Education	11%

Source: Welsh Government analysis of the HESA Student Record, 2016/17

The aim of the policy is to increase the number of individuals with high levels skills, who then contribute to the economy in a way which provides value for money for the taxpayer. The contribution to the economy is evidenced by

[1] http://www.rcuk.ac.uk/media/news/180118/

statistics on UK graduates from higher education, which demonstrates a clear advantage to doctorate leavers, compared with other postgraduate leavers, with respect to employment and average salaries. 86% of 2015/16 doctoral leavers were in employment (UK or overseas), compared with 81% of other postgraduates, six months after graduation. This difference largely reflects the higher proportion of other postgraduate leavers that go on to further study, rather than employment. More than 60% of 2015/16 doctoral graduates employed full-time were earning an annual salary of at least £30,000, compared with less than 50% of other postgraduate leavers, six months after graduation. Previous research has suggested an overall earnings premium of 9% for doctoral graduates, compared to those with a Masters degree[2].

Highly educated individuals are important to a modern knowledge-based economy, and wider benefits are expected to having more doctoral graduates in the workforce. The link between higher levels of educational attainment and increased productivity is well established, through both a direct effect on the individual's own capabilities and the indirect effect of facilitating innovation. Many doctoral graduates go on to use their skills within academia or research-intensive industrial occupations and some apply the skills gained through doctoral studies in a wide variety of other sectors and roles, which are highly valued by employers.

Age restriction

The Regulations restrict support to those under 60 years of age on the first day of the academic year in which the designated course starts. An age limit is discriminatory under the Equality Act 2010 and the European Convention on Human Rights (article 14 – prohibition on discrimination). Age discrimination can be justified if it meets a legitimate aim and is proportionate. The aim of the scheme is to increase, in the context of finite resources, high level skills for the economy. The Welsh Government considers that it is necessary to ensure value for money for the taxpayer and takes the view that the imposition of the age limit is rationally connected to that aim. To ensure value for money, sustainable funding is required and the age limit of 60 mitigates against the risk that loans are disproportionately taken out by older students who will be unlikely to repay the loan in full or make significant repayments and who would have a limited number of working years in which their skills would be available to the economy.

[2] https://www.vitae.ac.uk/vitae-publications/reports/what-do-researchers-do-early-career-progression-2013.pdf/view

Analysis by the Welsh Government indicates that, on average, a borrower entering repayment even at age 50 would not be expected to fully repay a £25,000 loan but such a borrower could conceivably continue to make an economic contribution for up to or over 15 years. A borrower beginning a new course at the age of 60 would not be expected to re-enter the workforce and become eligible to repay until they were aged at least 63, based on the minimum duration of study for a postgraduate doctoral degree. The average repayment estimated for a borrower entering repayment at age 63 is less than £6,500 (a 26% return), dropping to £5,000 by age 65 (a 20% return).

Although those aged 60 years and over increasingly remain in work, thereby making an economic contribution, it is nevertheless evident that employment falls off after age 60, from almost 80% of those aged 50–59, to around 50% for those aged 60–64, to around 10% for those aged 65 and over (source: employment rates for year ending 31 March 2016, Annual Population Survey, ONS).

The possibility of a less intrusive measure to achieve the Welsh Government's aim has been considered. The conclusion was that a system which required individual investigation and assessment would create a heavy administrative burden which could consume scarce resources. Such a system might also introduce scope for inconsistent decision-making.

Taking into account the evidence concerning not only repayment rates of loans but also employment rates (it is not the purpose of the loan to facilitate the uptake of doctoral degree courses by students who have no particular intention to return to the workplace), the Welsh Government considers that the age restriction strikes a fair balance and is justified.

Financial costs

The provision of doctoral loans will require loan cover (annually managed expenditure) from Her Majesty's Treasury. The estimated value of loan provision in the 2018-19 financial year is £0.8m, but there is uncertainty around potential demand and take-up. This figure is based on the estimated eligibility within the latest population; any increase in participation resulting from the availability of loans may increase the value of provision. For example, a 10% increase (in line with the forecasting assumption for the introduction of postgraduate Master's loans) would result in an estimated cost of £0.9m in 2018-19. A Resource Accounting and Budgeting charge (RAB) in the region of 35%, reflecting forecast non-repayment of doctoral loans, has been estimated. RAB is the amount of student loan paid out in a given year

that will ultimately not be repaid. Based on modelling, provision is made in the accounts to “write off” a proportion of the loans given to students during the given year. There is uncertainty around the RAB charge, relating to the number, characteristics and future earning potential of potential doctoral loan borrowers. The estimate provided would result in a 2018-19 financial year RAB cost of £0.3m, when applied to the estimated value of loan.

Costs will increase year on year while a full cohort eligible for doctoral loans phases in. A full cohort will take up to eight years to phase in (2025-26), and it is unclear whether demand will increase during that time. Based on the current estimated eligible population, a full cohort would require around £6m of loan cover, with an associated RAB cost of around £2m. These estimates could, however, be subject to marked change during the intervening time, as real data on demand and loan repayments become available.

This RIA is assuming that the relevant composite repayment regulations will be made by the Department for Education and Welsh Ministers in July 2018. Should composite repayment regulations not be in force by 1st August, then the rate of and threshold on repayment may be different from that stated for doctoral loan borrowers but only until the relevant repayment regulations do come into force.

An Equality Impact Assessment has been completed and is available on request from hepolicy@gov.wales

CONSULTATION

The proposed postgraduate doctoral degree policy was consulted on between 8 December 2017 and 2 March 2018 (*Support for doctoral study, WG33258*). A wide range of stakeholders were invited to respond to the consultation which generated 28 responses, consisting of 11 organisations and 17 individuals. A summary list of stakeholders invited to respond and those which responded is attached at Annex 1.

Stakeholders were generally positive about and welcomed the policy proposals. All but one respondent agreed that support should be provided for doctoral study and a number of key themes relating to the questions emerged. It was recognised that there were other sources of funding available for a limited number of courses but access was limited further due to the very competitive nature of application.

Respondents were aware that funding would be made available for English students in the 2018/19 academic year and welcomed the same opportunity for students in Wales. It was suggested that the policy could contribute to the expansion of Welsh medium courses over the course of time. A number of respondents indicated that the age restriction was not ideal but many understood the rational provided in the document; a more detailed rationale for maintaining the restriction is set out above.

Responses to the consultation did not identify any significant concerns and as a result the policy remains largely unchanged from the original policy proposed in the consultation for the 2018/19 academic year.

COMPETITION ASSESSMENT

There is no wider impact on the competiveness of business, charities or the voluntary sector in making these Regulations.

POST IMPLEMENTATION ASSESSMENT

The Regulations governing the student support system are revised annually and are subject to detailed review by both the Welsh Government and delivery partners.

SUMMARY

The making of these Regulations is necessary to establish the basis for the higher education student support system for students ordinarily resident in Wales and EU students who are starting a postgraduate doctoral degree course in the 2018/19 academic year.

Annex A

List of consultees:

Higher education institutions
Universities Wales
Further education colleagues in Wales
Colegau Cymru/ College Wales
NUS Wales
Student Loans Company
Higher Education Funding Council for Wales
UCAS
NIACE
NASMA
Charities with an interest in higher education
Other representative organisations with an interest in higher education
The general public

List of respondents:

Crocels Community Media Group
University of South Wales
UCAC Cymru
Cardiff University
Open University
Royal College of Nursing
HEFCW
University and College Union (Wales)
Universities Wales
Swansea University
Aberystwyth University
The general public

Draft Regulations laid before the National Assembly for Wales under paragraph 1(1)(g) and (2) of Schedule 2 to the Law Derived from the European Union (Wales) Act 2018, for approval by resolution of the National Assembly for Wales.

D R A F T W E L S H S T A T U T O R Y I N S T R U M E N T S

2018 No. (W.)

EUROPEAN UNION, WALES

The Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations repeal the Law Derived from the European Union (Wales) Act 2018 ("the Act") and are made under section 22 of the Act. Section 22 of the Act enables the Welsh Ministers to repeal, by regulations, the Act or any provision of the Act.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. A regulatory impact assessment was undertaken in relation to the Act. That regulatory impact assessment included an assessment of the option to continue to work with the UK Government to amend the EU (Withdrawal) Bill, the better to reflect the devolution settlement. As these Regulations reflect that option, information on the impact of these Regulations can be found in that regulatory impact assessment. The regulatory impact assessment can be accessed at: http://www.assembly.wales/laid%20documents/pri-ld11449-em/pri-ld11449-em-e.pdf.

Draft Regulations laid before the National Assembly for Wales under paragraph 1(1)(g) and (2) of Schedule 2 to the Law Derived from the European Union (Wales) Act 2018, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2018 No. (W.)

EUROPEAN UNION, WALES

The Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018

Made	***
Coming into force	*3 October 2018*

The Welsh Ministers make the following Regulations in exercise of the power conferred by section 22 of the Law Derived from the European Union (Wales) Act 2018(**1**) ("the Act").

In accordance with paragraph 1(2) of Schedule 2 to the Act, a draft of this instrument has been laid before the National Assembly for Wales along with a statement setting out the Welsh Ministers' view on whether the procedure in sub-paragraphs (6) to (14) of paragraph 1 of Schedule 2 should apply to this instrument.

In accordance with paragraph 1(3) of Schedule 2 to the Act, a statement has been laid before the National Assembly for Wales explaining why provision to modify primary legislation is needed.

In accordance with paragraph 1(6) of Schedule 2 to the Act, the Welsh Ministers have had regard to—

(a) any representations,

(b) any resolutions of the National Assembly for Wales, and

(**1**) 2018 anaw 3.

(c) any recommendations of a committee of the National Assembly for Wales charged with reporting on the draft regulations,

made during the 60-day period with regard to the draft regulations(**1**).

In accordance with paragraph 1(7) of Schedule 2 to the Act, the Welsh Ministers have laid a statement before the National Assembly for Wales—

(a) stating whether any representations were made, and

(b) if any representations were made, giving details of them.

In accordance with paragraph 1(8) of Schedule 2 to the Act, a draft of the regulations has been approved by a resolution of the National Assembly for Wales.

Title and commencement

1.—(1) The title of these Regulations is the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018.

(2) These Regulations come into force on 3 October 2018.

Repeal of the Law Derived from the European Union (Wales) Act 2018

2. The Law Derived from the European Union (Wales) Act 2018 is repealed.

Cabinet Secretary for Finance, one of the Welsh Ministers
Dated

(**1**) Paragraph 1(16) provides that the "60-day" period in relation to any draft regulations is the period of 60 days beginning with the day on which the draft regulations were laid before the National Assembly for Wales. Paragraph 1(17) provides that no account is to be taken of any time during which the National Assembly for Wales is dissolved or in recess for more than 4 days.

Explanatory Memorandum to the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018

This Explanatory Memorandum has been prepared by the Office of the First Minister Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018.

Mark Drakeford AM
Cabinet Secretary for Finance

8 June 2018

1. Description

The **Law Derived from the European Union (Wales) Act 2018** ("the LDEU Act") provides powers for the Welsh Ministers to preserve EU law covering subjects devolved to Wales on the withdrawal of the UK from the EU. It also provides powers for the Welsh Ministers to ensure that legislation covering these subjects works effectively after the UK leaves the EU and the European Communities Act 1972 ("the ECA 1972") is repealed by the European Union (Withdrawal) Bill ("the EU (Withdrawal) Bill").

The draft **Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018** ("the Regulations") have been brought forward under section 22 of the LDEU Act. They repeal that Act in its entirety following the Intergovernmental Agreement ("the IGA") between the Welsh Government and the UK Government on the EU (Withdrawal) Bill[1], as well as the agreement of the National Assembly for Wales ("the Assembly"), on 15 May 2018, to the Legislative Consent Motion on that Bill.

[1] https://www.gov.uk/government/publications/intergovernmental-agreement-on-the-european-union-withdrawal-bill

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

Paragraph 1(1)(g) of Schedule 2 to the LDEU Act provides that the enhanced procedure, laid out in paragraph 1 of Schedule 2, is to apply to regulations to be made under section 22. Paragraph 1(5) further provides that the procedure in sub-paragraphs (6) to (14) apply to draft regulations to be made under section 22.

The draft regulations must therefore be laid before the Assembly for 60 days (not taking into account any time during which the Assembly is dissolved or in recess for more than four days). At the end of those 60 days, the Welsh Ministers must have regard to any representations, any resolutions of the Assembly, and any recommendations of a committee of the Assembly charged with reporting on the draft regulations.

If, after the expiry of the 60-day period, the Welsh Ministers wish to make the regulations in the terms of the draft, they must lay before the Assembly a statement stating whether any representations were made, and if any representations were made, giving details of them.

Only when this statement is laid may the Welsh Ministers make regulations in the terms of the draft if it is approved by a resolution of the Assembly.

3. Legislative background

The LDEU Act was passed by the Assembly on 21 March and received Royal Assent on 6 June 2018. Section 22 of the LDEU Act empowers the Welsh Ministers to repeal, by regulations, the LDEU Act or any provision of the LDEU Act.

As noted above, paragraph 1(1)(g) of Schedule 2 to the LDEU Act provides that the enhanced procedure, laid out in paragraph 1 of Schedule 2, is to apply to regulations made under section 22. Moreover, sub-paragraph (2) of paragraph 1 of Schedule 2 to the LDEU Act requires the Welsh Ministers to lay a draft of such regulations before the Assembly along with a statement setting out their view on whether the procedure in sub-paragraphs (6) to (14) of paragraph 1 should apply.

Consequently, in accordance with sub-paragraph (2) of Schedule 2 to the LDEU Act, the Welsh Ministers are of the view that the enhanced procedure contained in sub-paragraphs (6) to (14) of paragraph 1 in Schedule 2 to the LDEU Act should apply to the Regulations. This view reflects the provision contained in sub-paragraph (5) of paragraph 1 of Schedule 2 to the LDEU Act which requires that regulations to be made under section 22 are subject to sub-paragraphs (6) to (14).

Sub-paragraph (3) of paragraph 1 of Schedule 2 to the LDEU Act requires that if draft regulations contain provision that modifies primary legislation, the Welsh Ministers lay a statement before the Assembly explaining why the provision is needed. By repealing the LDEU Act, the Regulations are modifying primary legislation and, in accordance with the requirement to explain why the provision to modify primary legislation is needed, the Welsh Ministers state that this is in order to fulfil the terms of the IGA between the Welsh Government and the UK Government on the EU (Withdrawal) Bill. For reference, paragraph 10 of the IGA states:

'As part of the implementation of this agreement, the governments agree that steps will be initiated to secure the repeal of Bills passed by the devolved legislatures as possible alternatives to the Withdrawal Bill, before the Withdrawal Bill receives Royal Assent.'

4. Purpose & intended effect of the legislation

It was made clear in *Securing Wales' Future* that the Welsh Government respects the result of the referendum on the UK's membership of the EU held on 23 June 2016.

The Welsh Government also recognises the need for legislation to maintain the effective operation of the law at the point of the UK's exit from the EU.

On 13 July 2017, the EU (Withdrawal) Bill was introduced in the House of Commons[2]. It contained provision for the repeal of the ECA 1972 and other provision in connection with the withdrawal of the UK from the EU.

The EU (Withdrawal) Bill—

- repeals the ECA 1972 from "exit day";
- preserves all of the domestic legislation that has been made in the UK to implement EU obligations (e.g. regulations made under section 2(2) of the ECA 1972 that implement EU directives);
- converts the body of EU law that applies directly in the UK (e.g. EU regulations that apply directly in the UK through the operation of the ECA 1972) into the domestic law of the UK jurisdictions ("UK law");
- incorporates any other rights etc. that are available in domestic law by virtue of the ECA 1972, including the rights contained in the EU treaties, that can currently be relied on directly in UK law without the need for specific implementing measures; and
- provides that pre-exit case law of the Court of Justice of the European Union ("CJEU") be given the same binding, or precedent, status in UK courts as decisions of the Supreme Court.

The law that is converted or preserved by the EU (Withdrawal) Bill is "retained EU law". Retained EU law is defined in clause 7(7) of the EU (Withdrawal)

[2] https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html

Bill[3] as anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of clause 2, 3 or 5 or sub-clause (3) or (6) of clause 7 of the EU (Withdrawal) Bill (as that body of law is added to or otherwise modified by or under the EU (Withdrawal) Bill or by other domestic law from time to time). Retained EU law will therefore include law on subjects that are devolved to the Assembly as well as law on subjects that are reserved.

Further details regarding the EU (Withdrawal) Bill can be found in the explanatory material published by the UK Government[4].

On 12 September 2017, the Welsh Government laid a Legislative Consent Memorandum before the Assembly in respect of the EU (Withdrawal) Bill as introduced on 13 July 2017[5]. It included a full list of clauses that are within, or modify, the legislative competence of the Assembly. The Legislative Consent Memorandum stated that the Welsh Government would not be able to recommend to the Assembly that it give consent to the EU (Withdrawal) Bill as drafted on introduction.

The Welsh Government's objective from the very beginning was an amended EU (Withdrawal) Bill that delivers stability and certainty for businesses and citizens about the rights, obligations and responsibilities that will exist at the point at which the UK leaves the EU, while also respecting the existing devolution settlement.

Consequently, on 19 September 2017, the First Minister of Wales and the First Minister of Scotland sent a joint letter to the Prime Minister with a set of proposed amendments to the EU (Withdrawal) Bill. The letter explained that if the amendments were made to that Bill, the Welsh Government and the Scottish Government could consider recommending that consent be given to the EU (Withdrawal) Bill by the National Assembly for Wales and the Scottish Parliament. The amendments were subsequently debated in the House of Commons on 4 and 12 December at Committee stage, but were not agreed. No significant amendments to the relevant parts of the EU (Withdrawal) Bill were tabled by the UK Government at Report stage.

On 29 January, again working jointly with the Scottish Government, the Welsh Government arranged a briefing session for members of the House of Lords on the interaction of the EU (Withdrawal) Bill and devolution.

The Joint Ministerial Committee met a number of times between February and May 2018 – in the formats of both JMC (Plenary) and JMC (EU Negotiations). Those meetings included discussion of proposals put forward by the Welsh Government, Scottish Government and UK Government on the EU (Withdrawal) Bill and agreement that all three governments shared the objective of reaching an agreement on the issues. Intensive work took place outside of those meetings, at both official and Ministerial level, to negotiate a

[3] As amended on Report in the House of Lords: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/18102.pdf
[4] https://services.parliament.uk/Bills/2017-19/europeanunionwithdrawal/documents.html
[5] http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf

position where such an agreement could be reached and a compromise could be achieved.

The Law Derived from the European Union (Wales) Bill ("the LDEU Bill"), also known as the Continuity Bill, was introduced in the Assembly on 7 March 2018, following the Assembly's agreement to treat it as an Emergency Bill. The introduction of the Bill was to provide a fallback option, both to provide legal continuity of EU legislation about devolved matters in Wales and to safeguard devolution in the scenario where no agreement was reached with the UK Government on the EU (Withdrawal) Bill.

Stage 1 of the LDEU Bill was completed on 13 March, Stage 2 on 20 March and Stages 3 and 4 on 21 March. The Bill was passed with 39 votes in favour and 13 against (with one abstention).

At the end of the four week intimation period, the Attorney General referred the LDEU Bill to the Supreme Court to consider whether the Bill was within the Assembly's legislative competence. The Attorney General and the Advocate General for Scotland similarly referred the Scottish Continuity Bill.

The Welsh Government's preference throughout the process was for an amended EU (Withdrawal) Bill that respected devolution. The negotiations between the Governments continued and produced the IGA, with the UK Government putting forward amendments to the EU (Withdrawal) Bill as part of the IGA. This represented substantial progress from the initial position, and soundly defends the interests of the National Assembly for Wales. This enabled the Welsh Government to recommend to the Assembly that it give its consent to the Bill.
The amendments and the IGA have resulted in the following being agreed:

- all devolved powers and policy that apply to Wales will now rest in Wales, unless specified to be temporarily reserved. These will be areas where the Governments agree that future common UK-wide frameworks with a legislative underpinning may be necessary.

- a process for seeking the consent of the devolved legislatures as to which areas of current EU law in devolved policy areas will be 'frozen' while these common UK-wide frameworks are agreed. In these, limited, areas the Assembly and the Welsh Ministers will not then be able to make any legislative changes until the frameworks are agreed.

- if the Assembly does not give consent to the 'freezing' of specific areas of EU law, the UK Government will be able, exceptionally, to ask the UK Parliament to do so but it will need to explain to Parliament why this is necessary and provide the view of Welsh Ministers as to why the proposal was not acceptable to the Assembly. Parliament will then make a decision on the issue.

- an unequivocal commitment that the UK Government will not ask Parliament to make legislative changes to these areas of law in respect of England while they are in the ‘freezer’.

- a ‘sunset’ clause that guarantees that the ‘freezing’ of any powers will be temporary.

- the Sewel convention (by which the UK Government would not normally legislate with regard to devolved matters without the consent of the devolved legislatures) will apply to any primary legislation to put new frameworks in place.

The Regulations repeal the LDEU Act in line with the agreement reached with the UK Government in the IGA.

5. Consultation

The Welsh Government’s preferred option was to see the UK’s EU (Withdrawal) Bill amended so that it provided the necessary legislative framework in consequence of the decision to leave the EU. The LDEU Act provided an alternative legal mechanism in the event that appropriate amendments were not made to the EU (Withdrawal) Bill. Those appropriate amendments have now been made. Those, along with the accompanying commitments contained in the IGA, mean that the fallback option of the LDEU Act is no longer needed and the decision has been taken to seek to repeal the LDEU Act.

Given the short timescale available for bringing forward this legislation, no consultation has been possible on the Regulations. However, reaching the IGA between the Welsh Government and UK Government was as a result of in-depth discussion and negotiation.

In addition, the Welsh Government has issued a number of policy documents, including *Securing Wales' Future* and *Brexit and Devolution*, and has taken steps to secure stakeholder engagement, for example through the European Advisory Group set up to advise the Welsh Government. The feedback from stakeholders has been, and continues to be, taken into account by the Welsh Government as it formulates and implements its response to the UK’s decision to leave the EU.

Consultation will be taken as appropriate on regulations made under the EU (Withdrawal) Bill, which will provide the legislative framework following repeal of the LDEU Act.

6. Regulatory Impact Assessment

The Regulatory Impact Assessment (RIA) conducted for the LDEU Act[6] contained three options:

Option 1 – Do nothing and, as a consequence, use the powers provided in the UK Government's EU (Withdrawal) Bill (as it was at the time of the introduction of the LDEU Bill prior to the amendments to the EU (Withdrawal) Bill being made.

Option 2 – Continue to seek to work with the UK Government to amend the EU (Withdrawal) Bill, the better to reflect the devolution settlement.

Option 3 – Introduce the LDEU Bill to preserve EU law, as it applies in relation to devolved subjects, as the United Kingdom withdraws from the European Union and further associated provision.

Option 2, which was the Welsh Government's preferred option, has been realised via the IGA reached between the Welsh Government and the UK Government on the EU (Withdrawal) Bill. The Regulatory Impact Assessment for the LDEU Act included a statement on the costings for this option and a further RIA has not been conducted in relation to the Regulations as the information on these costings has not changed since the RIA on the Act was carried out.

However, as stated in the RIA for the Act, while it has not been possible to produce a reliable estimate of the cost of each option at this stage, it would appear reasonable to assume that the administrative cost to the Welsh Government would be lowest under Option 1 and greatest under Option 3.

Consequently, it can be reasonably assumed that the administrative cost to the Welsh Government associated with bringing forward the subordinate legislation under the amended EU (Withdrawal) Bill (Option 2) would be lower than that associated with the subordinate legislation under the LDEU Act (Option 3).

7. Impact Assessments

Equality / Children and Young People

Impact Assessments for Equality[7] and for Children and Young People[8] were conducted for the LDEU Act.

Those impact assessments highlighted the fact that EU derived Welsh law was to be created by regulations made under the Act and therefore that the Act itself would not directly lead to changes in the EU law that is currently applicable in Wales. These Regulations repeal the Act in its entirety and no

[6] http://www.assembly.wales/laid%20documents/pri-ld11449-em/pri-ld11449-em-e.pdf
[7] https://gov.wales/docs/caecd/publications/180308-equality-impact-assessment-en.pdf
[8] https://gov.wales/docs/caecd/publications/180308-children-impact-assessment-en.pdf

regulations are intended to be made under the LDEU Act before its repeal. The repeal will not have any direct impact on individuals as it will not be removing any rights currently being enjoyed by individuals.

Those impact assessments did consider that the LDEU Act included a requirement to interpret EU derived Welsh law in accordance with the EU Charter of Fundamental Rights compared to the EU (Withdrawal) Bill as it stood at that time which provided that the Charter did not form part of retained EU law. The assessments analysed the possibility that to the extent that the powers under the LDEU Act were exercised to create EU derived Welsh law the requirement to interpret that law in accordance with the Charter could mitigate any potential loss of rights as a result of the approach taken in the EU (Withdrawal) Bill to the Charter.

However, since the LDEU Bill was passed the EU (Withdrawal) Bill has been amended by the House of Lords so that the EU Charter of Fundamental Rights would form part of domestic law. If such a provision in the EU (Withdrawal) Bill were to remain in the Bill the Charter would be relevant in all areas of retained EU law, and not only those areas of EU law retained in devolved areas by the LDEU Act. Subject to this amendment (or a form of the amendment) staying in the Bill it would go further in terms of the incorporation of the Charter into domestic law than that provided for under the LDEU Act. The House of Commons are due to consider this amendment but if they were to overturn the Lords' amendments then the Charter would not form part of domestic law under the terms of the Bill after the UK withdraws from the EU. The Welsh Government will continue to monitor the progress of the EU (Withdrawal) Bill through Parliament and how any changes impact the assessments relevant to the Regulations.

Human Rights

The draft regulations do not raise any issues in respect of the rights set out in the European Convention on Human Rights ("the ECHR"). The enactment and subsequent repeal of the Act will see no direct impact on the rights of individuals. However, the repeal of the Bill will mean that the legislative action required to make the legislative changes to devolved law will be under the EU (Withdrawal) Bill. The UK Government will be primarily responsible for assessing the human rights impact of that Bill, but each set of regulations made by the Welsh Ministers (and UK Ministers) will have to be considered individually to ensure that they are compatible with the ECHR.

The Welsh Language

A Welsh Language Impact Assessment[9] was conducted for the LDEU Act. This stated that there would be some positive impacts on the Welsh language from two of the three options considered (Option 2 – an amended EU (Withdrawal) Bill – and Option 3 – the LDEU Act). The subordinate legislation made under the LDEU Act would have provided the greatest potential for an

[9] https://gov.wales/docs/caecd/publications/180308-language-impact-assessment-en.pdf

increase in the amount of legislation available in the Welsh language, for example as directly applicable EU law would have been available bilingually. However, the scenario where the EU (Withdrawal) Bill was amended was also expected to offer a potential positive impact from a greater proportion of regulations being available bilingually as the powers of the Welsh Ministers would be expanded. This would offer greater scope for law to be made bilingually. In particular, a choice could be made to restate directly applicable EU law to provide clarity and accessibility which would mean that a Welsh language version of the law would be provided[10].

Although repeal of the LDEU Act may not provide the greatest positive impact for the Welsh language, it is considered to be the best overall solution and in line with the Welsh Government's preferred outcome from the outset – an amended EU (Withdrawal) Bill respecting devolution and providing certainty for businesses and the people of Wales, as achieved under the IGA and which also confirmed that steps would be taken to repeal the LDEU Act.

The impact of the Regulations on the Welsh Ministers' statutory duties set out under sections 77- 79 of the Government of Wales Act 2006 or the local government, voluntary sector and business schemes made under sections 73, 74 and 75 of the Government of Wales Act 2006 respectively was considered in the RIA for the LDEU Act and the associated Impact Assessments.

[10] See paragraph 20(b) of Schedule 7 to the EU (Withdrawal) Bill.

Document is Restricted

Agenda Item 3.2

SL(5)220 – The Sea Fishing (Miscellaneous Amendments) Regulations 2018

Background and Purpose

These Regulations amend the Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009 and the Sea Fishing (Points for Masters of Fishing Boats) Regulations 2014. They implement provisions of Article 38 of Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

Procedure

Negative, composite.

Technical Scrutiny

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

1. Standing Order 21.2(ix) – the instrument is not made in both English and Welsh

These Regulations have been made as a composite instrument, meaning that these Regulations have been: (a) made by both the Welsh Ministers and the Secretary of State, and (b) laid before both the National Assembly for Wales and the UK Parliament.

The Explanatory Memorandum to the Regulations states that, because of the composite nature of the Regulations, it was not considered reasonably practicable for the Regulations to be made in English and Welsh.

Merits Scrutiny

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

1. Standing Order 21.3(ii) – the instrument is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

EU law requires Member States to enforce certain prohibited sea fishing activities, such as importing fish caught by a fishing vessel of a non-cooperating third country. In March 2014, the Council of the European Union published, for the first time, a list of countries that have not cooperated with the EU in respect of illegal, unreported and unregulated sea fishing. The countries on the list are Belize, the Kingdom of Cambodia and the Republic of Guinea.

Those counties were specified as non-cooperating countries in March 2014. It is unclear why it has taken until May 2018 to make these Regulations to enforce prohibited activities against those non-cooperating countries.

2. Standing Order 21.3(ii) – the instrument is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

The application of these Regulations relies on definitions such as "areas within the seaward limits of the territorial sea adjacent to England" and "part of the sea within British fishery limits which is to be treated as adjacent to Wales" etc.

To work out the precise meaning of these areas, it is necessary to look at many pieces of legislation and plot a large number of co-ordinates.

We recommend that, in future, simple maps be included in Explanatory Memoranda, to provide an at-a-glance summary of the relevant sea areas.

3. Standing Order 21.3(ii) – the instrument is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

Some of the changes made by these Regulations arose out of **technical reporting points raised by this Committee in January 2015**. While we welcome those changes being made (in respect of Wales, England, Northern Ireland and, partly, Scotland), we note that it has taken almost three and a half years for the changes to be made.

Implications arising from exiting the European Union

These Regulations implement and enforce EU obligations in respect of sea fishing, and therefore these Regulations will form part of retained EU law after exit day.

The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks states that "fisheries management and support" is a policy area likely to be subject to clause 15 regulations under the EU (Withdrawal) Bill. Therefore, the law covered by these Regulations is likely to be an area of EU law that is frozen while common frameworks are put in place.

Government Response

Response to Technical Scrutiny Reporting Points

Point 1: Standing Order 21.2 (ix) – The instrument is not made in both English and Welsh

The Regulations are made on a composite basis to maintain the clarity, accessibility and transparency of the statute book for those required to comply with its provisions.

As this composite instrument (which amends two earlier instruments also made on a composite basis) is subject to approval by the National Assembly for Wales and by the UK Parliament, it is not considered reasonably practicable for this instrument to be made or laid bilingually.

Response to Merits Scrutiny Points

1. Standing Order 21.3(ii) – the instrument is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

Point 1.

The reporting point is noted.

In practice, the likelihood of Illegal, Unreported and Unregulated fishing by the non-cooperating countries listed in 2014 having a connection with the United Kingdom is relatively small and even less likely in connection with Wales.

In light of the minimal risk involved, it has been appropriate to wait for a composite SI process between Welsh Government and the Department of Environment, Food and Rural Affairs in Westminster. A separate initiative by Welsh Government would have resulted in the legislation in this subject area residing in separate legislative documentation which would potentially be confusing to those to whom it applies.

It is now important that legislation is enacted to allow the transposition of EU regulations in the event of the UK departure from the European Union.

Point 2.

The reporting point is noted.

Explanatory Memoranda will in future contain maps as suggested in similar circumstances.

Point 3.

The reporting point is noted.

In practice, the implementation of the 'Points for Master's' scheme had stalled at EU level following disagreements as to the seriousness, and thereby the level of points being ascribed by, individual Member States for similar offences amid concerns that a 'level playing field' was not being maintained.

In light of these circumstances and the extent to which domestic and other EU regulations apply to deter non-compliance with fisheries regulations generally, it has been appropriate to wait for a composite SI process between Welsh Government and the Department of Environment, Food and Rural Affairs in Westminster. A separate initiative by Welsh Government would have resulted in the legislation in this subject area residing in separate legislative documentation which would potentially be confusing to those to whom it applies.

It is now important that legislation is enacted to allow the transposition of EU regulations in the event of the UK departure from the European Union.

Committee Consideration

The Committee considered the instrument at its meeting on 11 June and reports to the Assembly in line with the technical and merits points above. The Committee agreed to write to the Cabinet Secretary for Energy, Planning and Rural Affairs.

Document is Restricted

Llywodraeth Cymru
Welsh Government

Commission on Justice in Wales:

Written Evidence submitted by the Welsh Government

Contents

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.

This document is also available in Welsh.

WG35141 Digital ISBN 978-1-78937-339-4

Introduction

The Commission on Justice in Wales has been invited to consider the outstanding questions about policing, the justice system and the legal jurisdiction in Wales not properly addressed by the Wales Act 2017. The justice-related matters within its remit are issues of broad constitutional significance, as the fact that legislative competence and executive responsibilities for policing and justice in Wales are currently reserved to the UK institutions has considerable impact on the way Wales is governed. This evidence from the Welsh Government provides an initial assessment of that impact on the system of government in Wales, on inter-governmental relations, on Welsh law and ultimately on public services provided to the people of Wales.

Developing a coherent and stable system of government for Wales has been a long process, one which is not yet complete. What began as a very limited form of executive devolution in 1999 has evolved. We now have a fully fledged legislature, a separate government accountable to that legislature and to the people of Wales, and means to raise funding for public services and investment through taxes and borrowing. However, the devolution settlement remains limited by domestic and international comparison and is, largely as a result of that, highly complex. The Wales Act 2017 did not bring an end to this process as had been hoped – and, indeed, arguably it has added complexity. Longstanding issues have not been resolved, and in some respects problems have been further exacerbated.

Moving from a conferred to reserved powers model of devolution exposed fault lines in the devolution settlement, largely arising from the UK Government's expressed wish to "protect" the single legal jurisdiction of England and Wales. The rationale for this appeared to be, essentially, to seek to limit the extent to which there is divergence in the law that applies to England and to Wales. But the law of England and of Wales has already diverged and will continue to diverge, as this is an inevitable consequence of the creation of a legislature for Wales. A fundamental characteristic of a legal jurisdiction - one uniform body of law – therefore no longer exists.

The existence of a single legal jurisdiction for England and Wales is often said to be the reason why policing and the justice system are (for the main part) not devolved to Wales. But there is no reason why these matters should not be devolved and there are compelling reasons why they should. Decisions about what should, or should not, be devolved to Wales should be based on establishing a coherent system of government for Wales which can improve the lives of people in Wales. They should not, as has been the case too often, be based on what has gone before. The absence of a legal jurisdiction for Wales is a quirk of events of nearly five hundred years ago, while the subject matter of the powers devolved to Wales are too heavily influenced by what was initially devolved to the Welsh Office some fifty years ago.

A common characteristic of decentralised government across the world is subsidiarity – the presumption that the central government of a state should only perform the tasks that cannot effectively be undertaken at a more local level. In consequence, this means that domestic matters such as the provision of public services are generally devolved. Policing and the justice system are no different. They are public services which are almost always devolved. Creating an artificial distinction between those public services that are devolved, and those that are not, puts up barriers to the joint working between government and local delivery agencies which is detrimental to effective public services.

This Written Evidence examines these matters further as follows:

Part 1 –relates to **the constitution and the law** and is concerned with the complexity of the devolution settlement, inter-governmental relations, the legal jurisdiction, access to justice and the legal sector in Wales.

Part 2 –relates to **policing and justice as public services** and is concerned with ensuring coherent delivery of public services. It outlines what the Welsh Government is currently doing to support justice services and the difficulties in doing so within a limited devolution settlement, and the opportunities that would arise were these matters to be devolved.

Part 1: The constitution and the law

Introduction

The Commission is considering issues that are fundamental both to the constitution and to the law. Unlike, for example, the case in Scotland, the process of devolving power to Wales has been unorthodox. It has been an ad hoc, piecemeal process that has been frequently criticised. There have been significant improvements since 1999, but in so far as justice, the legal jurisdiction and the law itself are concerned, Wales' constitutional arrangements remain highly unconventional, and are an outlier in global terms.

Legal jurisdiction

The single legal jurisdiction of England and Wales is a relic of history. It derives from Tudor times, specifically from the Laws in Wales Acts of 1535 and 1542. The purpose of these Acts was essentially to assimilate Wales into England for governmental purposes, and in doing so to seek to ensure political, administrative, linguistic and legal uniformity across England and Wales.

This uniformity has however in modern times ceased to exist. Administrative devolution, implying distinct governmental policy and administration for Wales, goes back at least as far as the creation of the Welsh Office in 1965. The creation of the National Assembly for Wales in 1999 democratised that devolution, and the National Assembly obtained full law making powers following the referendum in 2011. Wales has its own government, a distinct system of public administration and has recognised Welsh as an official language of equivalent status to English. Most fundamentally, Wales has its own political system, legislature and its own laws. However, a false notion of legal uniformity remains, in the guise of the only creation of those 16th century Acts that remains – the single legal jurisdiction of England and Wales.

But the "England and Wales" legal jurisdiction does not have the fundamental characteristics of a legal jurisdiction:

- "England and Wales" is not a coherent political and geographical territory – Wales has had a fully-fledged legislature since 2011 and the concept of "England and Wales" no longer exists for any other purpose;
- England and Wales does not have a homogenous body of law that extends throughout that territory – it is no longer sensible to speak of the law of England and Wales, as the law that applies to Wales continues to diverge from that in England and an increasing proportion of the law that applies to Wales is bilingual.

Notwithstanding the fact that the England and Wales legal jurisdiction is no longer fit for purpose, during the development of what became the Wales Act 2017 the UK Government – initially at least – sought to "protect" the jurisdiction. This was to be done by restricting the National Assembly's competence, presumably in an attempt to maintain, at least to some degree, a homogeneous body of law. But this body of law is already diverse in content, in application and in language. The Welsh Ministers have made approximately 4500 Statutory Instruments since 1999 and the National Assembly has to date enacted 56 pieces of primary legislation, many of which are lengthy and wide-ranging in content.

To give but one example, the National Assembly has been particularly active in legislating on environmental matters. Devolution has enabled the introduction, through a number of pieces of legislation, of a unique legislative framework for the environment, which delivers on international obligations and puts sustainable development and the environment at the heart of policy decisions in Wales. Further, to support an integrated approach to managing our environment, Natural Resources Wales

was created and provided with a new statutory purpose aligned to the legislative framework, to deliver well-being goals. Thus, the legislative framework for environmental matters for Wales now differs radically from that for England, yet both exist within the existing common legal jurisdiction, and this will considerably complicate matters when the consequences of Brexit for environmental issues come to be addressed.

It is additionally worth noting that the laws of England and Wales diverge also in consequence of laws made only for England, and that the emergence of "English" laws (and English votes for English laws in Parliament) means that there is an equally compelling case for a separate (truly) English legal jurisdiction.

With one exception across the common law world, a legislature is always accompanied by a corresponding legal jurisdiction. Wales is that exception - an anomaly. Creating a Welsh legal jurisdiction would not be a radical change, it would merely be dealing properly with the implications of what has already occurred. It is something that should already have been done, and it would in a sense simply be consequential on the earlier establishment of legislative devolution for Wales. So, from the Welsh Government's standpoint, the argument for a distinct legal jurisdiction for Wales is not based on an assertion of a need to secure "fairness" (in some sense) for Wales; rather it is concerned with a more efficient and effective form of governance for people in Wales.

Complexity of the devolution settlement

The existence of the single legal jurisdiction of England and Wales, and the associated reality that policing and justice are not devolved, is by far the single biggest remaining cause of complexity of the Welsh devolution settlement. The Government of Wales Act 2006 (as amended by the Wales Act 2017) contains 44 pages of reservations and restrictions, while by contrast the Scotland Act (as enacted) contains 20 equivalent pages. The difference is nearly all in consequence of the jurisdiction, and reservation of policing and justice.

As well as the complexity (and in this respect the settlement is even more complicated after moving from the conferred to reserved model of demarcating power) this also has practical implications. Under the principle of subsidiarity most 'domestic' matters have been devolved to Scotland and Northern Ireland, meaning that their powers are far more self contained and the potential for conflict with that reserved to the UK Parliament far less. By contrast in Wales the line drawn between what is devolved and what is not runs right through 'domestic' subjects, causing confusion and complexity and hindering joined up working and good governance.

In its report on *"Achieving Political Decentralisation"*[1], the Institute for Government notes that the UK is one of the most centralised countries in the world and that "**Academics and think-tanks regularly argue that decentralisation could boost economic growth; better reflect differences in local identities and preferences; and allow more local variation and innovation in public services**."

In that report the Institute considers how best to decentralise power and states that it has "**become clear…[that] policy design must take account of the real world practicalities of implementation**", referring to a "**web of obstacles**" to effective decentralisation. The Institute also makes the case that a "comprehensive set of powers" must be devolved, referring in particular what it refers to as the "big five" local policy areas – policing, strategic planning, transport skills and housing .

[1] www.instituteforgovernment.org.uk/sites/default/files/publications/DecentralisationPaper%20-%20FINAL_0.pdf

The report also concludes that "**Thinking for new decentralisation reforms should not be constrained by the past**", something that is particularly apt when cast in a Welsh context. Too often decisions taken about what should or should not be devolved to Wales has been based on what has gone before. Even today, despite all of the reform that has taken place since 1999, the subject matter of what is devolved is still largely the same as that devolved to the old Welsh Office.

The powers devolved to Wales should be coherent and comprehensive based on what is required to be an effective government improving the lives of the people it serves. They should not be based on what has happened in the past, or a desire to -protect UK institutions and structures.

More fundamentally, preserving our democracy and rule of law would be better served by a system of government under which responsibility for policing and justice was brought closer to the people. Applying the principle of subsidiarity would lead to better local awareness of issues and interest in outcomes, more flexibility and adaptability and greater legitimacy. The onus should be on the UK Government and Parliament to make the case for centralisation of policing and justice within the UK – a case that cannot realistically be made, not least because they are already devolved in Scotland and Northern Ireland, and to an extent even within some English city regions.

Accessibility of legislation and the rule of law

A fundamental tenet of there being one single jurisdiction for England and Wales is legal uniformity. A jurisdiction is based on the notion that the law is the same throughout its territory. This means that there is only one body of law for England and Wales. In consequence, there is no such thing, therefore, as "Welsh law" and (on that basis) there is strictly speaking no such thing as "English law" either.

This leads to practical problems which impact upon the complexity and accessibility of the law. Traditionally legislation in the UK has been divided by reference to its "extent", a concept which is in turn based on the legal jurisdiction within which the legislation has effect. Indeed, one of the purposes of a jurisdiction is to signify difference in this way.

A law that extends to Scotland becomes part of Scots law, and a law that extends to Northern Ireland part of the law of Northern Ireland. An Act passed by the National Assembly, however, cannot extend to Wales but only to England **and** Wales. Similarly an Act of the UK Parliament intended, say, to affect only local authorities in England must again extend to both England and Wales. In consequence, establishing what law has **effect** in Wales, and what law has **effect** in England (as distinct from the territory to which it **extends**), can be a difficult process, even for lawyers.

This adds complexity to an already complex and sprawling statute book, something which is particularly problematic set in the context of wider issues around accessing justice. The Welsh Government recognises the importance of access to justice so that people are able to defend and realise their rights, and the potentially negative social, economic and health consequences where people are not able to do so. Reductions in the availability of legal aid, increased court and tribunal fees, the rise in self-represented litigants in court, and court closures and relocations all represent change to the justice system in the last eight years which is unprecedented. In consequence the Welsh Government is particularly conscious of the need to ensure full and ongoing awareness and understanding of Welsh law by those subject to it.

The 'justice function' within government

Lord Thomas, while Lord Chief Justice, expressed concern about the absence of what he referred to as a "justice function" for Wales:

"No one has really studied the problem of what has happened under the [Government of Wales] Act and there is no justice function that looks after Wales. By default the courts have put one in place, but there is not a justice function. The Welsh Government do not have justice as a competence and the Ministry of Justice has only just realised, despite our pressing it, that there is a problem."

There is a clear disconnect within the constitution between making laws for Wales on the one hand (something that is, of course, devolved), and administering and enforcing them on the other (which is not devolved). Nowhere else, in the common law world at least, is a legislature and its executive not responsible for how its laws are implemented in practice by the police and through the courts. Welsh laws, like all others, create rights and responsibilities which may need to be enforced, create offences that often need to be prosecuted, and confer powers on the police.

Unlike any other system of government of which the Welsh Government is aware, these fundamental functions – inherent to a law making process – are the responsibility of others, specifically the UK Government's Home Office and Ministry of Justice. This leads to confusion, a lack of transparency, blurred accountability for implementation and the potential for inter-governmental tension. Where a Welsh Act makes wholesale changes to the law, this may have a significant impact, for example, on the court system, which may need to change its practices in relation to Welsh cases and incur cost. This means that a Welsh Act might not be able to be effectively enforced unless appropriate arrangements have first been agreed with the Ministry of Justice, which has its own pressures, timetable and priorities. This dependence of the Welsh Government on the UK Government to implement its legislation is anomalous and unsustainable in the long term.

The courts and the judiciary

Part of the "judicial function" referred to by the Lord Chief Justice is to manage the relationship between government and the courts and judiciary. Here there is again tension caused by the divide between what is devolved and what is not. Members of the judiciary have long been aware of the implications of the divergence in law. They have been conscious of the need to understand how the law is developing in Wales and to ensure that the correct law is applied where there is divergence. Lord Thomas instigated improvements in the relationship between the Welsh Government and the office of Lord Chief Justice, but difficulties remain in agreeing who should be responsible for matters such as training on new Welsh laws.

Also of significance here is that the single legal jurisdiction means, as a matter of theory at least, that a judge in Newcastle needs to know about the existence and content of say, the Renting Homes (Wales) Act 2016 (which contains wholesale reform of the law on residential tenancies, substantially differentiating the law applicable in Wales from that applicable in England), in the same way as does a judge in Newport. In practice efforts to train judges on developments in Welsh law focus on Welsh judges, but strictly speaking the single legal jurisdiction means there is no such thing as a "Welsh judge".

Creating a Welsh legal jurisdiction would involve the creation of distinct Welsh courts and judges with expertise in the law of Wales. (It would also put beyond doubt - doubts which the Welsh Government does not share - that Wales should be represented as of right in the membership of the Supreme Court, as the separate jurisdictions of Scotland and

Northern Ireland are now). The development of a distinct Welsh judiciary need not mean, however, that the expertise and specialism of English judges could not be called upon where appropriate. At least in the short to medium term the majority of the law of Wales would be the same or similar to the law of England, and the fundamental principles of common law systems are unlikely ever to change.

One welcome aspect of the Wales Act 2017 was the creation of the new judicial office of President of Welsh Tribunals. At the point of devolution in 1999, the National Assembly (and subsequently the Welsh Government) became responsible, as a consequence of the transfer of functions, for the resourcing and administration of a heterogeneous group of tribunals, and the recently-appointed President of Welsh Tribunals will have particular responsibilities in respect of these. Further, the Welsh Government and the Law Commission are in the process of agreeing a new law reform project in respect of these tribunals, work on which is expected to begin in 2019.

The Welsh language

As indicated above, the England and Wales legal jurisdiction is based on the notion of uniformity. This in part involved a fiction of linguistic uniformity – a fiction because at the time of its creation very few of the people of Wales spoke any English, and as late as 1891 30% of the population spoke Welsh only. Linguistic uniformity remains a fiction today, both in so far as the practice of the court is concerned and in relation to the language of the law administered. Those appearing before the courts in Wales have, since the Welsh Courts Act 1942, rights to use the Welsh language, and the laws made by the Welsh Ministers and National Assembly are bilingual. The English language and Welsh language texts of these laws have equal status and must be interpreted accordingly – this means that in any case of ambiguity of a provision of Welsh legislation **both** languages must be considered[2]. This again, is something for which the single legal jurisdiction is ill-equipped.

Legal education

A Welsh legal jurisdiction once created, like numerous other legal jurisdictions across the world, would be based on the common law. While its laws would be different, they would not be fundamentally so in light of the common law principles upon which such a jurisdiction would be built. While there will be a need for bespoke Welsh legal education to take differences in law into account, the vast majority of what is taught will remain the same. We envisage, therefore, that those educated in Wales will be proficient in both English law and in Welsh law – as would those who practise in Wales.

The legal professions

The Welsh Government recognises the importance of the Welsh legal sector. A thriving legal sector brings important economic benefits and an accessible network of local legal practices is also vital if people are to be able to access justice effectively.

We are aware that some legal practitioners have expressed concern about the creation of a Welsh legal jurisdiction, questioning whether it could damage the legal sector in Wales. We understand that a Welsh jurisdiction would represent a significant change, but we do not believe that it involves a change to the fundamental legal landscape. Most importantly there is no reason for Welsh practitioners to be excluded from the English

[2] For a comprehensive assessment of this issue, see Chapter 12 of the Law Commission's Consultation Paper on the Form and Accessibility of the Law Applicable in Wales.

legal jurisdiction and English law, and vice versa. There is no intention to, and no need to, create unnecessary barriers.

Indeed, we consider there to be opportunities for larger Welsh firms as they will be able to market themselves as expert 'English' lawyers (as there will be little divergence in most areas of commercial law, either because there may be little need to change the law or because the areas are not devolved), who also have expertience of the diverging law in Wales. Scotland and Northern Ireland have thriving legal sectors in similar circumstances and we see no reason why the Welsh legal sector should be different.

Part 2: Policing and justice as public services

Joined up policy making and delivery of public services

One of the most important reasons for devolving a coherent and comprehensive set of powers to any tier of government is the clear benefit of aligning policy-making, law-making and implementation– maximising the potential for delivery of coherent and effective public services. This is a complex and hugely important issue, particularly in relation to crime and justice – as recognised by the Home Office, Safer Communities: The Local Delivery of Crime Prevention through the Partnership Approach, Home Office, 1991 ('The Morgan report'). The Morgan Report coined the term 'community safety' and proposed a more 'holistic approach' to crime and disorder reduction that placed greater emphasis on prevention by focusing on the social, economic and environmental causal factors that result in criminality. It contained 19 recommendations, the fifth of which advocated that local authorities "… should have clear statutory responsibility for the development and stimulation of community safety and crime prevention programmes." This led to the Crime & Disorder Act 1998 which established statutory partnership working involving local authorities, police, fire, health and probation services to prevent and reduce crime, anti social behaviour, substance misuse and re-offending.

The executive powers of the Welsh Government are not however based on any assessment of what would be required for efficient and effective public administration. In 1999 the executive powers of the Secretary of State (as they had developed over a period of thirty or so years), were devolved (and those powers were subsequently converted into legislative competence for the Assembly). That process was driven primarily by political compromise and practicality rather than determining how a modern legislature and executive can best operate in order to serve the people. Achieving joined up working and services is challenging in itself, but is almost impossible when an incoherent allocation of responsibility and accountability is drawn right through the services we might seek to join together.

There is much debate about how best to deliver public services, some of which is derived from differing values and priorities. There are difficult questions to be addressed, such as achieving efficiency savings, modernising digital services, providing better infrastructure and making best use of all public bodies and other delivery partners in any particular area. It is generally accepted, however, that coherent policy and integrated delivery leads not only to cost savings, for instance through reducing demand for services through prevention and early intervention, but also to improving services and outcomes for vulnerable people and communities – which should be at the heart of any public services system. This is an issue that has also been analysed by the Institute for Government in a study and series of reports. The Institute notes that the:

"…public service landscape is wide, varied and complex, with a mix of organisations from the public, private and voluntary sectors delivering a huge range of services which are rarely co-ordinated with each other. People find it difficult to navigate the system and access the support they need, particularly at crucial life transitions or when their needs are multiple and complex."

The complexity of the landscape and the range of public services provided can be illustrated by the figure at Annex 1. It is important to note also that "joining up" these services is itself a multi-dimensional issue. "Joining up" services for citizens can generally only be achieved if policy, and where necessary law and regulation, is joined up; where the activities of public and other bodies involved are joined up; and where resources are joined up.

Devolution is key to achieving joined-up services. As the Institute indicates, there is an assumption that "more devolution and joined up service delivery go hand in hand". The intention behind numerous activities currently promoted by the UK Government

in respect of England is to ensure that powers and resource are decentralised in order to boost economic development and make the provision of public services more efficient. Prime examples can be seen in the London and Manchester mayoral models currently being implemented by the Ministry of Justice this year which decentralise both the administration and the budgets for justice agencies within these cities in order to work toward a 'whole system approach' that will "facilitate a transformation in criminal justice outcomes... including a reduction in reoffending and repeat victimisation"[3].

Public service delivery in Wales

The Welsh model of public service delivery, and the ways of working required by the Well-being of Future Generations Act (Wales) 2015, is designed to ensure a more joined up and sustainable approach focused around greater collaboration and service integration that encourages prevention, early intervention and 'future proofing'. The guiding principles set out in the Welsh Government's strategy *Prosperity for All*[4] are prevention, partnership, and collaboration to secure better outcomes. The aim is to ensure common purpose in leadership and governance, with accountability to the National Assembly, to support effective and effecient delivery on the ground. Through the statutory Public Service Boards, there is joined up leadership empowered to focus on shared priorities and promote innovation at local level.

The intention, therefore, is clear – but there are significant barriers to achieving the new way of working envisaged in the Act.

Current devolution arrangements creating barriers

A prerequisite of any system of joined up working is to ensure that those implementing it have a "comprehensive set of powers". In determining what is devolved within a Welsh context, the starting point is the legislative competence of the National Assembly and the executive powers of the Welsh Ministers. These powers are not comprehensive but are incoherent and are often illogical. For example, whereas the ambulance and fire services can be provided for, the Assembly cannot legislate to require that the police, probation or other criminal justice agencies should participate in the local Public Service Boards established by the Well-being of Future Generations Act, despite the central role they play in communities, because they are reserved authorities. (As against that, both the Police and Crime Commissioners and the police forces are, by virtue of the Welsh Language (Wales) Measure 2011, made subject to Welsh language standards specifying their obligations in relation to the use of Welsh in provision of their services; North Wales Police have been particularly innovative and committed to providing services in Welsh). More generally, most of the public services which contribute to preventing people from entering the criminal justice system and potentially being sent to prison, or to their rehabilitation after leaving prison, are devolved, but the criminal justice agencies including prisons themselves are not.

The 'Peelian Principles', founded by Sir Robert Peel's Metropolitan Police Act 1829 that established modern British policing, state:

"To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them."

[3] Working Towards Justice Devolution to London: Memorandum of Understanding between the Ministry of Justice, Mayor of London's Office for Policing and Crime and London Councils.

[4] www.gov.wales/docs/strategies/170919-prosperity-for-all-en.pdf

However, while policing and justice policy approaches are currently set by UK Government, many of the social, economic and environmental causal factors that result in criminality are more directly influenced by Welsh Government policy approaches. Wales Audit Office's *Community Safety in Wales* Report (2016) talks of the growing divergence of both policy and practice between the UK and Welsh Governments, with community safety 'partners' effectively caught in the middle. The report states:

"Based on the findings of this audit, the Auditor General has concluded that complex responsibilities make it difficult for public bodies to co-ordinate a strategic approach to community safety, which weakens collective leadership and accountability and undermines the potential to help people stay safe."

The Welsh Government's community safety review,[5] conducted last year in response to the Auditor General's report, identifies a number of critical aspects of multi-agency partnership working in Wales that are seriously undermined by the current division of responsibilities, accountabilities and leadership, leading to poorer outcomes for Welsh citizens. These include:

- the inability of partnerships and individual partner agencies to base their activities and service planning on robust sharing, use and analysis of multi-agency data, research and evidence;
- barriers posed by competing prioritisation and shrinking public sector resources to support the 'mainstreaming' of integrated and collaborative service design and provision that focus on prevention and early intervention;
- failure to incentivise 'invest to save' approaches to public service delivery as a result of current budgeting structures and silos (e.g., investment in devolved youth justice approaches such as prevention and early intervention primarily yields savings for non-devolved criminal justice budgets, investment in non-devolved policing approaches to violence prevention and early intervention yields savings for devolved health services);
- reduced opportunities for more sustainable and coherent 'place-based' and 'person-centred' public service budgeting, planning and commissioning that make greater sense and provide better outcomes to citizens and service users.

The National Assembly can create all manner of offences and make wide ranging changes to the criminal law, while having no say over the criminal justice system. In so far as the administration of justice as a whole is concerned, a number of tribunals are devolved, but no courts. This presents difficulties in engaging with those responsible for sentencing approaches that are proving to be ineffective in reducing reoffending; or, indeed, are contributing to perverse consequences such as children of women given inappropriate custodial sentences having to be taken into care.

Considering the figure of public services at Annex 1, the majority of these services are devolved but some are not. By contrast in Scotland and Northern Ireland they are nearly all devolved, and even English "city deals" are granted powers designed to be fit for the purpose of joining up services for the citizen, as identified above.

Justice delivery in the Welsh context

The delivery of justice services in Wales is inextricably linked to devolved services, most notably health and social care, education, learning and skills, and housing. Reducing offending and re-offending, supporting victims and preventing crime depend on joint planning and delivery by the justice agencies, local authorities, health boards, housing associations, schools and further education colleges

[5] Working Together for Safer Communities: A Welsh Government review of community safety partnership working in wales (December 2017).

and third sector organisations. The inter-dependence of devolved and non-devolved organisations in the justice field is notable, for example in:

- the dependence of prison reform on devolved health, education, learning and skills and housing inputs, as well as the increasing pressures on social care from an ageing prison population;
- the major impact of the decisions of the courts on devolved services – particularly in family justice and the consequences of custodial sentences for offenders with parental/carer responsibilities;
- the examples of constructive engagement with the judiciary on social care issues for example through the Family Justice Network and the cross-party Advisory Committee; and
- the role of community safety partnership working in preventing and reducing criminality, and re-offending – particularly given the comparative scale of offenders at any given time being managed within the community rather than within prison or secure units (approximately 16,000 Welsh offenders under active management of which less than 5,000 are within a prison environment).

However, the devolution settlement is a barrier to effective reform both by the Welsh Government and by the UK Government acting in relation to Wales. Welsh initiatives can be frustrated by lack of power, budget control or by complexity and disruption created by reform and organisational change designed in Whitehall for England but which apply also to Wales. For example, recent changes in the England and Wales structures for youth justice and probation, were not fit for purpose in the Welsh context and represented missed or delayed opportunities to develop solutions that support integrated delivery in partnership with the Welsh Government and devolved bodies. In areas such as prisoner health and education, there is a lack of clarity of accountability that militates against good governance and improved outcomes. Similarly there are examples of justice related initiatives that have been implemented by the UK Government in England only, because of the inter-dependency with services that are devolved in Wales; one example is the special family drug and alcohol courts which are designed to improve outcomes for children and families by providing an alternative way of working with parents involved in care proceedings who are experiencing substance misuse.

Opportunities for innovation and reform

The Welsh Government is taking action through legislation and delivery programmes on a wide range of issues impacting the justice system. These are summarised at Annex 2, but the ongoing collaborative work with the Youth Justice Board and Her Majesty's Prison and Probation Service (HMPPS) to develop distinct justice delivery blueprints for youth justice and women offenders perhaps merit further consideration by the Commission.

The Welsh public services model creates opportunities for continuous improvement and reform to promote more integrated working. Examples include:

- Our transformation of youth justice in Wales using a model based on treating young people within the system as children first and offenders second – recognising their rights and entitlements throughout. Initiatives such as the 'bureau/ triage' approach to early intervention – funded by Welsh Government – has resulted in significant and sustained reductions in the number of First Time Entrants by diverting children away from criminality, while our ACEs informed Enhanced Case Management (ECM) approach to managing young people who repeatedly offend has demonstrated success in reducing reoffending rates among this cohort. These approaches will form the foundations of the new 'blueprints' development for both youth justice and women offenders.

- We have worked with HMPPS and other agencies to pilot a Women's Pathfinder Project in Wales to 'design and deliver a women-specific, integrated, multi-agency approach to working with women who come into contact with the criminal justice system' and the initial evaluation focused on the early intervention, prevention and diversion has been highly encouraging with an estimated 87% of those engaged having no further proven re-offending post intervention.
- Our ground-breaking Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act has been instrumental in enhancing the prevention, protection and support for people affected by these issues, encouraging greater regional collaboration, improved multi-agency service planning and commissioning, and the establishment of Multi Agency Safeguarding Hubs (MASHs) such as those in Cwm Taf and Cardiff to identify risks, issues and vulnerability at an earlier stage in order to prevent more serious harm. Our approach to VAWDASV has also prompted a Wales-wide review of the Home Office's Domestic Homicide Reviews (DHRs) which is designed to ensure better links with Welsh safeguarding arrangements, reduce duplication and costs and improve the effectiveness of services in preventing future tragedies.
- There is also a recognised link between access to justice and equality. Difficulties in accessing justice disproportionately affect groups with protected characteristics under the Equality Act. In that context the First Minister announced on 8 March 2018 (International Women's Day) a wide-ranging review of Welsh Government's gender and equality policy, to bring new impetus to our work in this area and "consider how we move gender to the forefront of all decision making". The review is working closely with Chwarae Teg, the leading Welsh women's charity, and other partners including the Wales Centre for Public Policy. The first phase of the review will be completed by July 2018.

More generally, there are opportunities for more creative responses to the causes of offending, and the impact of penalties on individuals' long term life chances. Through closer working between the judiciary, criminal justice agencies and devolved public services there are opportunities to create better alternatives to incarceration, that ensure justice while creating constructive pathways toward better outcomes for individuals, their children and wider communities.

Conclusion and the way ahead

This Written Evidence sets out in broad terms the Welsh Government's interaction with justice in the context of our constitutional settlement, and highlights what we believe are unresolved problems about justice and the jurisdiction in Wales. It demonstrates that we are currently active in supporting justice through innovative interventions across our portfolios. We believe that with broader powers we could do much more to support prevention and effective rehabilitation.

We will be keen to learn the Commission's views on these matters, and how we might build on current innovation and joint working to establish a more sustainable and effective delivery model for Wales.

The Welsh Government's overarching policy on the constitution was recently set out in the draft Government and Laws in Wales Bill, published in 2016. Specifically in relation to the matters to be addressed by the Commission our view is that:

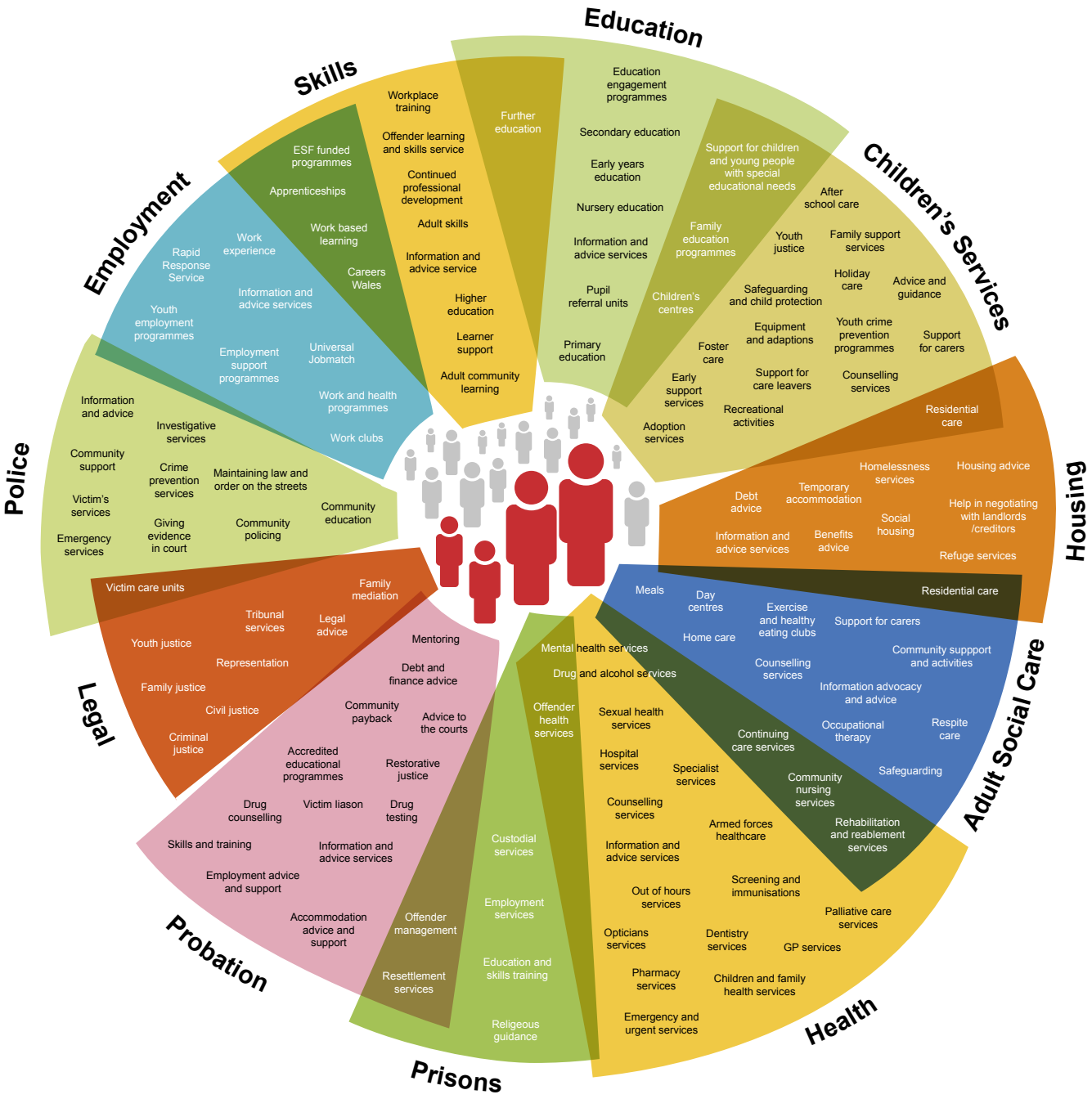
- the arrangements for the administration of justice in Wales are out-dated and out of step with the transformation of Welsh governance since 1999;
- reservations and restrictions relating to policing and justice have a major detrimental impact on other devolved services: this can at times be mitigated by good inter-governmental working, but this is not a sustainable long term solution and accountability is unclear;
- there are significant opportunities to achieve better outcomes in relation to policing and justice with a more distinct Welsh delivery model;
- the Welsh Government has an active programme of legislation and delivery designed to promote a safe and secure Wales, driven by a focus on preventative action to break the offending cycle and provide constructive alternatives for individuals – this is, however, hindered by the devolution settlement;
- access to justice is a major concern – the Welsh Government runs a number of programmes designed to provide preventative advice and support, but these cannot compensate for effective and affordable access to the courts;
- legal services provide vital support for the economy, and will remain a priority sector in their own right under Welsh Government's economic strategy – we believe that creating a Welsh legal jurisdiction and devolving the justice system will not be detrimental to the sector and should indeed provide new opportunities that will benefit the sector.

The former Secretary of State for Wales, Stephen Crabb MP, when launching what became the Wales Act 2017 argued that:

"...the story of Welsh devolution has long been one of fixes, fudges and political expediency. Of falling short, and thinking short-term. We need to end the process of constantly tinkering with the devolution settlement. Let's get devolution right. For the longer-term."

The Welsh Government agrees. But the Wales Act 2017 was another fudge. There is a void in Wales's constitutional arrangements that must be filled in order to get devolution right for the long term. A Welsh legal jurisdiction should be created and policing and justice related matters should be devolved. It is time to complete the devolution process, end the talk about the constitution, and create a stable and coherent system of government for Wales, one which allows efficient and effective delivery of services to people in Wales, who deserve nothing less.

Annex


Education
Education engagement programmes
Secondary education
Early years education
Nursery education
Information and advice services
Pupil referral units
Primary education
Further education
Skills
Workplace training
Offender learning and skills service
Continued professional development
Adult skills
Information and advice service
Higher education
Learner support
Adult community learning
Employment
ESF funded programmes
Apprenticeships
Work based learning
Careers Wales
Work experience
Rapid Response Service
Information and advice services
Youth employment programmes
Employment support programmes
Universal Jobmatch
Work and health programmes
Work clubs
Children's Services
Support for children and young people with special educational needs
Family education programmes
Children's centres
After school care
Youth justice
Family support services
Holiday care
Advice and guidance
Safeguarding and child protection
Equipment and adaptions
Youth crime prevention programmes
Support for carers
Foster care
Early support services
Support for care leavers
Counselling services
Recreational activities
Adoption services
Housing
Residential care
Homelessness services
Housing advice
Temporary accommodation
Debt advice
Help in negotiating with landlords /creditors
Social housing
Information and advice services
Benefits advice
Refuge services
Police
Information and advice
Investigative services
Community support
Crime prevention services
Maintaining law and order on the streets
Victim's services
Community education
Giving evidence in court
Community policing
Emergency services
Adult Social Care
Residential care
Meals
Day centres
Exercise and healthy eating clubs
Support for carers
Home care
Community suppport and activities
Counselling services
Information advocacy and advice
Occupational therapy
Respite care
Continuing care services
Safeguarding
Community nursing services
Rehabilitation and reablement services
Legal
Victim care units
Family mediation
Tribunal services
Legal advice
Youth justice
Mentoring
Representation
Debt and finance advice
Family justice
Civil justice
Community payback
Advice to the courts
Criminal justice
Probation
Accredited educational programmes
Restorative justice
Drug counselling
Victim liason
Drug testing
Skills and training
Information and advice services
Employment advice and support
Accommodation advice and support
Offender management
Resettlement services
Prisons
Custodial services
Employment services
Education and skills training
Religeous guidance
Health
Mental health services
Drug and alcohol services
Offender health services
Sexual health services
Hospital services
Specialist services
Counselling services
Armed forces healthcare
Information and advice services
Out of hours services
Screening and immunisations
Palliative care services
Opticians services
Dentistry services
GP services
Pharmacy services
Children and family health services
Emergency and urgent services

What the Welsh Government is currently doing to support better justice outcomes

Recognising that poverty has a major impact on individuals' life chances, the much wider programme of activity covered in *Prosperity for All* is relevant, but the examples we offer below are those areas which most directly relate to the justice system.

Violence against women

In April 2015, the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Bill received Royal Assent and became an Act. Working within the constraints of devolved competence, the legislation aims to improve prevention, protection and support for people affected by violence against women, domestic abuse and sexual violence.

The Act requires the Welsh Ministers to prepare and publish a strategy which contributes to the delivery of the Act's aims; in November 2016 we published our National Strategy on Violence against Women, Domestic Abuse and Sexual Violence 2016 – 2021. The strategy focuses on matters for which Welsh Government has responsibility, but it recognises the need to work collaboratively with other public sector partners (devolved and non-devolved) and with the UK Government, whose Ending Violence Against Women and Girls Strategy 2016-2020' sets out a number of actions which are applicable to Wales. This collaboration is all the more important with the UK Government publishing its consultation on a Domestic Abuse Bill on 8 March, which proposes to establish a Commissioner for Domestic Abuse with an England and Wales remit. It will be important to work through the relationship between the proposed Commissioner and Welsh Ministers' National Advisors on Violence Against Women, Gender Based Violence, Domestic Abuse and Sexual Violence.

Better outcomes for children and young people

The Welsh Government works closely with the Youth Justice Board Cymru (YJB Cymru) and jointly developed the Children and Young People First strategy in 2014 to improve services for young people from Wales in, or at risk of, becoming involved in the youth justice system. It is based on the principle that children and young people within the youth justice system should be treated as children first and offenders second. We work closely with YJB Cymru and youth justice services across Wales to monitor performance and offer improvement support where required.

In addition, we co-chair youth justice strategy and practice meetings with YJB Cymru – such as the Wales Youth Justice Advisory Panel and Strategic Implementation Board – in a partnership approach which seeks to mitigate the issues and challenges of implementing non-devolved youth justice policy within an increasingly devolved context. This includes supporting the YJB to develop and evaluate uniquely Welsh approaches to youth justice such as Enhanced Case Management, a trauma-informed model based on our growing understanding of Adverse Childhood Experiences (ACEs), particularly with regard to how such experiences can significantly increase a young person's likelihood of entering into the criminal justice system. We are also aware of the impact of the cyclical inter-generational nature of ACEs, in that where parents have experienced ACEs, their children are more likely to experience ACEs too. There are also clearly evidenced links between the youth justice and the Looked After Children (LAC) systems, with a higher proportion of LACs becoming young offenders. Reducing the incidence and impact of ACEs is a key priority for Welsh Government, and we seek to take an 'ACE-informed' approach across policy areas. However, our inability to control aspects of the criminal justice system can hamper this work, for example in relation to children in secure accommodation, and the impact of the incarceration of parents.

Prior to his appointment as the Chair of the Youth Justice Board for England and Wales, Charlie Taylor conducted a review of the youth justice system which was published in December 2016. The review made 36 recommendations for the UK and Welsh Governments, relevant inspectorates, local authorities and other bodies. However, many of the recommendations will require a different approach for Wales, not least due to the already effective joint working which exists between YJB Cymru and Welsh Government. Furthermore, legislation such as the Well-being of Future Generations (Wales) Act requires a different approach to ensure the delivery of a youth justice system that is fit for purpose and provides the required focus and support to young people in Wales.

The Welsh Government and UK Government have therefore agreed to develop a distinctive approach to youth justice in Wales. To achieve this, Welsh Government has commissioned YJB Cymru to carry out a review of youth justice service provision, building on the approach taken by the review conducted by Charlie Taylor. It is anticipated that work will commence at pace to review the entire youth justice approach in Wales, from prevention and early intervention mechanisms, community based restorative justice, the existing youth secure estate within Wales, and resettlement provision and services. For example, the current Young Offenders Institution located within an adult prison environment at HMP Parc is not deemed as an appropriate environment to address children's needs.

Support for Looked After Children and Care Leavers

The Welsh Government has established the Improving Outcomes for Children Ministerial Advisory Group which aims to reduce the number of children coming into care, improve outcomes for children who are in care and better support care leavers. This cross-government, cross-sector group is accountable to the Minister for Children and Social Care and has a wide-reaching work programme, including funding for the Reflect project which supports mothers who have already had children taken into the care system, to help reduce the risk of further children being taken into care in the future.

The Ministerial Advisory Group monitors delivery of the Welsh Government Action Plan developed in response to the *Laming Review*, which made a comprehensive set of recommendations to transform the life chances of children in care by protecting them from unnecessary involvement in the criminal justice system. The Ministerial Advisory Group has also integrated the issues raised in the *Laming Review* into their work programme.

In addition funding has been provided to introduce an 'active offer' of advocacy to children and 'young people who become looked after, including young people within the secure estate.

The Gwent Missing Children Hub brings together police officers, social workers, health workers and education representatives to respond to children who go missing from home or care. They work together in a coordinated way to share information and assess the risks to which these young people may be vulnerable.

Family Justice

In Wales the Welsh Family Justice Network brings together the key players within the family justice system providing a local community of understanding and common purpose to improve services and outcomes for children and families in Wales. The children and families who interface with the family justice system are often amongst the most vulnerable in our society. However, whilst family justice is not devolved, the services supporting these children and families are devolved e.g. Cafcass Cymru and local authorities. Family justice policy makers, therefore, need to prioritise engagement with Welsh Government and Welsh-

based operational stakeholders when considering policy reforms or changes to ensure there is an appreciation of the increasingly divergent Welsh context, but also to ensure any proposed changes are appropriate and likely to work in Wales.

Adult offending

Although criminal justice itself (including the actions of the courts, the sentencing arrangements for offenders, the management of those offenders in custody and their rehabilitation in the community) is non-devolved, most of the services that are required to manage offenders, ex-offenders and promote rehabilitation are devolved. Prisons are the responsibility of the Ministry of Justice, but the provision in public prisons of health services and education are the responsibility of Welsh Ministers. Moreover, many of the services that support offenders in the community – housing, health, education and skills and social care, are devolved. The importance of these services in reducing offending and re-offending, and the need for alignment and integration with criminal justice services is of course widely recognised. However, significant policy decisions are often made by UK Government without meaningful engagement with Welsh Government, with the result that the solutions they identify are based on the English public sector landscape, and may not be appropriate or workable in the Welsh context. Equally, as identified earlier, the current UK Government policy approach is focused on trying to manage more offenders outside of the prison estate, which has financial and other resource implications for Welsh Government and requires the full engagement and co-operation of devolved public services.

The UK Government has highlighted the need for increased mental health support for those people in the adult criminal justice system, the need for increased access to substance misuse support and the need for more appropriate accommodation on release from prison. These reflect identified priorities within the Welsh Government's *Prosperity for All* strategy and would predominantly fall to devolved services to provide.

HMPPS is currently wrestling with a number of significant challenges with the adult criminal justice system in Wales as it stands, including:

- the poor provision within some of the public prisons in Wales;
- a lack of access to appropriate diversion interventions that would prevent people going into custody;
- an increasing number of women being sent to prison for summary offences, often on short sentences with multiplier impacts on their families and children;
- the increasing risk of reoffending due to a lack of appropriate support for people on their transition from custody to community provision.

Welsh Government has worked with HMPPS in Wales to produce a 'Framework to support positive change for those at risk offending in Wales', which seeks to address the identified challenges around reducing re-offending based on the different circumstances that exist in Wales. The framework identifies six key areas for action:

- reducing the number of women in the criminal justice system;
- challenging domestic abuse perpetrators; holding them to account for their actions;
- improving provision for ex-armed services personnel engaged with the criminal justice system;
- providing support for young adults/care leavers;
- supporting offenders' families following sentencing; and
- prioritising the needs of Black, Asian and Minority Ethnic groups.

Female offenders

There are no female prisons in Wales and therefore any Welsh women who are given a custodial sentence are required to serve their sentence in English prisons, far away from their families. This places a greater level of complexity for the woman, her family and the support services and rehabilitation arrangements required. In developing a distinct justice delivery 'blueprint' for women offenders we will look to the lessons learned from the transformation in our approach to youth justice in Wales and focus on establishing a 'whole system' and trauma-informed approach that provides community-based prevention, diversion and early intervention, alongside the provision of secure accommodation within community-based women's centres with appropriate services for those who have more significant criminogenic needs.

Many women are given summary sentences for offences that in many cases would not result in imprisonment for men. Aside from the most serious of crimes, women tend to receive short term sentences which can have the greatest impact on the women and their families, not least as typically, women are the primary carers for their children. Short term sentences can have long term impacts, in many cases leading to the woman losing their tenancy and may result in their children being taken into residential care, hence requiring support from devolved services and risking exposure to further ACEs for the children of offenders.

The Welsh Government has worked with HMPPS and other agencies to pilot a Women's Pathfinder Project in Wales to 'design and deliver a women-specific, integrated, multi-agency approach to working with women who come into contact with the criminal justice system'.

The MoJ is currently considering a separate Female Offending Strategy as part of UK Government justice reform and, given that many of the key services which will be required to underpin a successful strategy are devolved, it is clear a different approach will be required in Wales, hence the imperative to establish a distinct blueprint for justice delivery in this area.

Links with the Welsh police forces and Police & Crime Commissioners

Although overall responsibility for policing policy and funding sits with the Home Office, the introduction of directly elected Police & Crime Commissioners (PCCs) in 2012 has created a hybrid devolved/ non-devolved policy approach whereby PCCs are able to operate more flexibly within the overarching framework set by UK Government. The four current PCCs have unanimously stated their support for devolution of policing and the Welsh forces have invested in a joint Deputy Chief Constable position to, in part, shape an agreed vision for a fully devolved approach. This has enabled the Welsh Government to establish a closer and more effective relationship with the police and PCCs, who see themselves as very much operating in a 'devolved' way and – although still accountable within the broad framework set by the Home Office – forces are increasingly looking to Welsh Government for strategic direction. This is not surprising given than more than three quarters of demand for police services is related to vulnerability, rather than crime, with direct links to devolved services.

The Welsh Government holds regular meetings with the four PCCs and Chief Constables, including the all-Wales Deputy, to ensure that the implementation of policing policy in Wales accords as closely as possible with cross-cutting areas of devolved responsibility. In addition, Welsh Government currently provides the four Welsh forces with £16m towards the cost of providing additional Community Support Officers to support neighbourhood policing.

This harmonious approach is, however, comparatively fragile as it remains subject to the vagaries of politics and the potential for the 4 Welsh PCCs due to be

elected in 2020 adopting a very different stance that could once again create stark policy differences with the Welsh Government.

The Police Scotland and Police Service of Northern Ireland (PSNI) models clearly demonstrate the 'interoperability' of devolved forces working in close co-operation with non-devolved agencies on issues such as serious & organised crime and terrorism – retaining enough in common to undertake joint operations and cross-border collaboration while remaining distinct policing services that better reflect the needs of their communities.

Education, learning and skills

HMPPS is responsible for the commissioning of learning and skills provision and library services for offenders in all Welsh prisons. Since 2009, functions under section 47 of the Prison Act 1952 in relation to education, training and libraries were transferred (as far as exercisable in relation to Wales) to Welsh Ministers.

These powers relate to education and learning and have to be exercised within the context of the regime for prisoners and offenders in the community, set down by the MOJ, and operational delivery through HMPPS. The powers provide the Welsh Government with an opportunity to improve further the quality and relevance of offender learning in the context of Welsh Government priorities. The Welsh Government delivers and funds the learning and skills provision in the adult prisons in Wales through a joint Memorandum of Understanding with HMPPS. The Welsh Government has an agreement with HMPPS for the delivery of education and learning in Welsh public prisons.

HMPPS is currently undertaking a review of learning in Welsh prisons which will consider the impact of the current system and make recommendations to enhance the outcomes for prisoners on release. They have procured external consultants to undertake the review which they will oversee. They will be consulting with key stakeholders as part of the review and will publish their findings later in 2018.

Through joint working with Welsh Government there are opportunities to strengthen rehabilitation by addressing specific barriers to employment, through aligning education, learning and skill development programmes and providing a continuum of support for prisoners on release. Current interventions include working with the Community Rehabilitation Companies and other key stakeholders during a prisoner's resettlement phase to provide a seamless transition on release.

Further interventions aim to provide a more modern, employment focused approach to skills training in prisons. This will include better integration with the broadest range of agencies that support prisoners pre and post release, working more closely with employers, and facilitating better use of Labour Market Intelligence to better focus interventions on real jobs.

Prison healthcare

The overall responsibility for the development of prison healthcare in the public sector prisons in Wales rests with the Welsh Government. Accountability for the planning of health services for prisoners is held by NHS Wales, but this responsibility can only be exercised in partnership with HMPPS. The principal aim of the partnership between the Welsh Government and HMPPS is to provide access to the same quality and range of health care services as the general public receives from the NHS in Wales. At a local level, Prison Health Partnership Boards, jointly chaired by LHBs and the Governors of the prisons, have responsibility for the governance of prison health services.

Welsh Government and Local Health Boards are working collaboratively with HMPPS to develop a set of shared priorities for prison health in Wales.

The priorities will reflect that improving health and wellbeing in prisons is a shared responsibility.

Housing

The Renting Homes (Wales) Act 2016, based closely on Law Commission recommendations, will make it simpler and easier to rent a home, replacing various and complex pieces of existing legislation with one clear legal framework. This builds on the Housing (Wales) Act 2014, which among other things introduced mandatory registration and licensing for private landlords and strengthened the prevention of homelessness.

In addition, under the 2014 Act, prisoners no longer have automatic priority need status. Instead, the Welsh Government has developed a number of distinct approaches to support those most at risk of homelessness. This includes the **National Pathway for Homelessness Services for Children, Young People and Adults in the Secure Estate**. This is a multi-strand framework for joint working to help prevent prisoners becoming homeless on release.

In October 2017, the UK Government announced it would be consulting on establishing a specialist housing court. The Welsh Government, in principle, supports such a development. In view of the fact the Residential Property Tribunal for Wales is already devolved, this should be seen as an opportunity to review more widely the devolution settlement in this area. The Commission's views on the scope to broaden and strengthen the role of the Welsh Tribunals in respect of housing, and more widely, in administrative justice in Wales, would be welcome.

Jeremy Miles AC/AM
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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: CG/00048/18

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12 June 2018

Dear Mick,

Implementation of Law Commission proposals

Thank you for your letter of 25 May seeking an update on the identification of a Wales only project for inclusion in the Law Commission's thirteenth programme.

A project to review the law governing our devolved Welsh Tribunals, and make recommendations for reform, has been agreed by the First Minister and the Commissioners.

As you will know, existing rules and procedures for the various devolved Welsh tribunals are complicated and inconsistent, having developed piecemeal from a wide range of different legislation. Most of this legislation was developed before tribunals were considered together as a judicial function.

In general terms, it is anticipated that a Tribunals (Wales) Bill could create standardisation of the tribunal's process in Wales through a unified tribunal system similar to that which exists for England and Wales under the Tribunals Courts and Enforcement Act 2007.

Whilst the Wales Act 2017 has already created the role of President of Welsh Tribunals (PWT), which provides some consistency within the Welsh tribunals, each tribunal is still governed by the legislation which established it and which in many cases is very dated. The PWT is hampered in his leadership role by this difficult legislative base, in which his role does not feature.

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As an overview, benefits of a unified tribunals system could include:

- President of Welsh Tribunals – oversight role for all tribunals
- One process for appointments and dismissals
- One process for appointments of Presidents/Deputies
- Power to make and standardise rules
- One process for appeals
- A clear process for handling complaints
- Creation of a system which supports judicial independence

You will be well aware of the practical difficulties the complicated statute causes for the proper and effective operation of the devolved Welsh Tribunals and I hope you will welcome the project, which offers potentially significant advantages in support of the Welsh Government's commitment to the accessibility of the law in this area.

Yours sincerely,

Jeremy Miles AM
Y Cwnsler Cyffredinol
Counsel General

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Agenda Item 7

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