

SL(5)411 – The Education (Student Support) (Postgraduate Master’s Degrees) (Wales) Regulations 2019

Background and Purpose

These Regulations provide for the making of loans to students who are ordinarily resident in Wales for postgraduate master’s degree courses which begin on or after 1 August 2019.

To qualify for support under these Regulations a student must be an “eligible student”. To be an eligible student, a person must satisfy the eligibility provisions in Chapter 2 of Part 4 and fall within one of the categories set out in Schedule 2. An eligible student must also satisfy the specific requirements applicable to each type of financial support. A person is not an eligible student if, amongst other things, that person has already obtained a qualification equivalent to or higher than a master’s degree.

Support is only available under these Regulations in respect of “designated” courses within the meaning of regulations 5 and 8. Support is provided to eligible students undertaking a designated course wherever they study in the United Kingdom.

The Regulations also set out provisions for, amongst other things:

- detailed support calculations
- transfers between designated courses
- time limits for applications
- information gathering
- payments, overpayment and recovery
- eligible prisoners
- amendments to the Education (Postgraduate Master’s Degree Loans) (Wales) Regulations 2017

Procedure

Negative.

Technical Scrutiny

Two points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. Standing Order 21.2(i): that there appears to be doubt as to whether it is intra vires.



Exemption 3 in regulation 10(1), and regulation 13(1), confers a discretion on the Welsh Ministers that is not otherwise subject to specific criteria or limitations (nor is it expanded upon in the EM). As such, this appears to confer a discretion that amounts to sub-delegation of a kind that requires express enabling powers.

It is noted the enabling power¹ permits regulations to make provision “for determining” eligibility that, in effect, allows the Welsh Ministers to sub-delegate a discretionary function to themselves. However, the presumption against sub-delegation is a strong one for rule of law reasons, and does not appear to have been rebutted clearly in this case merely by a reference to provision “for determining” eligibility. Whilst it is accepted that an exhaustive list of objective criteria cannot easily be set out in the enabling legislation (although it could be amended by regulations from time to time), the Committee considers there to be a respectable argument, justifying reporting on this point, that the enabling power should refer to objective criteria rather than simply providing an open discretion.

It is noted that the Welsh Ministers are subject to general public law restrictions, or indeed that guidance could be issued with a view to narrowing the discretion, but this does not address the underlying question of whether the enabling power is sufficiently wide to confer the discretion in the first place.

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

In the definition of ‘public body’ in paragraph 20 of Sch. 3, reference is made to ‘national, regional or local’. This is ambiguous and unclear. For example, the provision does not make it clear whether “national” is meant to refer to Welsh, UK, or wider public bodies.

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 10(1), Exception 11 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 first academic year of the designated course.

The Committee raises the following human rights and equality concerns in respect of this age limit.

¹ Teaching and Higher Education Act 1998, section 22(2)(a)



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.²

Section 13(1) of the Equality Act 2010 (Equality Act) prohibits direct age discrimination, unless it can be justified under section 13(2).

The Committee notes that the margin of appreciation increases with the level of education, and that a master's degree is at a high level on the education scale. The Committee also notes that the measure is intended to deliver social policy aims as set out in the Explanatory Memorandum, which is consistent with the instructive case law relating to the application of Article 6(1) of Directive 2000/78/EC.

The Committee believes that the issues raised by Regulation 10(1), Exception 11 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 or the Equality Act. The Supreme Court has set out a fourfold test³:

- 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

² 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)).

³ R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57



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) An amount of funding via the Higher Education Funding Council for Wales (HEFCW) will be disseminated to higher education institutions in Wales to provide a non-repayable bursary to eligible students, aged 60 and over, studying postgraduate Master's courses in Wales which begin in the 2019/20 academic year. According to the Explanatory memorandum, thereafter it is the aim of Government to provide access the grant elements of Welsh Government support for students aged 60 and over.
- e) 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. However, due to increasing retirement ages, the Government makes a commitment to keep under review all age limits that are placed on full-time and part-time undergraduate as well as postgraduate Master's student support.

We welcome the justification set out in the Explanatory Memorandum. The policy aims pursued by the Government appear legitimate and the measures taken by the Regulations to achieve them are rationally connected to such aims. The Committee notes the options analysis set out in the Explanatory Memorandum which provides evidence that due consideration has been given to imposing a fairly balanced and minimally intrusive regime. As such, it appears the Government has given proper and careful consideration to the justification of setting an upper age limit of 60 in these Regulations.

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, but at statement by Welsh Government on 2 July 2018 confirmed that "...that EU students will continue to be entitled to student support in the 19/20 academic year."

Government Response

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

Legal Advisers

Constitutional and Legislative Affairs Committee

8 May 2019

