

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

## Background and Purpose

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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

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Negative.

## Technical Scrutiny

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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 power<sup>1</sup> 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

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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.

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<sup>1</sup> 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.<sup>2</sup>

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 test<sup>3</sup>:

- 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

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<sup>2</sup> 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)).

<sup>3</sup> 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

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

Regulation 10(1) provides that a person (P) is not an eligible student if any of the listed exceptions applies. Exception 3 in regulation 10(1) states "the Welsh Ministers think that P's conduct is such that P is not fit to receive support".

Regulation 13(1) states that "the Welsh Ministers may terminate an eligible student's period of eligibility if they are satisfied that the student's conduct is such that the student is no longer fit to receive support".

The Welsh Government notes that the Committee states in their report that the enabling power "permits regulations to make provision "for determining" eligibility that, in effect, allows the Welsh Ministers to sub-delegate a discretionary function to themselves" and the Welsh Government agrees with that view. The Committee's report then goes on to say that "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". This appears to be at odds with the previous sentence in the Committee's report and the Welsh Government is unsure why the presumption against sub-delegation must be rebutted when the Committee accepts section 22 of THEA permits sub-delegation of functions in relation to determining eligibility.

The Welsh Government is also unsure of what is meant by "enabling power should refer to objective criteria rather than simply providing an open discretion". This appears to be a comment on the primary legislation.

It is the view of the Welsh Government that the powers in section 22 of THEA are sufficient to allow the Welsh Ministers to make the provision contained in regulations 10(1) and 13(1).

Section 22(1) of the Teaching and Higher Education Act 1998 (THEA) states that:

"Regulations shall make provision authorising or requiring the Secretary of State to make grants or loans, for any prescribed purposes, to eligible students in connection with their undertaking –

(a) higher education courses, or

(b) further education courses,

which are designated for the purposes of this section by or under the regulations."

This function of the Secretary of State has been transferred to the Welsh Ministers via section 44 of the Higher Education Act 2004 and paragraph 30 of Schedule 11 to the Government of Wales Act 2006.



Sub-section (1) provides a broad power to make regulations in connection with the provision of grants and loans for higher education students. Sub-section (2) then sets out more specific provision that may be contained in such regulations.

Section 22(2)(i), for example, states that regulations may make provision “requiring prescribed amounts payable to eligible students under loans under this section to be paid directly to institutions”. Use of the term “prescribed” should be noted. Section 43(1) of THEA includes a definition of the term as meaning “prescribed by regulations”. The loan amounts to be paid directly to institutions must therefore be set out on the face of the regulations.

By contrast, section 22(2)(a) of THEA (functions which are held by the Welsh Ministers on a concurrent basis with the Secretary of State) provides that regulations may make provision “for determining whether a person is an eligible student in relation to any grant or loan available under this section”. In this case the requirement is not that regulations “prescribe” whether a person is an eligible student and so the power contained in section 22(2)(a) is broader than that in section 22(2)(i).

The Education (Student Support) (Postgraduate Master’s Degrees) (Wales) Regulations 2019 set out a number of criteria a person must meet in order to be an “eligible student”. As part of these criteria, a person’s conduct may be considered and the Welsh Ministers are afforded discretion in regulations 10(1) and 13(1) to refuse or cancel a person’s status as an “eligible student” if their conduct is of such a nature as to make them unfit to receive student support. These provisions collectively “determine” whether a person is an eligible student.

It is the Welsh Government’s view that where Parliament intended provision to be made exclusively on the face of the regulations, the word “prescribed” was used in the enabling power, as it is at several points in section 22(2). Section 22(2)(a) does not use this term and so is clearly intended to be a broader power that would allow the regulations to make provision for “determining” whether a person is an eligible student that includes the discretionary power of the Welsh Ministers set out in regulations 10(1) and 13(1).

There are other parts of section 22(2) that explicitly provide for a matter to be determined by the Welsh Ministers “under the regulations”. For example, section 22(2)(e) states that regulations may make provision “for any grant under this section to be made available on such terms and conditions as may be prescribed by, or determined by the [Welsh Ministers] under, the regulations”. The explicit power to sub-delegate is needed here as the alternative is for the terms and conditions to be “prescribed” by the regulations. The same need doesn’t arise for section 22(2)(a). The eligibility criteria do not have to be prescribed by the regulations and so the power for the regulations also to allow eligibility to be determined by the Welsh Ministers does not need to be carved out; it already exists.

Section 22(2)(c) states that regulations may make provision “where the amount of any such grant or loan may vary to any extent according to a person’s circumstances, for determining, or



enabling the determination of, the amount required or authorised to be paid to him". It could be argued that "enabling the determination" implies a discretion not present in "for determining" itself. However, in the context the better interpretation is that "enabling" means the gathering of information to support the determination. For example, the power to request information about a student's household income to determine the level of means tested grant for which they qualify.

As stated above, if the intention was to require all provision about a whether a person is an eligible student to be set out in the regulations then section 22(2)(a) would use the defined term "prescribed". It does not do so and therefore must be read as allowing the regulations to include provision that confers discretion over an aspect of eligibility to the Welsh Ministers, as is done in regulations 10(1) and 13(1).

As the Committee notes, the Welsh Ministers are bound by principles and requirements of public law when exercising any function. Therefore, while the discretion in regulations 10(1) and 13(1) is not explicitly subject to criteria or limitations, it is bound by stringent limitations that will require the Welsh Ministers to, amongst other things, take into account all relevant factors, ignore all irrelevant factors and act reasonably whenever exercising this function.

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

The term "public body" is defined in paragraph 20 of Schedule 3 to the Regulations as "a state authority or agency whether national, regional or local". The term is only used in paragraph 4 of Schedule 3, which sets out the circumstances in which an eligible student is an "independent eligible student". This categorisation is relevant for determining whose income is taken into account when calculating the means tested student support for which the student qualifies. If a student is an independent eligible student then it will be the student's and/or the student's partner's income that will be taken into account rather than the income of the student's parents.

Paragraph 4(1) of Schedule 3 provides that an eligible student is an independent eligible student "if one of the following cases applies". Case 9 is "the student has been supported by the student's earnings for any period of three years (or periods which together aggregate at least three years) ending before the first day of the first academic year of the designated course".

Paragraph 4(2) states that "for the purposes of Case 9, an eligible student is treated as being supported by the student's earnings if during the period or periods referred to in Case 9 one of the following grounds applies". Grounds 1 to 3 are set out below.

### *Ground 1*

*The eligible student was participating in arrangements for training unemployed persons under a scheme operated, sponsored or funded by a public body.*



## Ground 2

*The eligible student received a benefit payable by a public body in respect of a person who is available for employment but is unemployed.*

## Ground 3

*The eligible student was available for employment and had complied with any registration requirement of a public body as a condition of entitlement for participation in arrangements for training or the receipt of benefits.*

The term “public body” is therefore relevant only in determining whether a person has been in receipt of state benefits linked to unemployment and so should be considered “independent” for the purposes of the regulations. The term has a specific and limited application in the legislation. The context of establishing that a student is “independent” (from her or his parent) means it is important for all relevant circumstances to be captured. The definition of “public body” has therefore deliberately been drafted to be wide enough to capture any case where a student may be considered to be receiving benefits or participating in training funded by a national state agency or authority. “National” in this context may mean Wales, the UK or another nation. Even if the provider of the benefit could be argued to fall under more than one category (national, regional or local), the benefit will be captured. The alternative to the definition as drafted would be to include in the regulations an exhaustive list of all relevant agencies and authorities. Given the wide scope of provision, there would be a significant risk that any list would result in gaps when agencies or authorities were created, dissolved or changed name

## Committee Consideration

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