

# Supplementary Report: SL(5)090 – The Education (Postgraduate Master’s Degree Loans) (Wales) Regulations 2017

## 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 2017.

To qualify for a loan a student must be an “eligible student”. Broadly, a person is an eligible student if that person falls within one of the categories listed in Part 2 of Schedule 1 and also satisfies the eligibility provisions in Part 2 of the Regulations.

These Regulations apply to students ordinarily resident in Wales wherever they study on a designated course in the United Kingdom.

## 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. Human rights and equality

Regulation 3(3)(a) says that a person is not an eligible student if the person has 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.<sup>1</sup>

The Committee believes that the issues raised by regulation 3(3)(a) relate to the right to education. Therefore, by setting an upper age limit of 60, the Committee asks whether regulation 3(3)(a) discriminates against people over 60 in relation to their enjoyment of the right to education? Put another way, once the Welsh Ministers have decided to offer postgraduate master's degree loans, can they deny that benefit to a distinct group of people, i.e. the over 60s?

The answer to those questions will depend on whether the bright line rule in regulation 3(3)(a) can be **justified**. If it can be justified, there is no discrimination and no breach of the ECHR.

The Committee notes that the margin of appreciation increases with the level of education, and that a master's degree is at a very high level on the education scale.

### The Explanatory Memorandum

The Explanatory Memorandum to the Regulations states:

The Regulations restrict support to those under 60 years of age (regulation 3(3)(a)). 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. Officials have considered options and have concluded that restricting support to those aged under 60 years is the appropriate policy, and can be objectively justified, for two reasons. First, those aged 60 years and over will not, on average, repay the loan. Analysis by the Welsh Government shows that a person aged 60 years at repayment can be expected to repay 87% of the loan, falling to just 50% for a person aged 65 years. Second, while those aged 60 years and over increasingly remain in work, thereby making an economic contribution, it is nevertheless true that employment falls off sharply after aged 60, from 78% of those aged 50–59, to 50% for those aged 60–64, to 10% for those aged over 65. This relatively modest economic contribution together with the fact that, on average, loans will not be repaid leads the Welsh Government to conclude that an age restriction is legitimate and proportionate in this case.

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<sup>1</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).



The Committee would welcome further information from the Welsh Government around the statement in the Explanatory Memorandum that a person aged 60 years at repayment can be expected to repay **87%** of the loan. At first glance, 87% seems to be a relatively high repayment rate, and appears to conflict with the statement in the Explanatory Memorandum that those “aged 60 years and over will not, on average, repay the loan”. Meanwhile, the Equality Impact Assessment to these Regulations states that “people over 60 are unlikely to repay the loan”.

The Committee also notes that the Equality Impact Assessment for these Regulation states “legal advice is that there are arguments to justify the policy”.

Without further information about the repayment rate of those who are aged 30, 40, 50, 55 etc. at repayment, the Committee finds it difficult to come to a conclusion as to whether the bright line rule in regulation 3(3)(a) can be justified.

The Committee asks the Welsh Government to provide further information around the justification of regulation 3(3)(a).

### **Justification and the *Tigere* case**

The Committee notes that the UK Supreme Court judgment in *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills*<sup>2</sup> is highly relevant to the human rights issues raised by regulation 3(3)(a).

In asking the Welsh Government to provide further information around justification, the Committee expects the Welsh Government to explain how it approached justification in accordance with the fourfold test set out by Lady Hale, and how it answered each of the four questions set out in that test.

### **Equality Act 2010**

The Committee also raises the above issues in relation to age discrimination under the Equality Act 2010. The Committee would welcome a similar explanation of how the protected characteristic of age was considered in relation to regulation 3(3)(a).

The Committee accepts there is considerable overlap between this request for explanation and the request in relation to human rights.

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<sup>2</sup> [2015] UKSC 57



## **Report under Standing Order 21.2(i)**

The Committee therefore reports the Regulations under Standing Order 21.2(i): that there appears to be doubt as to whether the Regulations are intra vires, on the basis that it is unclear whether there is a breach of the ECHR.

### **2. Maximum amount of loan for eligible prisoners**

Regulation 12(2) says that where an eligible prisoner applies for a postgraduate master's degree loan, the amount of the loan must not exceed the lesser of: (a) the fees payable in respect of the course, and (b) £10,280. This means that, if the fees payable in respect of such a course are £11,000, the maximum amount of loan the eligible prisoner can apply for is £10,280.

However, the Explanatory Memorandum and the Explanatory Note say that in the case of an eligible prisoner, the maximum loan amount is the value of the fees of the designated course. This means that, if the fees payable in respect of such a course are £11,000, the maximum amount of loan the eligible prisoner can apply for is £11,000.

Therefore, there is a significant inconsistency between what the Regulations say and what the Explanatory Memorandum and Explanatory Note say. The Committee asks the Welsh Government to provide an explanation for this inconsistency.

## **Report under Standing Order 21.2(v)**

The Committee therefore reports the Regulations under Standing Order 21.2(v): that for any particular reason the form or meaning of the Regulations (when read with the Explanatory Memorandum and Explanatory Note) needs further explanation.

## **Merits Scrutiny**

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

### **1. Human rights and equality**

The Committee refers to the same human rights and equality issues outlined under its report under Standing Order 21.2(i).



## Report under Standing Order 21.3(ii)

The Committee therefore reports the Regulations under Standing Order 21.3(ii): that the Regulations are of political or legal importance or give rise to issues of public policy likely to be of interest to the Assembly.

### 2. Maximum amount of loan for eligible prisoners

The Committee refers to the same issues around maximum loans for eligible prisoners outlined under its report under Standing Order 21.2(v).

## Report under Standing Order 21.3(ii)

The Committee therefore reports the Regulations under Standing Order 21.3(ii): that the Regulations are of political or legal importance or give rise to issues of public policy likely to be of interest to the Assembly.

## Government Response

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### 1. Human rights and equality

The Committee has asked for further information on the repayment rate of those aged 30, 40, 50, 55 etc. The table below provides the data, and is consistent with that used to inform the Explanatory Memorandum.

|                          |           |           |           |           |           |
|--------------------------|-----------|-----------|-----------|-----------|-----------|
| Age entering repayment   | <b>30</b> | <b>40</b> | <b>50</b> | <b>55</b> |           |
| Average income           | £40,390   | £48,640   | £46,909   | £45,657   |           |
| Average annual repayment | £1,163    | £1,658    | £1,555    | £1,479    |           |
| Total repayment          | £10,000   | £10,000   | £10,000   | £10,000   |           |
| Repayment rate           | 100%      | 100%      | 100%      | 100%      |           |
| Age entering repayment   | <b>60</b> | <b>65</b> | <b>70</b> | <b>75</b> | <b>79</b> |
| Average income           | £33,231   | £29,588   | £27,164   | £23,574   | £20,241   |
| Average annual repayment | £734      | £515      | £370      | £154      | £0        |
| Total repayment          | £8,713    | £5,043    | £2,467    | £618      | £0        |
| Repayment rate           | 87%       | 50%       | 25%       | 6%        | 0%        |



Source for income data: Effects of taxes and benefits on household income 2014–15, Office for National Statistics. Income includes all sources of income including wages and salaries, imputed income from benefits in kind, self–employment income, private pensions, annuities, investment income and other income.

Probable repayment of the loan is modelled by considering the average income of each age group, which includes the state pension where appropriate. Repayment of a £10,000 loan is assumed to be made by those with an income of over £21,000, and repaid at a rate of 6% of any income in excess of £21,000.

The Committee has noted that the Explanatory Memorandum states that those ‘aged 60 years and over will not, on average, repay the loan’ while the Equality Impact Assessment states that ‘people over 60 are unlikely to repay the loan’. The statistic data above is the basis for both statements, which are intended to be equivalent. In *R (on the application of Carson) v Secretary of State for Work and Pensions*; *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] 4 All ER 545 Lord Hoffman said:

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“a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line”.

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It is the view of the Welsh Government that, weighing all the relevant factors, an age 60 cut–off point achieves a fair and proportionate balance between the public interest and other interests involved and is, therefore, justified.

With regard to the four–fold test, it is the view that the bright line drawn does have a legitimate aim and is rationally connected to that aim: postgraduate loans are provided in the context of finite resources with the aim of promoting education which will improve the supply of highly skilled workers to meet employer demand and contribute to a competitive economy. In the context of finite resources, the Government’s aim was to set up a sustainable funding system representing a good return on investment i.e. loans. For that aim to be achieved, the efficient and effective collection of repayments is crucial. The statistical data in respect of repayments rates



for different age groups is objective evidence of a rational connection of the age 60 cut-off to those aims. The possibility of less intrusive measures to achieve the Government's aim was considered in weighing up the proportionality of the measure. It was considered that another system which required individual investigation and assessment created a heavy administrative burden which consumed scarce resources and introduced scope for inconsistent decision-making and such a system would be less appropriate than a bright line rule. To summarise, in light of all the relevant case law and on the basis of objective evidence, it is considered that a bright line rule is justifiable.

It is the view of the Welsh Government that the same considerations of objective justification will be applicable to justifying direct or indirect discrimination on the grounds of age under the Equality Act 2010 (section 13(2)).

## **2. Maximum amount of loan for eligible prisoners**

The Explanatory Memorandum and Explanatory Notes are drawn on the basis that regulation 12 will be referred to. As such, it will be evident that in the case of eligible prisoners that the maximum loan amount is £10,280; the policy basis being that the eligible prisoner will only utilise the loan to meet the course fees, as opposed to any notional maintenance element to the loan.

That said the Explanatory Memorandum and Explanatory Notes could have expressly repeated this caveat.

## **Committee Consideration**

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The Committee considered the regulations at its meeting on 15 May 2017, and reported to the Assembly on 18 May 2017.

The Committee considered the Government response at its meeting on 22 May 2017 and agreed to issue a supplementary report.

The Committee was content with the response in relation to the technical reporting point 1 above relating to human rights and the age limit.



On the technical reporting point 2 above, in relation to eligible prisoners, the Committee agreed that the Regulations, the Explanatory Note and the Explanatory Memorandum should state the same information in order to provide clarity on the law. The Committee agreed to write to the Cabinet Secretary to express concerns with the lack of clarity.

