

WELSH GOVERNMENT RESPONSE TO MERIT POINTS:

Diamond Review - CLAC legal advisors are correct to note that the policy underpinning the Regulations has been developed as a direct response to the 'Independent review of higher education funding and student finance arrangements' chaired by Professor Sir Ian Diamond.

Implications arising from exiting the European Union - The Welsh Government recognised the potential implications of Brexit for higher education in its White Paper 'Securing Wales' Future" in January 2017. As the implications arising from exiting the European Union become clearer the Welsh Government will ensure that it takes into account its impact on its student support policies and the development of Regulations.

WELSH GOVERNMENT RESPONSE TO TECHNICAL POINTS:

CLAC question: There is no definition provided for 'an NHS foundation trust' in Regulation 44 (4) (c). This is at odds with other bodies who are defined in Regulation 44 (4). A definition would put beyond doubt what is meant by the term. Definitions of the term are used in the Social Services and Well-being (Wales) Act (2014) and the Additional Learning Needs and Education Tribunal (Wales) Act 2018. [Standing Order 21.2 (vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements]

Welsh Government response:

It is our view that the drafting is not defective and it does not fail to fulfil statutory requirements. The regulations operate correctly and lawfully without defining "NHS foundation trust". The definition is not central to the operation of the regulations. There a number of examples on the statute book of primary legislation dealing with the functions of NHS foundation trusts which do not provide a definition for the term.

These include-

- i. the Care Act 2014;
- ii. Housing (Wales) Act 2014;
- iii. Autism Act 2009; and
- iv. National Health Service (Wales) Act 2006.

In the regulations it is clear from the preceding definition of "NHS trust" that "NHS foundation trust" does not mean a trust established under section 25 of the National Health Service Act 2006 or section 18 of the National Health Service (Wales) Act 2006, so the term is left to have its established meaning.

You have referred to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 as an example of recent legislation in which "NHS foundation trust" is a defined term. In our view this example can be distinguished, as a different drafting and policy rationale applied to the inclusion of the definition in the context of cross-border issues. The intention in this instance was to take the reader to the provision which makes it clear that NHS foundation trusts are England-only bodies, and, therefore, outside Wales. However, in the case of the 2018 Regulations, it is clear from regulation 44(2) that the bodies referred to in paragraph (4) are bodies in the United Kingdom.

CLAC question: Paragraph 2(2)(c) of Schedule 4 of the Welsh text refers specifically to grants, loans or other payments made by the Higher Education Funding Council for Wales. There is no reference to that body in the English text, so that the grants loans

or other payments are not limited in that way. [Standing Order 21.2 (vii) – inconsistencies between the meaning of the English and Welsh texts]

Welsh Government response:

We agree that the Welsh text does have a superfluous reference to the Higher Education Funding Council for Wales (“HEFCW”), and intend including that in an amending regulation. The England equivalent of HEFCW, the Higher Education Funding Council for England, is due to be abolished at the start of April 2018, at which point we will need in any event to amend this provision to account for the new funding body that will be established for England (the Office for Students).

CLAC question: Regulation 53 provides that a person is not eligible for a maintenance loan (in respect of living costs) if they have reached the age of 60 on the first day of the academic year in which the course starts. Students over 60 are however eligible to apply for a base grant, maintenance grant and other targeted grants.

Regulation 99 and Schedule 5 provide that a person is not eligible for an Oxbridge college fee loan (a loan made available for the payment of college fees in respect of certain designated courses offered by Oxbridge e.g. dentistry, social work) 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 regulations 53 and 99 relate to the right to education. Therefore, by setting an upper age limit of 60, the Committee asks whether they discriminates against people over 60 in relation to their enjoyment of the right to education?

Whether the upper age limit is discriminatory will depend on whether it can be justified. If it can be justified, there is no discrimination and no breach of the ECHR.

The Explanatory Memorandum provides no justification as to the setting of the upper age limit. The Committee therefore asks the Welsh Government to provide an analysis of the Welsh Government’s justification using the well-established fourfold test set out by the Supreme Court, i.e.

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

[Standing Order 21.2 (i) – that there appears to be doubt as to whether it is intra vires.]

Welsh Government response:

The Committee has asked for the Welsh Government's analysis of their justification for the setting of the upper age limit. The table below sets out the data which underpinned the policy:

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|---------------------------------|----------------|----------------|----------------|----------------|
| Age entering repayment | 30 | 40 | 50 | 55 |
| Average income | £40,390 | £48,640 | £46,910 | £45,660 |
| Average annual repayment | £1,380 | £2,130 | £1,970 | £1,860 |
| Total repayment up to: | £54,800 | £46,200 | £25,900 | £16,000 |
| | | | | |
| Age entering repayment | 60 | 65 | 70 | 75 |
| Average income | £33,230 | £29,590 | £27,160 | £23,570 |
| Average annual repayment | £740 | £410 | £190 | £0 |
| Total repayment up to: | £6,700 | £3,000 | £1,000 | £0 |

Note. Estimated total repayments are rounded to the nearest £100. Other figures are rounded to the nearest £10.

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 estimated by considering the average income of each age group, which includes the state pension where appropriate. Loan repayment is assumed to be made by those with an income of over £25,000, and repaid at a rate of 9% of any income in excess of that threshold.

The statistic data above is the basis for the policy decision to include an upper age limit for the maintenance loan and Oxbridge college fee loans in the Regulations. 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:

“ 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”.

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.

As the Committee has indicated in the commentary in point 3 of the Technical Scrutiny Report, students aged 60 or over are eligible to apply for the base grant, maintenance grant and other targeted grants to support their living and study costs . Over all, students aged 60 or over will have access under the Regulations to larger grants for living and study costs than they would have under previous undergraduate student support regulations.

The Oxbridge college fee loan is made available to students following one of a defined set of vocational courses provided by the University of Oxford or the University of Cambridge that lead to a professional qualification. The rationale for excluding students aged 60 and over

from applying for this loan is that in the context of finite resources, it is justifiable to target support at those starting their careers or wishing to retrain mid-career.

With regard to the four-fold test, it is the view of the Welsh Government that the bright line drawn does have a legitimate aim and is rationally connected to that aim: maintenance loans and Oxbridge college fee loans are provided in the context of finite resources. The Government's aim, in accordance with the recommendations of the Diamond review, was to establish and maintain 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 repayment 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. The package of support the Welsh Government provides to students aged 60 and over provides a reasonable balance between the accessibility of higher education and the overall financial sustainability of the student support system.

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)).

[end]