

SL(5)189 – The Education (Student Support) Wales Regulations 2018

Background and Purpose

These Regulations provide the basis for the system of financial support for students who are ordinarily resident in Wales (subject to exceptions) taking designated higher education courses in respect of academic years beginning on or after 1 August 2018. Support includes tuition fee loans, maintenance grants and maintenance loans.

Procedure

Negative

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. 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]**
2. 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]**
3. 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*.]

Merits Scrutiny

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

The *Independent review of higher education funding and student finance arrangements*, led by Professor Sir Ian Diamond ("the Diamond review") concluded in September 2016. Professor Diamond was asked to conduct a wide ranging review of higher education and student finance.

Professor Diamond made a number of recommendations which are reflected in these Regulations e.g.:-

- The current tuition fee grant for full-time undergraduate students is replaced with an additional student loan, up to a maximum level of £9,000.
- A £1,000 "base" grant available to all eligible welsh domiciled students.

¹ The European Court of Human Rights ECtHR has found that 'age' is included among 'other status' in Article 14, *Schizgebel v Switzerland* (No. 25762/07).



- Additional means-tested grant to cover living costs.
- Maintenance loans to be available (subject to eligibility) for those students who are not eligible for grant.

[Standing Order 21.3 (ii) – that is of political or legal importance or gives rise to issue of public policy likely to be of interest to the Assembly.]

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. There is also reference in the Regulations to the 'Erasmus programme'. This is a programme which offers university students a possibility of studying or doing an internship abroad in another country. It is not clear at this stage what affect Brexit will have on programmes such as Erasmus and the mobility of students.

Government Response

A government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 12 March 2018 and reports to the Assembly in line with the technical and merits reporting points identified.

The third technical reporting point identifies four questions to be covered in the government response because the Explanatory Memorandum contains no reasons for setting an upper age limit of 60. In our view, without justification for this approach, there remains the potential for doubt to be cast on whether they are compliant with human rights legislation.

