



The Scottish Parliament
Pàrlamaid na h-Alba

EDUCATION AND SKILLS COMMITTEE

AGENDA

8th Meeting, 2016 (Session 5)

Wednesday 26 October 2016

The Committee will meet at 10.30 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private. The Committee will also decide whether its consideration of its work programme should be taken in private at its next meeting, and whether reviews of pre-budget scrutiny evidence sessions should be taken in private at future meetings.
2. **Subordinate legislation:** The Committee will consider the following negative instrument—

Education (Student Loans) (Scotland) Amendment Regulations 2016
(SSI 2016/261)
3. **Higher Education and Research Bill (UK Parliament legislation):** The Committee will consider submissions received on the legislative consent memorandum, and its approach to further scrutiny on the Bill.

Roz Thomson
Clerk to the Education and Skills Committee
Room T3.40
The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

Agenda item 2

Paper by the Clerk

ES/S5/16/8/1

Agenda item 3

PRIVATE PAPER

ES/S5/16/8/2 (P)

Education and Skills Committee

8th Meeting, 2016 (Session 5), Wednesday, 26 October 2016

Subordinate Legislation

Introduction

1. This is the second Committee consideration of the negative instrument the Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261).

Background

2. These Regulations amend the Education (Student Loans) (Scotland) Regulations 2007 to increase the maximum age at which a person may be eligible for a loan towards their maintenance as a student attending a designated course of higher education. The effect of the Regulations is to increase the upper age limit from 55 to 60.
3. The impetus for bringing forward these regulations was a review of the existing upper age limit undertaken in light of the Equality Act 2010 and future increases in the state pension age. These Regulations are in part in response to a Judicial Review which found that “the current age limit of 55 is unjustifiably discriminatory on grounds of age.” Specifically, the court found that regulation 3(2)(b)(ii) is incompatible with Article 14 ECHR which affords protection from discrimination, when read in the context of Article 2 Protocol 1 ECHR which protects the right to education.

Previous consideration

4. The Committee first considered this instrument at its meeting on 5th October and agreed, given the concerns raised by the DPLR Committee, to write to the Minister for Further Education, Higher Education and Science to highlight these concerns. The letter to the Minister and the response are attached at the **Annexe**.
5. The paper for 5th October includes the instrument, policy note and Equalities Impact Assessment in its annexes. It is available in the papers for [5th October](#) (paper 2, page 10 of the papers pack).

Procedure in Committee

Motions to annul

6. Under the negative procedure, an instrument comes into force on the date specified on it unless a motion to annul is agreed by the parliament. Any MSP (whether a member of the lead committee or not) may lodge a motion recommending annulment of an instrument at any time during the 40-day period.

If such a motion is lodged for consideration by the Committee then the relevant minister would come to a Committee meeting to answer issues raised by members and speak against the motion.

Timetabling

7. Wherever possible clerks will timetable negative instruments to allow time for consideration at two committee meetings if required. The 26th October meeting is the second and last available consideration of this instrument.
8. Therefore, if members want to lodge a motion to annul or undertake any other work on the instrument please let the clerks know as early as possible.

Clerk to the Committee

21 October 2016

ANNEXE

LETTER FROM THE MINISTER FOR FURTHER EDUCATION, HIGHER EDUCATION AND SCIENCE

20 October 2016

Dear James

Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261)

Thank you for your letter of 7 October regarding the DPLRC's consideration of the above Regulations. I note that the Committee has raised a number of issues of policy and procedure with you and I shall respond to each of them below. The committee also wrote to me directly on these matters and I will shortly be sending them a full response.

Firstly, with regards to the appropriateness of using a negative procedure SSI instead of a remedial order under the Convention Rights Compliance (Scotland) Act 2001 ("the 2001 Act") to amend the age cap. I can confirm that consideration was given by Scottish Government officials as to the most appropriate amending instrument.

Section 12 of the 2001 Act states that the Scottish Ministers may make a remedial order where: "...*the Scottish Ministers are of the opinion that there are **compelling reasons** for making a remedial order **as distinct from taking any other action**.*" In this case, there were no compelling reasons to make a remedial order as distinct from taking other action since there were existing subject-specific powers in primary legislation to amend the defective provision via secondary legislation. The power to make a remedial order under the 2001 Act was conferred largely to avoid the need for emergency legislation and, due to the existing powers, there was no reason to rely on emergency procedure or emergency legislation in this case.

The existing subject-specific powers are in sections 73(f) and 74(1) of the Education (Scotland) Act 1980. The negative procedure for the exercise of these powers was determined to be appropriate when the Education (Scotland) Act 1980 was passed and the instrument was laid in compliance with the statutory procedure for negative instruments, therefore appropriate scrutiny was ensured by laying before Parliament for a clear 28 days.

On the point related to whether the decision to increase the age cap to 60 could be justified with regards to the recent judicial review: in its judgement, the Outer House found that: "...*a cut off or a blanket rule which interferes with Convention rights may well be reasonable, for example where an objective basis is shown that it will reduce*

the overall impact on resources. But the cut off chosen...must be rationally connected to the aim or objective and be a proportionate way of achieving it... A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved."

The judgement, therefore, confirms that 'blanket' rules (which discriminate on grounds of age) can be justifiable but, while there was a legitimate aim behind the particular age limit of 55, "*There [was] no evidence available as to the intention behind [that] particular "cut off"*".

As my officials said to the Committee, when reviewing the policy, we looked at a number of options. In assessing the ECHR compatibility of a new age cap of 60, the Scottish Government had regard to more evidence than was before the Outer House in relation to the age limit of 55, including what the legitimate aim of an age cap was. The Outer House considered the aim of "*encouraging access to education*" but, in setting a new upper age cap, the Scottish Government is seeking to ensure that the overall student support system is financially sustainable. Having considered all of the current evidence including the EQIA, financial modelling and other factors such as the position in the rest of the UK, as well as recognising the financial constraints on the Scottish Government and the changing demographics and participation in the labour market, the decision was made to raise the age cap to 60.

This provides a balance between the desires of students of all ages to study courses, and receive support from government to do so, and the need to ensure that students taking out a loan have a reasonable chance to repay some or all of that loan. Accessibility of higher education is then fair, while also being sustainably balanced in terms of the overall affordability of the student support system.

You will want to note that the Scottish Government was represented at a 'remedy hearing' at the Court of Session on 7 September, where our legislative response to the Outer House's judgement was presented to the Court.

The DPRLC also asked why no EQIA was undertaken in order to specifically assess the equality impacts of the new policy having an age cap of 60.

The Scottish Government commenced a review of the upper age limit for student loans in November 2014 and an EQIA was carried out at that time as a core part of the process. Guidelines state an EQIA should be proactively undertaken as an embedded part of policy development to inform future policy options. They should not be done as a retrospective bolt-on once the final policy has been designed.

While the EQIA took the original age cap of 55 as a starting point, it also considered the impact of any upper age cap at all, on older learners. Given this, it was not necessary to carry out a further EQIA once the decision was made to increase the age cap to 60 because the original assessment took into consideration all students aged 55 and above throughout.

However, I recognise the importance of Equality Impact Assessments and will ensure this policy remains subject to on-going review. In addition, the Programme for Government commitment to review the entire system of student support to make sure that it is fair and effective, will look at student loans. My officials will complete an EQIA as part of that process and I would be pleased to provide documents for the Education and Skills Committee's consideration once that work is underway.

Finally the DPLRC asked about what "seems to be a very significant" cost range for raising the age limit (£0.7 million - £16.5 million).

As my officials explained when they gave evidence, it is very difficult to accurately predict exactly what the cost of raising the age cap to 60 is due to a number of factors.

To estimate the financial implications analysts looked at the numbers of full-time and part-time students between 55 and 60 currently on a higher education course in Scotland. As data on household incomes (which would determine the level of support a student is entitled to) for students between the age of 55 and 60 is limited, several income scenarios were modelled. The modelling was done on the basis that there is a 100% take up rate of support – i.e. all students are assumed to take the maximum entitlement.

It is possible that some students may change their mode of study as a result of increased support being made available, and so modelling was done to estimate the cost if different percentages of the students currently studying on a part-time basis changed to full-time study instead.

The lowest estimated figure (£0.7 million) is based on an assumption that there will be no increase in the overall number of full-time students aged between 55 and 60 entering Higher Education as a result of the change in policy, and that all students fall into the highest household income category (and are therefore eligible for the lowest level of support). The highest figure (£16.5 million) shows the potential cost if 100% of students studying part-time switched to full-time education as a result of the change in policy, and if all students fall into the lowest household income category (and are therefore eligible for the highest level of support).

SHIRLEY-ANNE SOMERVILLE

LETTER FROM THE CONVENER TO THE MINISTER



EDUCATION AND SKILLS COMMITTEE

T3.40

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By email

7 October 2016

Dear Shirley-Anne

I am writing to you following the Education and Skills Committee's initial consideration of the Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261) on Wednesday. The Committee noted the outstanding concerns raised by the DPLR Committee and agreed I should write to raise these issues with you.

As you will be aware the DPLR Committee raised matters of procedure and process with this Committee and also highlighted two policy matters that this Committee could independently pursue. A summary of the issues raised is detailed below:

- The Committee was not persuaded by the Government's arguments to use the negative procedure when the remedial order process was available which "would have allowed for greater scrutiny and would also have given the Parliament a chance to shape the Regulations"

- The Committee also questioned whether replacing one restriction on eligibility drawn by reference to age with another restriction also drawn solely by reference to age could be justified in terms of the ECHR, having regard to the [Judicial Review] judgement.
- The Committee highlights the Equality Impact Assessment (EQIA) has not been updated to reflect the increase to 60. The Committee states it “could be questioned what value this document now serves in informing the Scottish Government’s judgement and why officials contend that no further EQIA is necessary to assess the equality impacts of an increased age cap of 60.”
- Finally the Committee mentions policy issues for this Committee’s consideration including what “seems to be a very significant” cost range for raising the age limit (£0.7 million - £16.5 million).

This Committee would very much appreciate it if you could address all of the issues raised by the DPLR Committee including the matters of policy. The letter from the DPLR Committee Convener is attached in full for your reference.

This Committee is required to report on the instrument by 31st October meaning the meeting on 26th October is its last opportunity to consider it. To give members sufficient time to consider your response, including to inform any further scrutiny it may wish to conduct on 26th October, I should be very grateful for a response by Thursday 20th October.

The Committee may be entirely content with your response but there is always the potential that a member of the Committee will lodge a motion to annul the instrument. On that basis you and the relevant accompanying officials may wish to provisionally block off the morning of the 26th October from 10am for a possible appearance before the Committee.

Yours sincerely

JAMES DORNAN MSP

CONVENER

Delegated Powers and Law Reform Committee

James Dornan MSP

Convener of the Education and Skills
Committee

29 September 2016

Dear Convener

I am writing to you on behalf of the Delegated Powers and Law Reform Committee to make you aware of the Committee's outstanding concerns about the Education (Student Loans) (Scotland) Amendment Regulations 2016.

The Regulations were laid on 9 September 2016 and are due to come into force on 8 October 2016. These Regulations amend the Education (Student Loans) (Scotland) Regulations 2007 to increase the maximum age at which a person may be eligible for a loan towards their maintenance as a student attending a designated course of higher education. The effect of the Regulations is to increase the upper age limit from 55 to 60.

The Committee notes that the impetus for bringing forward these regulations was a review of the existing upper age limit undertaken in light of the Equality Act 2010 and future increases in the state pension age.

The policy note explains that, informed by the findings of that review, Ministers decided to increase the upper age limit from age 55 to age 60, bringing Scotland into line with the age cap applied elsewhere in the rest of the UK. The effect of the age cap is that a person aged over 60 when beginning a course of higher education is not eligible to apply for a maintenance loan.

To inform this review the Scottish Government undertook an Equality Impact Assessment (EQIA) and financial modelling.

The policy note advises that during the conduct of the policy review, the current upper age limit of 55 was challenged by judicial review in the Outer House of the Court of Session. On 20 May 2016, Lady Scott issued her opinion in that Judicial Review. She found that the current age limit of 55 is unjustifiably discriminatory on grounds of age and, as such, regulation 3(2)(b)(ii) of the Education (Student Loans)

(Scotland) Regulations 2007 (which contains the age limit)) is incompatible with the European Convention on Human Rights (ECHR) and is outwith the executive competence of the Scottish Ministers.

Specifically, the court found that regulation 3(2)(b)(ii) is incompatible with Article 14 ECHR which affords protection from discrimination, when read in the context of Article 2 Protocol 1 ECHR which protects the right to education.

Lady Scott stated in her judgement that “A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved”; she was not satisfied that such a rational connection was shown for an age limit of 55. Furthermore she was “...not satisfied that there was no less intrusive measure than a blanket cut-off available.”

The policy note explains that, in light of the review and Scottish Ministers’ pre-existing intention to raise the age limit to 60, the Scottish Government took the decision not to appeal the judgement.

The Scottish Government contends that it is able to show a rational connection between the age limit of 60 and the policy of ensuring a fair and proportionate approach to the issue of student support that recognises the needs and desires of students of all ages to study courses of higher education as well as the financial constraints on the Scottish Government and the changing demographics and participation in the labour market.

The Committee felt that it had insufficient information to form a view on these Regulations and sought further information from the Scottish Government in writing and in oral evidence in order to understand why increasing the age limit to 60 addresses the defect identified by the court. Specifically, the Committee sought to explore with the Scottish Government the reasons why it considers that replacing one restriction on eligibility drawn by reference to age with another restriction also drawn solely by reference to age could be justified in terms of the ECHR, having regard to the judgement.

Having considered the evidence available to it, the Committee took the view that these Regulations do not raise a devolution issue in terms of the Committee’s formal reporting grounds. However, the Committee was left with outstanding concerns about the approach adopted by the Scottish Government to these Regulations.

Firstly, the Committee is concerned by the Scottish Government’s decision to correct the defect identified by the court by way of amending regulations which, by virtue of the provision in the Education (Scotland) Act 1980, are subject to the negative procedure. The Committee recognises that the remedial order process under the Convention Rights Compliance (Scotland) Act 2001 was also available to the Scottish Government as a means of resolving the defect identified. The Committee explored with Scottish Government officials in oral evidence why it had not considered using the remedial order process as this would have allowed for greater scrutiny and would also have given the Parliament a chance to shape the Regulations. Officials explained that it is normal practice to use a power appropriate to the particular subject matter where one is available, and that a remedial order

would only be used in circumstances where a subject-specific power did not exist. Officials also noted that the court had not made any adverse comment on this approach. The Committee did not find these arguments persuasive.

The court judgement indicates that decisions about how the incompatibility with ECHR ought to be corrected must be left to the Parliament, guided by the Scottish Ministers. The Committee considers that the remedial order processes afford greater opportunities to Parliament as well as interested stakeholders and the public at large to be consulted and to scrutinise the Scottish Government's proposed approach to correcting the defect. The Committee considers that such an approach would have been more closely aligned with the direction given by the court as to the manner in which the defect identified should be resolved.

Secondly, while the Committee reached the view that the Regulations did not raise a devolution issue, it found the arguments lacked clarity as to why increasing the age limit to 60 addressed the incompatibility issue.

In oral evidence, officials argued that the approach taken meets the tests for determining compatibility with ECHR. That is to say, having weighed up all the relevant factors, the measure adopted achieves a fair and proportionate balance between the public interest being promoted and all of the other interests involved. I attach as an annex to this letter the arguments advanced by the Scottish Government in this regard.

The Committee found the evidence available to it to be sufficient to enable it to take the view that these Regulations do not raise a devolution issue. However, the Committee found it disappointing that it was only after considering the policy note, lengthy written evidence and oral evidence that it obtained sufficient information to enable it to reach this view. The Committee would also have welcomed a more compelling and clear case being presented to Parliament as to why simply increasing the age limit to 60, as opposed to choosing any other possible approach, addresses the incompatibility issue.

The Committee also expresses concern about the EQIA. The EQIA focuses on assessing the equality impacts of the existing policy, i.e. an age cap of 55, rather than 60. The choice of a cut-off at age 55 has now been found to be unjustifiably discriminatory by the Court of Session. Accordingly it could be questioned what value this document now serves in informing the Scottish Government's judgement and why officials contend that no further EQIA is necessary to assess the equality impacts of an increased age cap of 60. These questions have not been answered to the satisfaction of the DPLR Committee and as such these may be matters your committee would wish to explore with the Government.

Two further matters were raised in the evidence session, which do not fall within the remit of the DPLR Committee and its consideration of these Regulations, but which may be matters your Committee would wish to consider further.

The Committee was advised in oral evidence that modelling suggested that raising the age limit could cost between £0.7 million and £16.5 million. This seems to be a very significant range and your Committee may wish to explore this.

Finally, the Committee notes the Scottish Government's commitment to look again at this rise in the age cap for eligibility for student loans as part of a wider student support review that will be starting shortly. This may be another matter your Committee may wish to consider and in so doing, you may wish to consider the implications of the rise in the age cap on younger people too.

Yours sincerely,

Convener of the Delegated Powers and Law Reform Committee

Appendix

Argument presented by the Scottish Government to the DPLR Committee

DPLR Committee Meeting 28 September 2016 – OR Cols 11 to 12

“There are two potential tests. The first is whether the measure taken by the Scottish Government and passed through the Parliament is manifestly without reasonable foundation. The other test is whether, weighing up all the relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest and the other interests involved.

As I mentioned earlier, the Supreme Court has considered which of those two tests would apply in this kind of case, and it has not reached a conclusion. We submit that the test of whether the measure is manifestly without reasonable foundation is the appropriate one. Nevertheless, I will take you through the other, closer test on the basis that that gives closer scrutiny.

The first question for the second test is whether the Education (Student Loans) (Scotland) Amendment Regulations 2016 have a legitimate aim. As I described, the aim of the regulations is “to prioritise support, in the form of tuition fee grants, bursaries and living-cost loans, for students entering the labour market, and ensuring that students taking out a loan have a reasonable chance to repay some or all of that loan prior to retirement.”

The latter part of that is very much about the sustainability of the scheme. Is that a legitimate aim? Well, we submit that it is a legitimate aim to have a scheme that is sustainable—one that can carry on from year to year.

The next question is whether the measure is rationally connected to the objective of prioritising support for students entering the labour market and ensuring that students who take out a loan have a reasonable chance to repay it prior to stopping work. Again, we submit that it is rationally connected to that objective; because the measure sets a cap on eligibility for student maintenance loans at the age of 60, it has a rational connection with ensuring that the system is sustainable by helping to ensure that loans are repaid in whole or in part. As I mentioned before, once people stop being part of the pay as you earn system—once they stop being employed—the maintenance loan repayments are no longer collected.

The next question would be, could a less intrusive measure have been used without unacceptably compromising the achievement of the objective? As I mentioned before, Wales and Northern Ireland have apparently found no suitable alternative. I understand that we have identified no alternative that was suitable and which would not unacceptably compromise achievement of the objective of having a sustainable system.

On the question of whether the measure strikes a fair balance, we would submit that it does. Given the wider considerations about the affordability of the student finance system and the decision of the Government to focus on providing free tuition for first-degree students, which benefits people of all ages, having an age cap is proportionate and justifiable.

A balance has to be achieved. If we consider the alternatives, one would be to have no age limit. However, that would clearly cost more and it would also put someone who is 25 years old when they enter college in a different repayment position from someone who is 75. That might be thought not to strike a fair balance between the position of the person who is 25, who will have to pay for the system, and that of the person who is 75, who will not. I hope that that further explanation is useful to you.”