EXPLANATORY MEMORANDUM TO

THE EDUCATION (STUDENT LOANS) (REPAYMENT) (AMENDMENT) REGULATIONS 2021

2021 No. 191

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

1.2 These are composite regulations with the Welsh Ministers and these Regulations will also be laid before the Welsh Parliament.

1.3 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Education (Student Loans) (Repayment) Regulations 2009 (S.I. 2009/470) ("the 2009 Regulations"), which govern the repayment of income-contingent repayment student loans. The purpose of this instrument is to make changes to the regulations to facilitate:

- the introduction of a new and distinct earnings-based repayment threshold for loans made under the Education (Scotland) Act 1980, defined as "Scottish Student Loans",
- the provision of electronic format information notices issued to borrowers,
- an amendment to Regulation 17(ca)(ii) to clarify that it does not confer a discretionary function on Her Majesty's Revenue and Customs (HMRC).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Joint Committee on Statutory Instruments in its 52nd Report of Session 2017 - 2019[1] reported regulation 3(b) of the Education (Student Loans) (Repayment) (Amendment) Regulations 2019 (S.I 2019/189), which amended Regulation 17(ca)(ii) of the 2009 Regulations to provide that payment from a borrower is considered to have been received either on the day it is deducted from earnings by an employer or where it is necessary to take account of any adjustment to the deduction, on such day as HMRC specifies. The Committee concluded that the amendment could be construed as conferring a discretionary function on HMRC, without clear sub-delegation in the enabling Act and reported regulation 3(b) for doubt as to whether it is intra vires.

3.2 Regulation 5 of these Regulations makes amendments to Regulation 17(ca)(ii) of the 2009 Regulations to address this issue.

[1] This report is available at: Fifty-second Report of Session 2017-19 - Joint Committee on Statutory Instruments - House of Commons (parliament.uk)

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The extent of this instrument is primarily England and Wales because it concerns the repayment terms of loans made by borrowers ordinarily resident in England and Wales. However, the administrative work of collecting student loan repayments is managed on a UK-wide basis by the Student Loans Company (SLC) working in partnership with HMRC. This instrument thus extends to all of the UK insofar as the 2009 Regulations impose any obligation or confer any power on HMRC, an employer or a borrower in relation to repayment under Parts 3 or 4 of those Regulations, or on any other person in relation to the retention or production of information or records. In addition, whilst not relevant to this instrument, Regulation 80(3) of the 2009 Regulations ("Effect of borrower insolvency on student loans") extends to Northern Ireland.

4.2 The territorial application of this instrument is primarily England and Wales only.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument amends the 2009 Regulations made under section 22 of the Teaching and Higher Education Act 1998, which govern the repayment of income-contingent repayment student loans, including through setting earnings thresholds above which an employer must deduct repayments and providing for the allocation of repayments to different loan balances where a borrower has more than one loan.

6.2 On 13 January 2021, Scottish Ministers laid the Repayment of Student Loans (Scotland) (Amendment) Regulations 2021 (S.S.I. 2021/8) [the 2021 Scottish Regulations] which are due to come into force on 6 April 2021. Those regulations increase the earnings-based repayment threshold in relation to student loans made under the Education (Scotland) Act 1980, which necessitates amendments to the 2009 Regulations so that the system of repayment deductions administered by HMRC aligns with the new repayment thresholds introduced in respect of Scottish borrowers by Scottish Ministers.

6.3 The Education (Student Loans) (Repayment) (Amendment) Regulations 2019 amended Regulation 17(ca)(ii) of the 2009 Regulations in connection with the time at which a repayment is considered received by the Secretary of State, when an employer has made an adjustment to its deductions from earnings.

6.4 The JCSI concluded that the amendment made to Regulation 17 (ca)(ii) "could be construed as conferring a discretionary function on HMRC, without a clear express sub-delegation in the enabling Act". The Department committed to revisit the drafting at the first opportunity, which is now addressed in Regulation 5 of this instrument.

6.5 The Student Loans Company, acting on behalf of the Secretary of State, is implementing a programme of operational improvements to enhance the repayment service for customers. The 2009 Regulations currently restrict the method of communication with borrowers in relation to repayments to paper-based methods only. This instrument makes amendments which will enable correspondence to be issued via digital platforms as well as retaining the ability to correspond via paper where required.

7. Policy background

What is being done and why?

7.1 This instrument makes three categories of amendments to the 2009 Regulations:

- Amendments enabling the introduction of a new earnings-based repayment threshold for Scottish student loans,
- Amendments enabling the provision of electronic format information notices to borrowers,
- A correction to Regulation 17(ca)(ii) to clarify that it does not confer a discretionary function on HMRC.

7.2 This instrument makes amendments to the 2009 Regulations to facilitate, from April 2021, the introduction of an increase to the student loan repayment threshold that applies to all Scottish student loan borrowers. This is being implemented in Scotland through the 2021 Scottish Regulations.

7.3 Since 1998, student loans for all student loan borrowers in the UK have been income contingent. For these loans, the relevant UK administration sets an income threshold for repayment below which borrowers are not required to make repayments on their loan. Borrowers earning above this repayment threshold are required to make repayments of a set percentage of their income that falls above the threshold. The threshold is adjusted annually.

7.4 In 2012, a new undergraduate loan (post-2012 loan) was introduced in England and Wales with different terms and conditions. The repayment threshold was set at £21,000. In 2018, the repayment threshold was increased to £25,000 in England and Wales and then adjusted annually in line with average earnings. The repayment threshold in relation to loans taken out by Scottish borrowers remained unchanged.

7.5 The terms and conditions under which borrowers repay their student loans through employer deductions or following self-assessment of earnings, administered by HMRC, are contained within the 2009 Regulations which are UK-wide. The 2009 Regulations contain provisions relating to the cross-jurisdictional allocation of loan repayments, collection of repayments via HMRC through the taxation system and collection of direct repayments via the SLC.

7.6 In June 2018, the Scottish Government Minister for Further Education, Higher Education and Science confirmed to the Scottish Parliament that the repayment threshold rate, for Scottish student loan borrowers, would increase to £25,000 from April 2021. The Scottish Government has amended the Repayment of Student Loans (Scotland) Regulations 2000[2], in order to introduce a new Scottish loan repayment

[2] The Repayment of Student Loans (Scotland) Amendment Regulations 2021 (legislation.gov.uk)

threshold, changing terms and conditions relating to loan repayments for existing and future Scottish borrowers.

7.7 As repayments are collected through the UK-wide taxation system, the changes to the threshold applicable to Scottish borrowers will need to be reflected in the 2009 Regulations. Therefore, this instrument makes amendments to the specific areas where Scottish loan repayment conditions now diverge from conditions applying to Northern Irish loans and English and Welsh loans. The new Scottish loan repayment threshold (which reflects the changes to the terms and conditions relating to loan repayments for existing and future Scottish borrowers) will apply to Scottish undergraduate and post-graduate borrowers.

7.8 Additionally, amendments are also required to cater for the scenario where a borrower has an outstanding loan liability under more than one loan type. A borrower may have studied in Scotland and received a [pre-2012] loan and subsequently moved to England and received a [post-2012] loan. Alternatively, a student may have studied in England, receiving a [pre-2012] loan, undertaken a course in England, receiving a [post-2012] loan, and subsequently move to study in Scotland post-2021 and receive a new [Scottish Student Loan] loan.

To enable the changes required in consequence of the increase to the repayment threshold for Scottish student loans, this instrument amends the 2009 Regulations in the following areas:

7.9 **Definition of Student Loan.** The current definitions of student loans do not distinguish between loans made to English, Welsh, Scottish and Northern Irish borrowers. The introduction of a new Scottish student loan repayment threshold requires that the current definitions of student loans (pre-2012 loans and post-2012 loans) are expanded to include the definition of a Scottish student loan.

7.10 **Repayment threshold**. The new repayment threshold in relation to Scottish student loans is not set out in this instrument, though reference is made to the threshold in Regulation 29, which states that the threshold is set out in Regulation 2 of the Repayment of Student Loans (Scotland) Regulations 2000(a) as amended.

7.11 **Multi-loan threshold.** Borrowers may have drawn down a student loan in Scotland, England, Wales and Northern Ireland, and as such may have multiple student loans across different loan types. The Regulations provide for the situation where a borrower has both a pre-2012 loan and a post-2012 loan. Where a borrower has a loan balance in repayment for both a pre-2012 loan and a post-2012 loan, the loan repayment will be calculated at 9% of the income above the lowest applicable threshold. If a borrower with multiple loan types has a post-graduate loan this will be calculated and deducted independently from the other pre-2012 and post-2012 loans. The introduction of a new Scottish student loan repayment threshold will mean some borrowers will have a pre-2012 loan, a post-2012 loan and a Scottish student loan. In this situation, the calculation of the repayment will make provision for the Scottish student loan repayment threshold and will use the lowest applicable threshold.

7.12 **Allocation of repayments.** The Regulations make provision to incorporate the new Scottish student loan repayment threshold in the allocation or repayments across multiple loan types. The regulations will extend the existing rules which relate to the division of repayment between post-2012 student loans and those that are not considered post-2012 student loans.

7.13 In addition to the amendments to enable the implementation of a new Scottish student loan repayment threshold, this instrument will also make the following separate amendments:

7.14 **Provision of electronic format information notices to borrowers.** The SLC is currently required to issue paper correspondence (information notices) relating to Confirmation of Customer Details (COCD) by post. The recent introduction of an online process for COCD has simplified the process and enabled the SLC to correspond with borrowers via e-mail. As a result of the requirement to send postal correspondence, the SLC now send an e-mail in addition to existing COCD postal correspondence. The improved COCD process forms part of a wider digital strategy that moves the SLC towards providing a fully digitised service that will improve customer service and reduce costs associated with sending paper correspondence to borrowers. The changes will remove paper correspondence as a default, though retaining this option for borrowers who request this form of correspondence rather than electronic communications.

7.15 **Correction to Regulation 17(ca)(ii) to clarify that it does not confer a discretionary function on HMRC.** SI 2009/470 was laid in January 2019, amending the Education (Student Loans) (Repayment) Regulations 2009 to enable the introduction of More Frequent Data Sharing between HMRC and SLC. The Statutory Instrument was reported by the Joint Committee on Statutory Instruments (JCSI) as there was doubt whether it is intra vires. The amendment in question is Regulation 17 (ca)(ii) - as amended by Regulation 3(b) of the Education (Student Loans) (Repayment) (Amendment) Regulations 2019/189):

> (ii) where an adjustment is made in relation to the deduction, such other day as HMRC specifies in order to take account of that adjustment; and

7.16 The JCSI concluded that the amendment made to Regulation 17 (ca)(ii) "could be construed as conferring a discretionary function on HMRC, without a clear express sub-delegation in the enabling Act". The Department committed to revisit the drafting at the first opportunity.

7.17 Regulation 17 (ca)(ii) has been amended to remove the implication that HMRC has a discretion to select the date of the deemed receipt of repayment where an adjustment is made. Under MFDS, HMRC notifies the SLC of the date of adjusted repayment(s) and this date will have been determined by the actions of the employer. HMRC does not exercise a discretion in deciding the date of an adjusted repayment.

7.18 Where employers make adjustments to student loan deductions within a tax year, HMRC will apply the date of the adjustment, as reported by the employer. Where the employer makes an adjustment after the end of a tax year, HMRC cannot know the date to which the adjustment applies and will default to applying the last day of the relevant tax year as the date of the adjustment.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Department for Education does not consider that consolidation of the 2009 Regulations is necessary at this time but will keep the position under review.

10. Consultation outcome

10.1 No formal consultation was undertaken on this instrument. The policy change to the Scottish repayment threshold is a matter for the Scottish Government and is set out in the 2021 Scottish Regulations. This instrument makes technical changes to enable the change in policy for Scottish borrowers but does not specify the change itself. The amendment to respond to the JCSI report and the changes to allow electronic communications to borrowers are also technical in nature and do not change existing policy.

11. Guidance

11.1 HMRC provides guidance to employers on matters related to the collection of Student Loan repayments from employees. Updated guidance on the new Scottish student loan repayment threshold will be made available to employers prior to the launch of the new repayment threshold.

11.2 The SLC provides extensive guidance to borrowers on the operation of the student loan repayments system through its repayments website. This includes details of how student loan repayment works for example the current loan types, repayment thresholds and variable interest thresholds (for post 2012 loans only) applicable to borrowers' resident in the UK and borrower's resident overseas.

12. Impact

12.1 There is no, or no significant, impact on business, charities, or voluntary bodies.

12.2 There is no, or no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because of the low level of impact for individual businesses. When employing student loan borrowers, employers must establish their employees' student loan types in order to make deductions against the appropriate threshold, as notified by individual employees. The new Scottish student loan repayment threshold increases (from three to four) the number of loan types from which to select, but the requirement to identify a loan type does not change, and the impact on employers is, therefore, negligible. Updated HMRC guidance will be made available to all employers to make them aware of the introduction of the new Scottish student loan repayment threshold and its implications for their employees with student loans, but no additional burden on employers is expected as a result of these changes. The amendment to respond to the JCSI report and the amendment to allow electronic communications to borrowers do not impact business, charities, voluntary bodies or the public sector.

12.4 The Department has considered the amendments with reference to the Public Sector Equality Duty and has concluded that borrowers with protected characteristics are unlikely to be adversely affected by the changes being introduced. The introduction of the new Scottish student loan repayment threshold, with an increased repayment threshold of £25,000 is intended to benefit existing and new Scottish borrowers. The Scottish Government has undertaken an equality impact assessment, which is

published on their website[3]. For the JCSI amendment, there is no impact for any borrowers with protected characteristics. The provision of electronic format information notices by SLC to borrowers introduces more efficient communication (while retaining paper correspondence for those borrowers who require this format) and has no negative impact on borrowers with protected characteristics.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to update the standard guidance provided by HMRC to all employers. This guidance will set out the new repayment threshold for the Scottish student loans and which borrowers it will apply to.

13.3 The basis for the final decision on what action to take to assist small businesses is the low impact caused by this instrument, which is limited to a very minor aspect of routine payroll administration.

14. Monitoring & review

14.1 HMRC, the Student Loans Company and the Department for Education will continue to monitor the collection of Student Loan Repayments as part of their ongoing work in this area.

15. Contact

15.1 Amanda Fenn at the Department for Education (Amanda.Fenn@education.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Paul Williams, Deputy Director for Student Funding Policy at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michelle Donelan, Minister of State for Universities at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

[3] https://www.gov.scot/publications/increase-student-loan-repayment-threshold-equality-impact-assessment-results/