

Government response to draft report for Constitutional and Legislative Affairs Committee on The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Supplementary Provisions) Regulations 2019

Points raised under Standing Order 21.3(ii)

1. The current law in force relating to special educational needs in Wales is the Education Act 1996 ('the 1996 Act'). Under the 1996 Act the relevant functions of appointing the President and legal chairs to the Special Educational Needs Tribunal for Wales ('SENTW') is vested in the Lord Chancellor (LC) only.
2. The Additional Learning Needs and Education Tribunal (Wales) Act 2018 ('the 2018 Act') introduced the Lord Chief Justice (LCJ) functions in respect of the similar appointment functions in relation to the Education Tribunal for Wales (which is a continuation of SENTW, but renamed by the 2018 Act) so as to ensure that those functions were not vested wholly and unfettered in the hands of the executive. (Section 91 of the 2018 Act is not yet in force.)
3. During a late stage in the passage of the ALNET Bill the law affecting SENTW in this regard changed by virtue of the Judicial Appointments and Discipline (Amendment and Addition of Offices) Order 2017 which was made by the UK Government. This order came into force on 1 December 2017. That Order could not, of course, amend the ALNET Bill. It is considered that as the selection of the President and the Legal Chairs have been brought, by the Order, within the Judicial Appointments Commission (JAC) procedures, that the additional roles in section 91 of the 2018 Act are not required because of the particular role enshrined in the Constitutional Reform Act 2005 to ensure that the LC upholds judicial independence.
4. The effect of the 2017 Order is to bring the LC's functions of appointing the President and legal chairs of SENTW within the formal JAC process for appointing members of the judiciary (by adding those functions in the relevant places in Schedule 14 to the Constitutional Reform Act 2005) for the first time. The effect of the 2017 Order read along with the Judicial Appointments Regulations 2013 is that the appointing authority (at stage 3) must make a selection. It is contended that retaining a role for the LCJ in the appointment of the President would cause operational difficulties in that two people would have to be in agreement with the recommendation of the Judicial Appointments Commission for appointment of a person as President. (The same position applies in relation to the appointment of the legal members). For example, by virtue of the Order and the Judicial Appointments Regulations 2013 (regulations 32 to 34) there comes a point in the appointments process when the appointing authority (in this case the LC) must make an appointment from those selected by the JAC. The effect of the relevant provisions of the 2018 Act are that the LC cannot appoint unless the LCJ agrees. Whilst the likelihood of disagreement following a JAC process is very small the fact that the Bill creates this possibility does give credence to

this concern. There is a recognition that this could affect the operability of the system.

5. It is considered that the changes introduced by the Ministry of Justice in the Order secure the same end (preserving judicial independence) as the agreement requirements currently in section 91(3) and (4) of the 2018 Act particularly taken in conjunction with the duty on the LC in s. 3 of the 2005 Constitutional Reform Act. Moreover the effect of the Order is to 'normalise' the judicial appointments procedure for the SENTW (and this will be applied also to the Education Tribunal appointments) by bringing the process for those appointments into line with other similar appointments made by the LC.
6. What we are left with, therefore, in terms of the appointment of the President and legal chairs of SENTW following the 2017 Order is that those appointments are brought into line with the usual process for making judicial appointments. On the other hand as regards the appointments to the same posts under the 2018 Act the procedure is not in line with that usual process. It is, we think, to those provisions in the 2018 Act that create the offices of President and legal chairs of the Education Tribunal that the provisions we propose to make in the current set of draft regulations are supplementary.
7. To bring the relevant provisions of the Act 2018 into line with those now applying to SENTW we need to replace the reference to SENTW in Sch 14 of the Constitutional Reform Act 2005 and remove the Lord Chief Justice functions.
8. Sections 97 and 99 of the Act 2018 clearly envisage that regulations under section 97 may amend or repeal a provision of the Act itself.
9. In terms of dictionary definitions, a provision is "supplementary" if it completes or enhances something. A provision is "expedient" if it is convenient or practical.
10. Considering the objective underlying the LCJ's functions in section 91(3) and (4) of the 2018 Act, the question arises whether, in the light of the change of the law applying in this regard to SENTW, it is convenient to supplement the provisions of the 2018 Act (including by amending or repealing provisions) creating the offices of President and legal chair by 'normalising' the appointment provisions in section 91(3) and (4) to bring them into line with the law that now applies to SENTW in this regard.
11. Our view is that regulations under section 97 of the 2018 Act can be made having that effect.
12. The draft report asserts under 1.4 that the Committee is concerned that "supplementary powers are being used to reverse important sections of an Assembly Act."
13. It is not agreed that the effect of the regulations is to reverse the section. "Reversing" would suggest that the purpose of the amendment is to give the

section an entirely opposite purpose and effect. The purpose and effect of section 91 of the 2018 Act was to ensure that there is an independent process in place to appoint the president and other members of the tribunal. The amended section 91 would serve and achieve the same purpose.

14. In terms of our proposed amendments, this is not a case where there is an extension of power, an amendment of a definition or the exclusion of the operation of a provision of primary legislation. The issue in this case is, in the light of the change of law applying to SENTW, whether the objective underlying the consent functions in section 91(3) and (4) of the 2018 Act in relation to the Education Tribunal can be achieved in a different way which is consistent (a) with the law that now applies to SENTW and (b) with other Lord Chancellor appointments. This is not a case where the proposal represents a fundamental (or contradictory) change in the scheme of the primary legislation.
15. A number of options were considered at the time for dealing with this matter and the Welsh Government considered that this was the best approach in the circumstances outlined above. As the draft report indicates, at the stage 4 debate on the ALNET Bill, Members were informed of the need to make a minor amendment to section 91 of the Bill when it became an Act. The National Assembly for Wales passed the Bill on that basis. Assembly Members will have an opportunity to debate the regulations.