

# SL(5)395 – The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Supplementary Provisions) Regulations 2019

## Background and Purpose

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The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (**the 2018 Act**) establishes the statutory system in Wales for meeting the additional learning needs of children and young people. Part 3 of the 2018 Act continues the Special Educational Needs Tribunal for Wales and re-names it the Education Tribunal for Wales.

These Regulations make amendments to section 91 of the 2018 Act which provides for the constitution of the Education Tribunal, including the appointment of the President of the Tribunal and other members of the Education Tribunal.

Regulation 2(2) removes from section 91(3) of the 2018 Act the requirement for the agreement of the Lord Chief Justice for the appointment of the President of the Education Tribunal by the Lord Chancellor.

Regulation 2(3) removes from section 91(4) of the 2018 Act the requirement for the agreement of the President of the Tribunal for the appointment of the legal chair panel by the Lord Chancellor.

Regulation 3 substitutes for the entry in Schedule 14 to the Constitutional Reform Act 2005 relating to the Special Educational Needs Tribunal for Wales an entry relating to the Education Tribunal.

## Procedure

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Affirmative.

## Technical Scrutiny

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No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

## Merits Scrutiny

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One point is identified for reporting under Standing Order 21.3 in respect of this instrument.

**1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.**

**1.1 The JAC process for appointing the President of SENTW**



The Judicial Appointments Committee (JAC) process currently applies to the appointment of the President of the Special Education Needs Tribunal for Wales (**SENTW**). The JAC process requires the Lord Chancellor to follow a three-stage process before appointing the President of SENTW.

## 1.2 The 2018 Act process for appointing the President of ETW

The JAC process does not currently apply to the appointment of the President of the Education Tribunal for Wales (**ETW**). A different appointment process applies under the 2018 Act to the appointment of the President of the ETW. Under The 2018 Act, the President of the ETW is appointed by the Lord Chancellor with the agreement of the Lord Chief Justice.

## 1.3 The Regulations

These Regulations seek to amend JAC-related legislation so that the JAC process applies to appointing the President of the ETW. Under the JAC process, the function of appointing the President of the ETW would rest with the Lord Chancellor.

This therefore creates a conflict with regard to the appointment of the President of the ETW: the JAC process would involve just the Lord Chancellor, while the 2018 Act process would involve both the Lord Chancellor and the Lord Chief Justice.

The Regulations seek to address this conflict by deleting the reference to the Lord Chief Justice in the relevant sections of the 2018 Act, so that both the JAC process and the 2018 Act involve only the Lord Chancellor.

## 1.4 Use of supplementary powers

The Explanatory Memorandum states that the enabling powers in section 97(1) and (2) of the 2018 Act (emphasis added):

“provides the Welsh Ministers with power to make regulations to make supplementary, incidental, consequential, transitory, transitional or saving provisions if they consider it necessary or expedient **to give full effect to provisions in the Act or in consequence of any provisions in the Act or for the purposes of any provisions of the Act.**”

Given that the appointment process as set out in the 2018 Act works as it is currently drafted (legally there is no fault in the appointment process set out in the 2018 Act) we ask the Welsh Government to clarify:

- its understanding of the word “supplementary” in section 97(1) of the 2018 Act, and why the “supplementary” power is being used to apply the JAC process to the appointment process of the President of the ETW (thereby changing the law as debated and passed by the Assembly);
- which element of “giving full effect to provisions in the Act or in consequence of any provisions in the Act or for the purpose of any provisions of the Act” in section 97(1) of the 2018 Act is being relied upon in these Regulations (bearing in mind that the appointment process in the 2018 Act is not defective).

It should come as no surprise that this Committee is concerned that supplementary powers are being used to reverse important sections of an Assembly Act.





## 1.5 Stage 4 proceedings on the 2018 Act

We note that, during Stage 4 proceedings on the 2018 Act, the Minister for Education said:

I want to quickly mention a very recent development that will require a minor amendment to the Bill when it becomes an Act. Appointments to the Special Educational Needs Tribunal for Wales were not previously part of the Judicial Appointments Commission, which was an oddity. An order made by the UK Government's Ministry of Justice, which came into force on 1 December, remedied that for the first time and that is to be welcomed. As a result, we propose to amend section 91 of the Bill by order. This will remove the agreement role of the Lord Chief Justice and the president. It will bring appointments to the future education tribunal into line and normalise the position, as has been done for SENTW. An agreement has been reached with the UK Government for dealing with this, which in practice is a small, technical issue.

We accept that the Assembly was given notice of the change that is being proposed by these Regulations, and we accept the Assembly voted in favour of the Additional Learning Needs and Education Tribunal (Wales) Bill at Stage 4 by 50 votes to 0.

However, we do not believe that Stage 4 is the proper way to announce intentions to make changes to important parts of Assembly Acts, especially changes that arise as a result of a last-minute agreement reached between the Welsh Government and the UK Government.

We ask the Welsh Government to clarify why could the proposed changes not have been properly debated during an additional Report Stage.

## Implications arising from exiting the European Union

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No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

## Government Response

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A government response is required.

## Committee Consideration

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The Committee considered the instrument at its meeting on 25 March 2019 and reports to the Assembly in line with the merits points above.

