

Explanatory Memorandum to the Special Educational Needs Tribunal for Wales Regulations 2012

This Explanatory Memorandum has been prepared by the Department for Education and Skills and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Special Educational Needs Tribunal for Wales Regulations 2012.

Leighton Andrews

Minister for Education and Skills

8 February 2012

1. Description

- 1.1** These Regulations set out the procedure to be followed in proceedings before the Special Educational Needs Tribunal for Wales (“Tribunal”). They make provision relating to the exercise of the Tribunal’s jurisdiction under Part 4 of the Education Act 1996 (“1996 Act”) which concerns special educational needs (SEN) appeals and Chapter 1 of Part 6 of the Equality Act 2010 (“2010 Act”) which concerns claims of disability discrimination in respect of school pupils.
- 1.2** These Regulations also make provision to give effect to section 17 in Part 1 of the Education (Wales) Measure 2009 (“Measure”). The Measure gives children a right to make special educational need appeals and claims of disability discrimination against schools to the Tribunal themselves. Section 17 gives the Welsh Ministers the power to make regulations to pilot the rights of a child to appeal or make a claim to the Tribunal.

2. Matters of special interest to the Constitutional Affairs Committee

- 2.1** There are no matters of special interest to the Constitutional Affairs Committee.

3. Legislative background

- 3.1** The Tribunal is an independent statutory Tribunal. It was established in 2003 under the Education Act 2002, section 195 and schedule 18.
- 3.2** The Tribunal has jurisdiction, under Part 4 of the 1996 Act, to hear and decide appeals against certain decisions made by local authorities in Wales. Appeals are currently made by parents whose children have SEN and relate to decisions concerning their children’s education. The Tribunal is also responsible, under Chapter 1 of Part 6 of the 2010 Act, for deciding claims of disability discrimination against schools in Wales.
- 3.3** The 1996 Act (as amended by Education (Wales) Measure 2009) and the 2010 Act (as amended by the order made under section 20 of the Education (Wales) Measure 2009) enables the Welsh Ministers to make regulations governing the Tribunal’s procedure.
- 3.4** The Secretary of State’s agreement is required to make certain provisions in regulations under the 1996 Act:
 - to prescribe requirements for the appointment of lay members to the Tribunal (section 334(2));
 - to enable the jurisdiction of the Tribunal to be exercised by a number of tribunals determined by the Tribunal’s President (section 333(5)(a));

- to make other provision in connection with the establishment and continuation of the Tribunal (section 333(5)(b)); and
 - prescribe the time periods for compliance with an order of the Tribunal (section 336A(2)(b)).
- 3.5** On 9 December 2009 the Education (Wales) Measure 2009 (“Measure”) received Royal Approval. Sections 1 to 8 of the Measure amend Part 4 of the 1996 Act to give children a right to make SEN appeals to the Tribunal themselves. Sections 9 to 16 of the Measure amended Part 4 of the Disability Discrimination Act 1995, which related to discrimination in schools, to give children the right to make claims of disability discrimination to the Tribunal themselves. The Measure also makes provision to enable the Tribunal to hear and decide SEN appeal and disability discrimination claims made by children.
- 3.6** However, on 1 October 2010 the 2010 Act repealed Part 4 of the Disability Discrimination Act 1995 and as a consequence the disability discrimination provisions in sections 9 to 16 of the Measure were repealed on that date. The 2010 Act consolidates discrimination law and re-states with modifications, the provisions that were in Part 4 of the Disability Discrimination Act 1995
- 3.7** To address this issue, the Education (Wales) Measure 2009 (Commencement No.1) Order 2011 was made on the 10 June 2011. The order brought section 20 of the Measure into force on 11 June 2011. Section 20 of the Measure gives the Welsh Ministers the power to make an order to remove the provisions in the Measure that amended Part 4 of the Disability Discrimination Act 1995 and to insert instead corresponding and consequential provisions to amend the 2010 Act.
- 3.8** The Right of a Child to Make a Disability Discrimination Claim (Schools) (Wales) Order 2011, made under section 20 of the Measure, was approved by the National Assembly for Wales on 5 July 2011 and came into force on 6 July 2011. The Order inserts into the 2010 Act provisions that correspond with the amendments that were previously made to the Disability Discrimination Act 1995 by the Measure..
- 3.9** The Welsh Government launched its consultation on the draft tribunal Regulations later that day
- 3.10** On 17 November 2011, the Secretary of State for Justice and Lord Chancellor, the Rt. Hon. Kenneth Clarke MP QC provided consent for the Welsh Ministers to make provision in regulations relating to the constitution of the Tribunal, members of the Tribunal panel and compliance with Tribunal orders.

Piloting the provisions under Part 1 of the Measure

- 3.11** Section 17 of the Measure gives the Welsh Ministers the power to make regulations to pilot the new rights and duties rights under Part 1 of the Measure (“pilot regulations”).
- 3.12** The Education (Wales) Measure 2009 (Commencement No.3 and Transitional Provisions) Order 2012 was made on 9 February 2012 and brought section 17 of the Measure into force on 10 February 2012. The majority of the remaining provisions under Part 1 of the Measure will come into force on 6 March 2012.
- 3.13** The Welsh Ministers laid pilot regulations before the National Assembly for Wales on 13 February 2012. These pilot regulations will come into force on 6 March 2012. The effect of the pilot regulations when taken with the commencement order is that Carmarthenshire County Council and Wrexham County Borough Council will pilot the new duties and rights in their respective areas. Once the pilot regulations cease to have effect, the rights and duties will automatically apply to the whole of Wales.

4. Purpose & intended effect of the legislation

- 4.1** The purpose of the legislation is to improve the Tribunal’s procedure and to give effect to Welsh Ministers proposal to pilot the new rights and duties given to children under Part 1 of the Education (Wales) Measure 2009.
- 4.2** Four sets of Tribunal regulations currently apply to SEN appeals and claims of disability discrimination in schools. These Regulations, made by the Secretary of State in 2001/2 with the agreement of the National Assembly for Wales, were intended to apply to the Special Educational Needs and Disability Tribunal (SENDIST) whose jurisdiction extended at that time to England and Wales.
- 4.3** In 2003 the Special Educational Needs Tribunal for Wales was established and the effect of the SENDIST regulations extended to apply to the Special Educational Needs Tribunal for Wales until superseded by regulations made by the Welsh Ministers.
- 4.4** In 2008 the Tribunals, Courts and Enforcement Act 2007 introduced a new Tribunal system which abolished the SENDIST and transferred its functions to the First-Tier Tribunal for England, As a consequence, the tribunal regulations made in 2001/2 now apply only to Wales.

Intended Effect of the Legislation

- 4.5** These Regulations consolidate and overhaul the existing tribunal regulations that apply to SEN appeals and claims of disability

discrimination. They set out the procedure to be followed when making a SEN appeal or a claim of disability discrimination to the Tribunal by:

- (i) a parent;
- (ii) a child entitled to make an appeal or a claim by virtue of pilot regulations made by the Welsh Ministers.

4.6 These Regulations also set out the procedure to be followed in proceedings and the procedure relating to compliance with orders of the Tribunal. The structure of the legislation has also been improved and recast in more “plain English” term to improve its user-friendliness.

5. Consultation

5.1 Welsh Government officials proactively utilised the expertise within the Tribunal User Group Network, comprising of local authority representatives, Tribunal members, voluntary and legal sectors, the Children’s Commission for Wales and the Administrative Justice and Tribunal’s Council, to ascertain the views of these key stakeholders and ensure that the draft Regulations were in line with the Tribunal’s procedures prior to formal consultation.

5.2 On the 6 July 2011 the Welsh Government undertook a 6 week formal consultation on the Regulations.

5.3 A total of 23 responses were received from a wide range of stakeholders. In general, the responses received were very positive with the inclusion of an overriding objective being welcomed by all. The majority of the responses concerned the scope or effect of the provisions with some minor changes suggested.

5.4 Policy officials have considered the responses and have made necessary amendments accordingly. No substantial changes have been made, other than to regulation 66 which formerly made reference to section 8 of the Safeguarding and Vulnerable Groups Act 2006 (monitoring by the Independent Safeguarding Authority). Amendment is necessary because the UK Government proposes to repeal section 8 of the Safeguarding and Vulnerable Groups Act 2006 via the Protection of Freedoms Bill. Alternative provision is made in the regulations to afford protection to children who have, or wish to have, a case friend.

6. Regulatory Impact Assessment (RIA)

6.1 No Regulatory Impact Assessment has been conducted as these Regulations are designed to achieve the intended objective of the Measure. They achieve this making provision that will enable children in pilot areas to make SEN appeal or claims of disability discrimination to,

the Tribunal themselves. The Welsh Ministers propose to pilot the new rights given to children on 6 March 2012.

- 6.1.1** The pilot phase will run across three financial years (2011-12, 2012-13 and 2013-14). £32,500 has been allocated by the Welsh Government for 2011-12 pre-commencement costs. £48,750 will be provided in 2012-13 and a further £48,750 in 2013-14.
- 6.1.2** Whilst the pilot scheme provides the opportunity to develop an evidence-base, there is uncertainty about the likely take up. The pilots and the outcome of the Action Research Project that will evaluate them will help to identify any costs for implementing the new rights and duties across Wales in 2015. If final child appeal and claim numbers are as low as anticipated, costs to the Tribunal would be marginal. Naturally, subsequent to the pilot phase and the full roll-out of children's rights, trends would be carefully monitored and the Administrative Justice Tribunal Unit, who finance the SENTW, kept informed.
- 6.2** We do not believe that the Regulations have any impact on the statutory duties of Welsh Ministers (sections 77 -79 Government of Wales Act 2006).