

# WELSH GOVERNMENT INTEGRATED IMPACT ASSESSMENT

<b>Title of proposal:</b>	<b>Draft Education Tribunal for Wales Regulations</b>
<b>Official(s) completing the Integrated Impact Assessment (name(s) and name of team):</b>	<b>Additional Learning Needs Transformation Team</b>
<b>Department:</b>	<b>Education and Public Services</b>
<b>Head of Division/SRO (name):</b>	<b>Ruth Conway, Deputy Director, Support for Learners</b>
<b>Cabinet Secretary/Minister responsible:</b>	<b>Cabinet Secretary for Education</b>
<b>Start Date:</b>	<b>10 December 2018</b>

## WHAT ACTION IS THE WELSH GOVERNMENT CONSIDERING AND WHY?

### Background

This impact assessment relates to the draft Education Tribunal for Wales Regulations ('the draft Tribunal Regulations'), which are made under the sections 74(1), 75(1), 75(2), 75(4), 76(3), 77, 91(6) and 92(2) of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 ('the 2018 Act'). These were published for consultation on 10 December 2018; the consultation will close on 22 March 2019.

The Additional Learning Needs and Education Tribunal (Wales) Act 2018 ('the 2018 Act') makes provision for a new statutory framework for supporting children and young people with ALN. It will replace existing legislation surrounding special education needs ('SEN') and the assessment of children and young people with learning difficulties and/or disabilities ('LDD') in post-16 education and training.

The 2018 Act renames the Special Educational Needs Tribunal for Wales ('SENTW') the Education Tribunal for Wales. The Tribunal's remit is extended to hear ALN appeals against governing bodies of further education institutions (FEIs) as well as against local authorities. It can:

- make orders to local authorities and FEIs in relation to ALN appeals;
- make recommendations to NHS bodies in relation to ALN appeals; and
- appoint 'case friends' for children who lack capacity.

The remit of the Education Tribunal also includes hearing claims relating to disability discrimination against schools, under the Equality Act 2010<sup>1</sup>.

The draft Tribunal Regulations set out the procedures to be followed in proceedings before the Education Tribunal for Wales ('the Tribunal'), including the initiation of an appeal and the proceedings that follow. They also set out the constitution of the Tribunal.

It is intended that the ALN Code and regulations will be laid before the National Assembly for Wales by the end of 2019, with a view to the provisions of the 2018 Act and regulations commencing from September 2020, with a three year implementation period before they apply in full.

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<sup>1</sup> Powers conferred under section 207(4) and Schedule 17, paragraphs 6A, 6(1), (2), (3), (4), (5) and (7) of the Equality Act 2010. This retains the current system whereby SENTW hears disability discrimination claims in respect of schools.

## Development of policy

The draft Tribunal Regulations have been developed in light of the five ways of working in the Well-being of Future Generations (Wales) Act 2015.

They are intended to provide **long term** underpinning to a new statutory system for supporting children and young people with ALN, by:

- providing clear and effective processes and procedures relating to appeals and claims, which avoid unnecessary delays in resolution; and
- providing for a tribunal that is able to deal with cases proportionately, fairly and justly, and make well-informed decisions.

The procedures and requirements the draft Tribunal Regulations propose to impose are focused on **preventing** children and young people from missing out on educational opportunities and the chance to fulfil their potential, by ensuring that they receive the provision called for by their ALN in a timely and efficient way, enabling them to participate in and benefit from learning.

The draft Tribunal Regulations and the 2018 Act that they support, **integrate** with the key theme of 'Ambitious and Learning' within *Prosperity for All* and with the well-being objectives within that key theme and others. They have been developed in **collaboration** with our partners in the delivery of the proposed procedures and requirements, including SENTW. A Transformation Programme has been developed to ensure that our partners have the capacity and understanding necessary to implement the procedures and requirements.

Given that they are the intended beneficiaries of the new system of support, we have also sought to **involve** children, young people and their families in the development of the ALN system by undertaking targeted engagement events. We will do so again as part of the current consultation on the draft ALN Code and draft regulations.

## Impact

The 2018 Act<sup>2</sup> enables the Welsh Ministers to make regulations about:

- the provision of and procedure for appeals to the Education Tribunal under part 2 of the 2018 Act;
- the timescale for making a report to the Education Tribunal in response to recommendations to NHS bodies in relation to their functions under the Act;
- compliance with orders made by the Education Tribunal;
- parents and young people who lack capacity;
- case friends for children who lack capacity; and
- the constitution of the Education Tribunal.

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<sup>2</sup> Powers conferred under sections 70 (4), 74, 75, 76(3), 77, 83(2), 85(8), 91(6), 92(2) of the Act.

The draft Tribunal Regulations published for consultation set out the procedures and requirements relating to the matters listed above, with the exception of parents and young people who lack capacity (see 'Proposed regulations' section of the consultation document for an explanation).

The procedures and requirements proposed in the draft Tribunal Regulations are intended to ensure the smooth and effective operation of Tribunal proceedings and that children and young people obtain access to the provision necessary to support their ALN. In particular, the timescales proposed in the draft Tribunal Regulations are intended to be realistic for those subject to them to adhere to, whilst avoiding unnecessary delays in the process. The draft Tribunal Regulations intend to support two of the main objectives of the 2018 Act: to create a system that leads to early, timely and effective interventions for children and young people with ALN; and to provide for fair and transparent processes for the resolution of concerns and appeals.

They have been developed in the context of the operation of the current SENTW, including the deficiencies perceived by SENTW and parties to Tribunal proceedings. The changes made to the case statement process, in particular, are intended to ensure that all parties to Tribunal proceedings and the Tribunal itself clearly identify the areas in dispute (or indeed areas of agreement). The intention is to enable the Tribunal to deal with cases fairly and make well-informed decisions. The proposed changes may also provide an opportunity for the respondents to consider alternative dispute resolution or settlement, which may prevent the need for tribunal proceedings continuing to a final hearing.

### Financial implications

The financial implications of the new system introduced by the Act and subsequent subordinate legislation were set out in the Regulatory Impact Assessment that accompanied the Act<sup>3</sup>. A specific Regulatory Impact Assessment for the Tribunal Regulations will be produced at the same time as they are laid

### Mechanism for delivery

The ALN Code will provide the necessary comprehensive guide to public bodies on their statutory functions in relation to ALN, including those set out in the Act and regulations made under it. As it also imposes additional statutory requirements, it is itself a form of secondary legislation. Information and advice for local authorities, FEIs and NHS bodies about appeals processes and procedures, including about children who lack capacity and applications for case friends, is provided in the draft ALN Code (see Chapters 26 and 27 of the draft ALN Code).

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<sup>3</sup> <https://beta.gov.wales/sites/default/files/publications/2018-04/additional-learning-needs-and-education-tribunal-wales-act-2018-explanatory-memorandum.pdf>

## CONCLUSION

### **How have people most likely to be affected by the proposal been involved in developing it?**

In developing these proposals, the Welsh Government has consulted with numerous stakeholders including local authorities (against whom appeals will usually be brought) and children, young people and their families. These consultations included formal public consultations and direct consultation through events to raise awareness and to engage with stakeholder when developing the draft Bill, when consulting on the draft ALN Code and before the Bill went through Assembly scrutiny. Welsh Government has also consulted directly with the Special Educational Needs Tribunal for Wales (SENTW) to better understand how the new case friend role will support children who lack capacity and how best to engage with the ALN system. SENTW has also been involved with setting out current challenges under the SEN system, and how improvements can be made under the new system.

### **What are the most significant impacts, positive and negative?**

The most significant impact from the proposed regulations will be the improved human rights of children and young people in Wales.

Under the Act, all children, their parents/carers and young people up to the age of 25 will have the right to appeal to the Education Tribunal against decisions made by a local authority or further education institution (FEI) in relation to their ALN or their IDP. Children and young people must also be provided with access to independent advocacy services.

The increased support children will receive from case friends will further their rights under the Act, which ultimately aims to improve educational achievement across Wales. Access to the support required to achieve their potential will become easier and less adversarial for children and young people, making a fairer, more compassionate society.

These improvements to education and learning will lead to a more prosperous Wales. Not only do we expect educational achievement to improve, but with the right support we can build ambition and encourage learning for life. These proposals can help equip everyone with the right skills for a changing world, improving the nation's resilience and becoming a more proud and confident people.

### **In light of the impacts identified, how will the proposal:**

- **maximise contribution to our well-being objectives and the seven well-being goals; and/or,**
- **avoid, reduce or mitigate any negative impacts?**

As noted above, the regulations themselves will help contribute the Welsh Government's well-being objectives; particularly, a prosperous Wales, a resilient Wales, and a more equal Wales. More generally, the Act itself is about reforming an outdated system that works well for some but leaves others behind. The Act will improve the current system and strengthen children's rights in Wales.

The regulations on case friends in particular will help improve the rights of the child and help promote and strengthen equality in Wales by ensuring children who lack capacity are supported to partake in the new system. Case friends must ensure the views, wishes and feeling of the child are respected when decisions are made on their behalf, including if the child goes to tribunal over a particular decision.

The ALN Code provides further details and guidance to help avoid any negative impacts and situations that may occur under the new system, such as the duties on local authorities to avoid and resolve disagreements. The focus on an inclusive approach to provision planning and on the avoidance and early resolution of disagreements should ensure that there is no increase in appeals to the Tribunal when compared with the existing system, despite the enhanced rights of appeal introduced by the 2018 Act.

Transition to, and implementation of, the new role of the Education Tribunal and its functions under the 2018 Act and the proposed draft Tribunal regulations, will require considerable preparation on the part of the SENTW. To enable this preparation to take place, and mitigate any harmful impacts it might otherwise have had, the Welsh Government has committed to providing funding to the SENTW to make the necessary arrangements to develop systems and processes, as well as guidance and information for potential parties to appeals and claims. This funding forms part of the Welsh Government's £20 million package of investment in the ALN Transformation Programme.

### **How will the impact of the proposal be monitored and evaluated as it progresses and when it concludes?**

The Education Tribunal for Wales will publish annual reports and maintain a public facing website. The website will also contain statistics about cases and appeals. The annual reports will include a breakdown of cases and appeals enabling detailed analysis. However, given the different roles SENTW will have to the new Tribunal, comparison between the two systems will not be possible. Nor would it be appropriate to judge the success of the new system on the number of cases going to tribunal alone.

The Welsh Government has appointed five ALN Transformation Leads whose role includes monitoring and reviewing implementation arrangements during the transition period.

A post-implementation review will form part of the Welsh Government's overarching monitoring and evaluation model, which itself will consider implementation in stages, specifically:

- readiness – to assess the extent to which delivery agents are prepared for the changes;
- compliance – to monitor how effectively organisations are adhering to the new legislative requirements once they take effect; and
- impact – to evaluate the extent to which the legislative and wider policy changes are being embedded and making an impact on outcomes for learners.

This compliance, impact monitoring and evaluation approach will be further supported through ongoing inspection and review arrangements led by Estyn.

## DECLARATION

### Declaration

I am satisfied that the impact of the proposed action has been adequately assessed and recorded.

Name of Deputy Director: Ruth Conway  
Department: Education and Public Services  
Date: 3<sup>rd</sup> December 2018

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