

SL(5)775 – The Education Tribunal for Wales Regulations 2021

Background and Purpose

These Regulations set out the procedure to be followed in proceedings before the Education Tribunal for Wales. The Regulations make provision relating to the exercise of that Tribunal's jurisdiction under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 ("the 2018 Act") which concerns additional learning needs appeals, and Chapter 1 of Part 6 of the Equality Act 2010 ("the 2010 Act") which concerns claims of disability discrimination in respect of school pupils.

Procedure

Draft Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 10(1)(b), it appears that the words "the notice of" should appear in the wording preceding the subparagraphs (rather than at the beginning of subparagraph (i)) as it applies to *both* subparagraphs, rather than just subparagraph (i).

Paragraph (1) would read as follows:

(1) An appeal to the Tribunal must—

(a) be made in writing in accordance with these Regulations, and

*(b) be received by the Tribunal no later than the first working day after the expiry of 8 weeks beginning with the date when **the notice of**—*

(i) the decision of the local authority, or FEI governing body, and

(ii) the right to appeal under Part 2 of the 2018 Act against the decision, was given.



2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 18(8), the words “so that” have been omitted before “the respondent can be represented”. The effect of the omission is that it obscures for the reader the purpose of postponing or adjourning a hearing under that provision (i.e. for the respondent to be represented following reinstatement of their entitlement to be so represented). The omission does not occur in the Welsh version of these Regulations.

The omission has not been repeated in regulation 19(8), which is a broadly similar provision.

3. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 55(1) reference is made to a written application being made to the “Education Tribunal”. It appears that this should be a reference to “the Tribunal” as that is how the Education Tribunal for Wales is referred to throughout the remainder of the Regulations. Any departure from this may cause confusion for the reader.

4. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulation 57 refers to “the Court” but there is no definition of this term in any of the Regulations, the 2018 Act or the 2010 Act. Failure to define the term may lead to confusion as to what it being referred to in Regulation 57.

5. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 64 is included in the Regulations under the general heading of “*Children who lack capacity and case friends*”. Regulation 64 does not appear to be related at all to this general heading, but relates instead to recommendations of the Education Tribunal to an NHS body, presumably under section 76 of the 2018 Act (although this is not clear from the Regulations). It is noted that headings in Regulations do not have legal effect but including a regulation under a non-related heading is likely to cause confusion for the reader and does not promote accessibility of the law.

Merits Scrutiny

The following 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 Senedd.

These Regulations (which come into force on 1 September 2021) contain references to provisions in the 2018 Act that have not yet been commenced. Specifically, reference is made to sections 13, 14, 18, 19, 23, 24, 68, 70, 71, 72, 73, 79, 81, 84 and 85.



The relevant provisions of the 2018 Act will therefore need to be brought into force by 1 September 2021 pursuant to a Commencement Order made by the Welsh Ministers under section 100(3) of the 2018 Act in order for the relevant provisions of these Regulations to operate effectively.

Paragraph 3.7 of the Explanatory Memorandum to these Regulations confirms that:

“The Welsh Ministers intend to exercise their commencement powers (under section 100 of the Act) to provide for functions under the Act to come into force on a phased basis from 1 September 2021.”

Welsh Government response

Technical Scrutiny point:

1. The appeal rights relating to ALN matters are given by the Act to children, their parents and to young people. It is the notice of the decision that triggers the timescale for bringing the appeal in regulation 10. If the alternative suggested drafting was accepted, it is considered that this would cast doubt on the position.
2. It is understood why the issue has been raised in relation to regulation 18(8). However, in relation to the English text, it is not agreed that the omission obscures the purpose of the adjournment or postponement. It is clear that the adjournment or postponement (as appropriate) must be necessary. It is clear that the respondent in the circumstances can be represented as a result of the grant of permission. So it is clear that in the circumstances there could be an adjournment or postponement for the purpose of the respondent being represented. The Welsh text does not contain the omission and can be used as an interpretative aid. However, if there is a later opportunity to re-visit the drafting and amend this for clarity, this will be considered.
3. The reference to the “Education Tribunal for Wales” in regulation 55(1) is set in parentheses and is simply a reference to the title of section 81 of the ALNET Act 2018 which is referred to in regulation 55(1). The title of s.81 is “Appeals from the Education Tribunal for Wales to the Upper Tribunal”. The reference to “Education Tribunal” later in regulation 55(1) whilst not consistent with the way that that tribunal has been referred to in the remainder of the instrument nevertheless leaves no reasonable room for doubt as to its meaning. In that context, and on the basis, it is considered that the use of this term is not inappropriate and will be readily understood.
4. Any appeals from the Upper Tribunal will be heard by the relevant appellate court, namely the Court of Appeal or the Supreme Court. The legislation dealing with this is the Tribunal, Courts and Enforcement Act 2007, which is cited in the definition of Upper Tribunal in the Regulations. The reference to “Court” acknowledges that position. The wording in regulation 57 replicates the existing drafting in regulation 60 of the Special Educational Needs Tribunal for Wales 2012 Regulations which currently deal with the tribunal procedures relating to the



special educational needs system under the Education Act 1996. We have not received any indication during the consultation process or at any other point that this provision is not readily understood.

5. We thank the Committee for identifying this point, and are seeking to remedy this matter via a correction slip, although we do not believe it affects the operation of the legislation.

Merit Scrutiny point:

The Government's position relating to commencement of the legislation relating to the ALN legislation package was explained in the EM as is noted and cited in the report. No further response in relation to the commencement is requested.

Committee Consideration

The Committee considered the instrument and Government response at its meeting on 22 March 2021 and reports to the Senedd in line with the reporting points above.

