

Public Administration and a Just Wales: Education Summary Report and Recommendations (March 2020)

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LIST OF ABBREVIATIONS

ALN	Additional learning needs
ALP	Additional learning provision
AJTC	Administrative Justice and Tribunals Council
CAJTW	Committee for Administrative Justice and Tribunals Wales
CCW	Children's Commissioner for Wales
DELCO	Designated Education Clinical Lead Officer
EA	Education Act
ECHR	European Convention on Human Rights

EIA	Education and Inspections Act
ERA	Education Reform Act
EWM	Education (Wales) Measure
FGCW	Future Generations Commissioner for Wales
FOI	Freedom of information
HRA	Human Rights Act
IDP	Individual Development Plan
LA	Local authority
NI	Northern Ireland
NIPSO	Northern Ireland Public Services Ombudsman
PSOW	Public Services Ombudsman for Wales
SEN	Special educational needs
SEND	Special educational needs and disability
SENTW	Special Educational Needs Tribunal for Wales
SSFA	School Standards and Framework Act
SSOWA	School Standards and Organisation (Wales) Act
UNCRC	UN Convention on the Rights of the Child
WLC	Welsh Language Commissioner
WTU	Welsh Tribunals Unit

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Introduction

1. Our research examines administrative justice and education dispute avoidance and resolution in Wales. Administrative justice concerns ‘how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them’.¹ The Commission on Justice in Wales (‘Justice Commission’) recognised that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.²
2. This is a short version of our report on administrative justice in relation to education. The ‘Education report’ is part of a larger project on administrative law and justice in Wales. The general report, *Public Administration and a Just Wales*, focuses on general Welsh public administrative law across public services provision, and on Welsh policies about good administration, well-being, human rights and equality. That Report also examines the key institutions in the Welsh administrative justice system, how the system is designed and overseen, and suggests reforms. Another report examines administrative justice in the context of social housing and homelessness. The ‘Housing’ and ‘Education’ reports are case-studies about how the various elements of administrative justice (law, information, advice, avoiding disputes, dispute resolution and learning to improve performance) function in particular areas of Welsh public administration and impact on people’s daily lives.
3. Education is a devolved area. Over the years, the body of primary law on education for Wales, and the context in which it operates, has developed, for example, legislation on additional learning needs (ALN) is a recent flagship piece of Welsh legislation. In terms of administrative justice, education is one of the most complex devolved areas with many different bodies involved, numerous sources of law setting out these bodies’ powers and responsibilities, and a range of different procedures for challenging or questioning decisions of the bodies which provide public services in education.
4. Our project deals with maintained primary and secondary schools. This summary focuses on the areas which either evoked the greatest controversy in our workshops and groups or on which we consider that we have a particular contribution to make to existing research and scholarship. Accordingly, other areas covered in the full education report (eg school organisation, transport, attendance and home school) have been omitted in this summary even though they are of great importance to the people affected by them and also show the interconnected nature of the administrative justice system in education.

General questions and concerns

5. Stakeholders and expert responses to our research highlighted the following potential causes of disputes: legal complexity; a lack of understanding of law; resources; lack of good quality advice and accurate information; and navigating numerous redress systems.

¹ UK Administrative Justice Institute: <https://ukaji.org/what-is-administrative-justice/>

² Justice Commission, *Justice in Wales for the People of Wales* (October 2019) para 6.1.

Understanding of the law

6. We heard that sometimes those applying the law have a poor understanding of it. It was suggested that within some local authority (LA) departments there is confusion around the distinction between what is required by the law and what is actually the authority's own policy, suggesting greater support and training for LA staff might be needed. The offer of such training might also be valuable for local councillors who are approached for assistance and advice but for whom there is no specific training on administrative justice redress.

Recommendation 1: More dedicated and specific training on administrative justice issues and routes to redress should be made available for local authority staff. Such training should use clear practical examples in order to help decision-making staff understand the differences between mandatory legal requirements, discretionary powers and 'due regard' duties. In addition, it should be clear what is the local authority's own policy as to how the law is implemented and what is legally required.

Navigating redress pathways

7. The Justice Commission observed that the 'processes of the court and tribunal system are not easy to understand without advice'³ and that the 'current system for challenging public bodies in Wales is complex.'⁴ Piecemeal development of education law has led to the evolution of a range of different specific redress systems, each dealing with different individual problems, such as admissions, exclusions, or the curriculum. Even when the substantive law has been consolidated, the redress systems have not been. Other education areas rely on the complaints systems within LAs and the general powers of intervention of both LAs and the Welsh Ministers. There are also some general redress systems not specific to education such as judicial review and complaints to the Public Services Ombudsman for Wales (PSOW).
8. There are other bodies whose role is to monitor aspects of education, children's rights or well-being principles (eg Estyn, the school inspectorate, the Children's Commissioner for Wales (CCW), the Future Generations Commissioner (FGCW)). These bodies sometimes provide assistance in relation to individual complaints (eg the CCW). Some difficulties in understanding the role of these bodies is evident given individual complaints are sometimes made to those (such as Estyn and the FGCW) who have no individual complaint handling role.
9. Different redress routes lead to different outcomes, eg a legally binding decision on judicial review or a recommendation (usually followed) from the PSOW. Some routes are more formal (eg judicial review) than others (eg Education Tribunals or PSOW). Some may be more local (eg sittings of a relevant tribunal). Some may be easier to access without specialist knowledge (eg PSOW). Some may be speedier than others, and some more expensive. Awareness of, and ability to assess, this range of differences would be necessary

³ Justice Commission, para 5.56.

⁴ Justice Commission, para 6.16.

⁵ The Special Educational Needs Tribunal for Wales (SENTW) will be renamed the 'Education Tribunal' on entry into force of the Additional Learning Needs and Education Tribunal (Wales) Act 2018. For simplicity, we have used 'Education Tribunal' here to cover the existing SENTW and new Education Tribunal.

to make an informed choice about which to pursue. Making the wrong choice, if one exists, could lead to missing a time limit or incurring extra costs.

10. It can also be time consuming and exhausting where different routes must be taken, for example when dealing the education aspects of special educational needs (SEN) while also complaining to an NHS body about health aspects. We heard from parents who were dealing with a large number of different key workers in relation to the education, social services and health aspects of issues in relation to an individual child. There are also questions about the costs and efficiency of running a range of, sometimes unconnected, systems.
11. The Justice Commission considered that it is necessary to ‘unify courts and tribunals, both for civil justice and administrative justice’,⁶ and, in the short term, recommended ‘better co-ordination in relation to administrative justice so that the public have a clear understanding on where to go to have their disputes resolved.’⁷ While there is valuable information on different individual websites, such as those of the Education Tribunal and the PSOW, we consider it essential for the public to be able to access information about different redress systems in one place, and to understand how they relate to each other.

Recommendation 2: We recommend that Welsh Government considers whether the Law Wales site might indicate in one place the different redress systems of relevance to education disputes and explain briefly how they relate to each other.

What works and what does not work

12. Parents value transparency and fairness. Good home-school communication is viewed generally as helping to avoid disputes and preventing existing disputes from escalating. However, LA staff observed that the need to follow certain procedures can sometimes be perceived by parents as ‘distant’ or ‘clinical’.
13. We heard that head teachers can feel exposed as regards decisions about discipline within a school, and sometimes there is aggression towards them, especially when social media is used to make public criticisms. External bodies observed that some schools are good at engaging parents, making real efforts to support vulnerable parents. From the perspective of governors, we heard: ‘If there is effective parental engagement, issues get resolved early. Being open is important including having all school policies readily available. Sometimes just saying sorry if appropriate at the outset is what is needed.’
14. While we heard examples from parents of genuine support received in relation to SEN, especially from some SEN co-ordinators, teachers and health professionals, many parents, including some who had succeeded at the Education Tribunal, told us they did not feel they had been listened to by schools and by LAs. Parents who had gone to the Education Tribunal described positive impressions about its operation, especially in relation to clarity on the law and how the Tribunal created an atmosphere conducive to hearing from the child or young person. However, they considered there to be significant financial obstacles to going to Tribunal, putting this out of many parents’ reach.

⁶ Justice Commission, para 5.56.

⁷ Justice Commission, para 6.60.

15. Sometimes it is not the substantive outcome giving rise to problems, but the way in which the process is conducted. It might be that there is a delay, or that the ‘messaging was not quite right.’ This is evident from PSOW’s casework, where, on occasion, complaint handling is found to have been flawed even where the outcome is a perfectly proper result.
16. Early intervention can pay dividends and it was suggested that more focus could go into avoiding problems. For example, if there were an offer of advocacy to children who had had a fixed term exclusion, work could be done on re-engagement and avoiding further problems within schools and later in life: it was argued in one of our workshops that money spent on advocacy sorting out low level issues in schools would be much more valuable and cost effective than spending money later on young people in the criminal justice system.

Recommendation 3: We recommend that Welsh Government assesses the value of conducting an audit of the availability of advocacy services in education for all children and young people, including those who are not currently entitled by statute to advocacy services, including whether advocacy is provided early enough to prevent problems arising or escalating.

The legislative framework and consolidation

17. A frequent comment during our research concerned the plethora of legal instruments – Acts, regulations and guidance, as well as case law – and that this can prove confusing, especially for lay people. Statutes must be looked at ‘as amended’. There is also the complication of whether the law applies in Wales or in England. People indicated that the law is hard to find. Someone who had served as a governor said that ‘you really need to know what you are looking for. There is nowhere with *all* the regulations etc in one place.’
18. Currently, Welsh Government’s Law Wales website provides a list of ‘key legislation’ and some topic headings. But it is not obvious from the title of any Act (many are called ‘Education Act’) what its focus is, and thus far Law Wales does not yet have all subject matters covered in the list of topics.
19. Education law was consolidated in the Education Act (EA) 1996 bringing together provisions on key issues and representing a clear starting point for finding the law on education; although regulations, guidance and case law would also have to be consulted. Instead of amending this Act when needed, the process of moving topics to other Acts began just two years later with the School Standards and Framework Act (SSFA) 1998. Such developments should be avoided in any new codification project.
20. The EA 1996 remains, but an examination of its current list of sections in force reveals how much has been moved to other legislation. For example, on discipline within schools, the head teacher’s power to exclude a pupil is provided for in the EA 2002 but the processes for making and challenging exclusions are found in Regulations. There is further detail in Welsh Government Guidance. The more general responsibilities of governing bodies regarding school policies on good behaviour and discipline are found in the Education and Inspections Act (EIA) 2006, also setting out requirements for head teachers regarding the school behaviour policy, and the conditions applying to imposition of disciplinary penalties other than exclusion. The prohibition on corporal punishment

remains in the EA 1996, although this section is referred to in the EIA in order to clarify that sections in the EIA on using reasonable force in certain circumstances do not permit corporal punishment.

21. From the original Part V of the EA 1996 on the curriculum, a few provisions remain regarding religious education, sex education (including a parent's right to withdraw their child), provisions on avoiding political bias or indoctrination, and the system for complaints about the curriculum. Other provisions on religious education (including those on withdrawal of learners from religious education and collective worship) are found in the SSFA 1998. In section 409 of the EA 1996 on curriculum complaints, one must cross-refer to the School Standards and Organisation (Wales) Act 2013 (SSOWA) to find the Welsh Ministers' powers of intervention if a dispute is not resolved. Otherwise, the key legislation on the curriculum at present is in Part 7 of the EA 2002 which sets out the national curriculum for Wales. The proposed changes to the curriculum will provide a welcome opportunity to consolidate the law as regards the curriculum and it is important that the provisions regarding dispute avoidance and resolution are dealt with as well as the substantive changes.
22. If individual areas of education are consolidated when the opportunity arises due to policy changes being legislated for, eventually these individual consolidations will form a 'code' of primary legislation. At present, the most accessible instruments, in terms of readability and intelligibility for a lay reader, are the Codes or Guidance documents provided by Welsh Government. It is essential that they are taken into account in the process of clarifying, consolidating and codifying Welsh law and we recommend that the eventual structure should provide clear sign-posting to accessible Codes and Guidance, and ensure that these resources, and the electronic links to them, are kept up to date.
23. The predominant view among our research participants was that it would help if all the relevant law, primary and secondary, and guidance could be found in the one place.

Recommendation 4: We recommend that Welsh Government should regard education law as a priority for consolidation. Such consolidation could take place steadily topic by topic, with the intention of producing a series of Acts, with descriptive titles, which codify the law on specific topics and which, together, would form the Education Code for Wales. The codification process will need to grapple with the place of case law and what currently exist as Codes or Guidance within a codified system, and how to ensure that these are made visible and accessible to the general public.

Recommendation 5: We recommend that when legislation is proposed regarding the changes in the school curriculum, the opportunity is taken to bring together in one place all the provisions currently in different pieces of legislation on the curriculum regarding its content, delivery and systems for resolving disputes.

The availability of advice and support

24. Limited access to information and advice is a problem, particularly outside the major urban areas of south Wales. Sometimes professionals find that people have received advice that is plainly wrong. Some solicitor practices are providing pro bono advice but this is a heavy responsibility on small practices. Third sector bodies such as SNAP Cymru and Tros Gynnal Plant are regarded as playing a valuable role, but their ability to do so is limited by

availability of resources. Although there is a vast amount of information available, not all parents know how to find it and it is not always clear how it all connects together.

25. Advocacy has the potential to make a big difference. The all-Wales approach to statutory advocacy is regarded positively but it is the non-statutory side (for children who do not have a social worker) that might fall down. A view shared by many is that the earlier advocacy support can be offered, the greater the chance of avoiding problems arising or escalating.
26. Throughout the project we heard from families that it was essential that advice was available from bodies independent of both LAs and schools.

Resources

27. A shortage of resources can lead to problems. This was felt to be the case when schools struggle to provide for SEN or disability. However, it was also felt that sometimes issues regarding resources are more to do with lack of understanding of what the law requires. Problems with capacity and resources in the education sector were viewed as combining with difficulties accessing advice, and challenges in understanding law and policy, creating a ‘perfect storm.’

Key bodies and systems in education

28. This summary report focuses on the key bodies with responsibilities in delivering and administering the provision of primary and secondary education and those involved in dealing with disputes. The full Education report covers a wider range, including Estyn (the schools inspectorate), the Wales Audit Office, and Regional Education Consortia).

Welsh Ministers and local authorities

29. Welsh Ministers have general legal duties to ‘promote the education of the people’ in Wales⁸ and to exercise powers in respect of bodies that receive public funding in order to provide education and specifically to run schools. The EA 1996 makes general provision for the Welsh Ministers to determine certain education disputes between an LA and a school governing body, and between two or more Welsh LAs. There are also powers of intervention in relation to concerns regarding LAs’ exercise of their functions. Specific powers and duties exist in particular pieces of legislation.
30. Welsh LAs have a broad range of duties, some phrased in general terms such as to secure the provision of ‘efficient’ primary and secondary education to meet the needs of the population of their area, and more specific duties around providing for sufficient schools that are properly resourced. LAs have a range of powers to establish and maintain schools, and to secure provision of full-time and part-time education for persons over compulsory school age. Specific duties relate to planning for, and delivering, Welsh medium education. Each LA must arrange for the provision of ‘suitable education’ at school or otherwise for children of compulsory school age who, for various reasons, require education other than in school. They also have powers of intervention to deal with problems within maintained schools concerning the level of pupil performance, safety or the management or

⁸ Education Act 1996, s10 (EA 1996).

governance of a school or if the governing body or head teacher has failed to comply with a duty under the Education Acts.

Governing bodies and head teachers

31. Maintained schools must have a governing body and head teacher. Head teachers are responsible for the school's internal organisation, management and control, for advising on and implementing the governing body's strategic framework, and for performing any functions delegated to them by the governing body. Governing bodies provide strategic leadership and accountability within schools and have general responsibility for the school's conduct: they must set aims, objectives, and policies, and targets for achieving them. They must also offer support and constructive criticism to the head teacher. Governing bodies are involved in redress systems relating to general school complaints and exclusions.
32. The Education (Wales) Measure (EWM) 2011 requires LAs to ensure that every governor is provided, free of charge, with the information the LA considers appropriate to discharge the governor's duties. Regardless of more specific duties in any regulations, the EWM requires an LA to secure for every governor, training which the LA considers necessary for the discharge of their functions. Additionally, Welsh Ministers may require LAs to secure the provision, free of charge, of 'prescribed training' to 'prescribed governors' of maintained schools.
33. A 2013 report for Welsh Government questioned whether all governors were familiar with the sources of information available to them. Given the huge role played by governors, who are volunteers, it is important that the level of support available, and take-up of that support and training, are monitored. Responses to our research suggested that governors' knowledge and understanding of relevant law and policy varies. We question whether additional topics, especially concerning complaint handling, should be added to mandatory training for all or some governors. A balance is needed between burdens taken on by governors and the acquisition of necessary skills. Some of our participants were in favour of additional mandatory training, others were concerned at the demands being placed on volunteers and the risk that this would affect recruitment of governors. We also heard doubts as to whether existing mandatory training was being delivered in the same way across Wales: there was a perception that support received by governors is varied. Some research participants felt that particular areas of law were less understood than others, disability discrimination law being an example.

Recommendation 6: We recommend that local authorities should consider:

- i. the take-up by governors of the training that is offered by the local authority;
- ii. whether it would be useful for Welsh Government to extend the scope of the topics covered in the training for governors which is mandatory.

Recommendation 7: We recommend that the Welsh Government should consider:

- i. whether it would be valuable to gather information from local authorities on the level of take-up of training for governors that is offered by local authorities;
- ii. whether it would be valuable to consult with local authorities, school governors and other interested parties as to whether additional topics should be included within the training that is mandatory for governors; and
- iii. whether to exercise its powers regarding the scope of mandatory training for governors.

The Public Services Ombudsman for Wales (PSOW) and Welsh Commissioners

34. The PSOW has jurisdiction to examine complaints of alleged maladministration and service failures within most public bodies in Wales: this includes LAs, and the independent appeal panels constituted by them for admissions and exclusions, but not school governing bodies (except when they are dealing with pupil admissions to maintained schools). The legislation expressly excludes from the PSOW's jurisdiction any matters relating to the giving of instruction or conduct, curriculum, internal organisation, management or discipline.
35. Complaints concerning education have constituted a small but consistent percentage of overall PSOW complaints, usually about 3% or 4% per-annum. The main topics complained about include SEN, transport and school admissions. Although complaints are brought by individuals, there is wider value in recommendations that authorities review their general arrangements for dealing with the issue addressed. Recommendations made in admissions cases include improved training for panel members and clerks, and for reviews of the admissions policies to be conducted.
36. In Northern Ireland (NI), all publicly-funded schools (more than 1100) are within the jurisdiction of the Northern Ireland Public Services Ombudsman (NIPSO). Once the internal school complaints process has been exhausted, a complaint may be made to the NIPSO. An extension to the PSOW's jurisdiction in this way would have resource implications. However, it is worth monitoring trends in NI and considering whether, with the publication of NIPSO decisions in these cases, there is greater scope for lesson learning than when the complaints process is wholly internal to schools.

Recommendation 8: That Welsh Government and the office of PSOW monitor the experience in NI regarding schools coming within jurisdiction, including any information regarding the additional resources required, and to consider whether a similar development would be worthwhile in Wales.

37. A distinguishing feature of administrative justice in Wales is the establishment of Commissioners with varying powers and remits: the Children's Commissioner for Wales (CCW), the Welsh Language Commissioner (WLC), and the FGCW. Legislation requires the PSOW and Commissioners to work together and a Memorandum of Understanding has been concluded between them to facilitate this. The establishment of Commissioners, and granting 'own initiative powers' to the PSOW, are evidence of a proactive, collaborative and long-term approach in Wales, seeking to improve decision-making and prevent problems from arising in service delivery and administration generally.
38. The CCW's powers to review, examine and provide assistance have been exercised in the education sphere, which has been one of the top two areas in terms of individual requests for assistance received by the office. The CCW does not have powers to determine disputes or require other bodies to provide redress but the Justice Commission has observed that the 'name and shame' function of the Commissioners generally has 'potential to influence the culture of public bodies and how those bodies exercise their functions.'⁹ The CCW has highlighted problems affecting groups of children and played a significant role in promoting a rights-based approach for children in education.

⁹ Justice Commission, para 6.57.

Judicial review and the Administrative Court

39. Where areas of education law provide for an initial complaint but no further route to redress, an individual may be able to seek judicial review in the Administrative Court. According to our research (from Administrative Court Office data), 43 education judicial review claims have been issued against Welsh public bodies in the Administrative Court in Cardiff between 1 May 2009 and the end of April 2018, making education one of the most frequently litigated areas of devolved decision-making through judicial review. However, owing to limited specialist legal provision in North and Mid-Wales, its use has been South Wales centric.
40. There are a number of law firms in South Wales with significant specialist experience in education law claims, including judicial review, so it might not be especially difficult (certainly for people in the South) to access privately funded legal advice. However, access to state funded (legally aided) advice is a more complex matter.
41. The general picture is that judicial review can provide an effective route to redress for individual children, young people and families, and that this may lead to the resolution of broader issues for others. Frequently, it is the threat of judicial review, the letter before claim, that leads to the resolution of the issue. However, there are limits to its usefulness as a remedy in education. Judicial review is effectively a ‘gap filling’ procedure where the individual has no specific right to redress, or where they have exhausted all other avenues yet still consider there to have been a legal flaw in a relevant decision. In terms of the subject matter, some duties in education law are expressed in very broad terms and would not be amenable to judicial review, short of a total default in duty by the relevant authority. Judicial review is always a review of the ‘legality’ rather than the ‘merits’ of a decision, and in areas of social and economic policy, especially where resources are implicated, there is likely to be even greater judicial deference to the political decision-makers. In practical terms, access to the procedure is highly dependent on both awareness of legal rights and financial resources. This means, as barrister Tom Hickman QC puts it, that judicial review is simply not available for most people.¹⁰

General duties relevant to education: human rights and equality

42. All the bodies involved in making legislation and policy, and delivering education and associated redress, are bound by the Convention rights set out in the Human Rights Act 1998 (HRA), and by the provisions of the Equality Act 2010. The Welsh Ministers must also have due regard to the UN Convention on the Rights of the Child (UNCRC) when making decisions.
43. The ECHR right to education which is applicable under the HRA is a weak right and has not added to the protection of the right to education. The right of parents to have their religious and other beliefs and convictions respected in relation to their children’s education may be more of a constraint, but there are still considerable limits. Thus far, the right to a fair hearing has not been viewed as applicable in relation to disputes such as exclusion hearings.

¹⁰ T. Hickman, ‘Public Law’s Disgrace’, U.K. Const. L. Blog (9th Feb 2017) (available at <https://ukconstitutionallaw.org/>)).

44. From the early years of devolution, the UNCRC has figured prominently in Welsh law and policy. The focus on equality in education may result from the UNCRC influence or be a separate influence in its own right. Many education issues, such as bullying, or narrowing the attainment gap between different schools, have been framed as aspects of the right to education. There has been considerable emphasis on making legislative provision for learners' participation rights in schools, exclusion hearings and SEN / ALN appeals and claims, in contrast to the position in England.¹¹ This has not however translated into major change in practice: for example, there is extremely limited evidence of learners actually exercising their right to claim or appeal to the Education Tribunal.¹² However, the Tribunal's President has noted that the 'very nature of the legislation around children's rights to appeal has improved the culture of listening to and hearing the voices of our children and young people.'¹³ This remark chimes with the feedback we had from some parents who found the Tribunal's atmosphere conducive to young people's participation.
45. While there are some obvious indications of the influence of human rights and equality duties, it is not always clear whether the human rights and equality agenda is specifically and consistently feeding into the education administrative justice system, especially as it operates in practice.
46. We heard concerns from parents and professionals that equality legislation in schools appears to be poorly understood, especially in comparison with the level of understanding of the SEN legislation. Without further research it is difficult to explain this. It was suggested to us that greater awareness-raising and training might have taken place in relation to the devolved area of education, rather than in the generally reserved area of equality. Alternatively, it may be that the cross-cutting law on discrimination presents greater complexity and challenges to those applying it in specific situations than the single-area of SEN/ ALN law.

Recommendation 9: That Welsh Government considers whether the appeal rights provided for in education legislation in Wales are being used in practice, and, if not, considers how practical barriers to their use may be addressed.

Recommendation 10: That consideration must be given to how to raise the level of understanding in schools regarding discrimination, in particular disability discrimination.

Complaints within schools

47. Unless legislation provides for a specific redress system, the starting point for pursuing a complaint is within the school itself. The School Complaints Guidance sets out the general principles that should govern complaint handling. It recommends a three-stage process involving a member of the school staff other than the head teacher, then the head teacher,

¹¹ School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033, reg 2 where 'the relevant person' who may complain or seek review is the parent unless the learner is 18 or over. For Tribunal cases, the Children and Families Act 2014, s51, provides for appeals by the parent or a young person over compulsory school age.

¹² D Holtom, S Lloyd-Jones and J Watkins, *Evaluation of a Pilot of Young People's Rights to Appeal and Claim to the Special Educational Needs Tribunal for Wales* (Welsh Government, 2014). See also, O. Drummond, <https://ukaji.org/2016/11/30/child-participation-at-special-educational-needs-tribunals/>

¹³ SENTW, Annual Report 2014-15 (October 2017), p 3.

and finally the school's governing body which it is recommended should establish a committee to handle complaints.

48. When issuing its School Complaints Guidance in 2012, Welsh Government found evidence of high levels of dissatisfaction among parents/carers with complaints handling. It was concerned that not all governing bodies had a complaints procedure or publicised it, and that some failed to comply with their own procedures or had inadequate procedures. Our findings raise the question of whether there is a need to further investigate and review how complaints systems are operating post issue of the 2012 Guidance.
49. We heard from some LA staff that governors and LAs working objectively through technical processes can make parents feel that they are being treated in a detached 'clinical' manner about something immensely important to them. The staff considered that there could be more awareness-raising, not just of the required procedures, but also that their purpose is to allow information to be gathered fairly, and not to be obstructive.
50. Feedback in our events stressed that there is still significant variation between different governing bodies and indeed different governors within the same body: some are viewed as skilled and knowledgeable and some less so.
51. We heard that parents often found it hard to see the governors as unbiased and independent adjudicators. We discuss this further in our section on exclusions. We heard of one instance where it was felt that someone independent was needed to investigate an issue: this was resolved by governors from other schools committing the equivalent of 3 days' work to the issue, perhaps underlining how dependent school governance is on the goodwill of volunteers.
52. As noted earlier in this report, the suggestion of compulsory focused training on complaint handling for governors was met with concerns that more mandatory training could put people off becoming governors. This is a heavy role for a volunteer work force and this fear is entirely understandable. We heard that governors may very rarely have to deal with a complaint, but when they do it can be complex, serious and challenging for them. If further training on complaints handling were to be provided for school governors, the PSOW's reports might be drawn upon as good practice. We refer to our earlier recommendations (Recommendations 6 and 7) that the scope of mandatory training for governors requires consideration and (Recommendation 8) that experience in NI should be considered regarding whether it would be wise to extend the PSOW's jurisdiction to include schools.

Admissions

53. Admission to maintained schools and the process for resolving disputes are dealt with in the SSFA 1998, regulations, and statutory Codes on the making of admission arrangements and decisions (Admissions Code) and on appeals against individual admission decisions (Appeals Code).
54. Whilst parents may express a preference for a school, their wishes will be accommodated only 'so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure':¹⁴ this limitation applies if a school

¹⁴ SSFA ss 86(1) and 86(3)(a.)

were oversubscribed. Admissions arrangements must set the admissions number for each school and establish the criteria for allocating places if the school is oversubscribed.

55. LAs must establish an admissions forum for their area whose role is to advise the admissions authorities and monitor compliance with the Admissions Code. Ideally this should prevent disputes from arising concerning the lawfulness or fairness of arrangements adopted. A parent and other relevant bodies may refer objections about the admissions arrangements made by an admissions authority to the Welsh Ministers. In deciding whether to uphold an objection, the Welsh Ministers may consider whether it would be appropriate for changes to be made to the admissions arrangements, whether or not such is required to address the specific objection raised.
56. An appeal against an individual admission decision may be made to an independent appeal panel whose decision on an appeal is binding on the initial admissions authority, and on the relevant school governing body.
57. An appeals panel may determine that a place should be offered to a child if satisfied that the child would have been offered a place if the school admission requirements had complied with the Admissions Code and/or the SSFA, or if the panel decides that the school's admission arrangements had not been properly implemented, or if the decision was not one which a reasonable admission authority would have made in the circumstances. There is no further appeal from the panel's decision. The options for a parent or young person remaining dissatisfied would be either a complaint to the PSOW or judicial review in the Administrative Court.
58. The system for dealing with appeals against individual admission decisions has been considered by a number of bodies concerned with administrative justice, including the Administrative Justice and Tribunals Council (AJTC), the Committee for Administrative Justice and Tribunals Wales (CAJTW) and the Justice Commission.
59. While LAs collect data on school admission appeals, Welsh Government does not collect statistics on the number or outcomes of appeals in Wales. Such statistics are collected in England. In its 2016 Legacy Report,¹⁵ CAJTW noted an estimate that there were approximately 600 school admission appeals in Wales each year but observed that Welsh Government had less information on admission appeals than on exclusion panels. There is therefore no Wales-wide overview of the admissions appeals system. Nor is it clear whether LAs' analysis of such data involves any consideration of the administrative justice aspects of appeals.
60. Some oversight was provided in the past when the now dis-banded Welsh Committee of the AJTC, and then CAJTW, occasionally observed admission (and exclusion) appeal hearings to monitor compliance with Welsh Government guidance. Their functions have not been replaced, so this element of oversight has been lost.
61. CAJTW also recommended that without 'systematic monitoring of local performance there is a considerable risk that the performance of Panels will not be consistent.'¹⁶ It also considered that training which is currently provided at local authority level would be better done at the national level. Welsh Government rejected these recommendations.

¹⁵ *Administrative Justice: A Cornerstone of Social Justice in Wales*, 2016 (herein after CAJTW 2016).

¹⁶ CAJTW 2016, para 52.

62. CAJTW also suggested that, along with exclusion appeals, admission appeals should be brought within the jurisdiction of the Education Tribunal. Welsh Government responded that the tribunal was ‘not the appropriate vehicle’ for these appeals. It is not clear whether this was down to resources or the subject matter of the appeals, CAJTW itself having observed that the potential resource implications for the tribunal would be significant with around 600 admission appeals every year.¹⁷ The timing of admissions appeals is likely to have been, and remains, an issue with a significant concentration of admissions appeals at particular times of the year. This might be difficult in terms of managing the resources of the tribunal, though the Welsh Government did not expressly address these concerns or provide consideration of an alternative means of redress. We would argue that the case for such a transfer of admission appeals to the tribunal seems to be less compelling than for exclusion appeals, but agree with CAJTW’s recommendations for training in both types of appeal panel to take place at a national level.
63. A less radical change would be to move the administrative functions for the admission appeals panels into the Welsh Tribunals Unit (WTU). CAJTW reported that Welsh Government had conducted a feasibility study of transferring the administrative responsibilities for the school panels into the WTU. This would have the advantage of enhancing the perception of independence of the appeal panels in the eyes of parents and learners.
64. An alternative to bringing the admission appeals within the Education Tribunal’s jurisdiction that was considered, but not preferred, by CAJTW was preserving the local panels but having them operate under the oversight of a national tribunal President.¹⁸ This issue of oversight was raised again by the Justice Commission where it expressed the concern that appeal panels ‘operate without any kind of judicial scrutiny save in those very rare cases in which an exclusion leads to an application for judicial review.’ Its conclusion was that ‘a thorough appraisal of LA appeal panels and oversight by the President of Welsh Tribunals of their decision-making processes is required.’¹⁹ The Justice Commission also recommended that:

‘All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh tribunals, should be brought under the supervision of the President’.²⁰

It is likely that the admissions and exclusion appeal panels can both be considered as ‘quasi judicial’ bodies as they make binding decisions about people’s legal rights and entitlements. However, supervision by the President of Welsh Tribunals may run counter to CAJTW’s previous concluded view, and also appears to extend the President’s own role beyond that anticipated in the Wales Act 2017 which established the office. These matters are discussed further in our report *Public Administration and a Just Wales*.

Recommendation 10

- i. **That Welsh Government, and any board or other body examining civil and administrative justice established in response to recommendations of the Justice**

¹⁷ CAJTW 2016, para 49.

¹⁸ CAJTW 2016, para 53.

¹⁹ Justice Commission, para 6.47.

²⁰ Justice Commission, para 6.50.

- Commission, considers how the issue of admission appeals can be considered from a *justice* perspective as well as from an education perspective.
- ii. That the President of the Welsh Tribunals supervisory function over appeal panels as quasi judicial bodies should include a review of the training for appeal panel members and the procedures, if any, for collecting data about the number of panels convened and their outcomes, as a means of identifying any trends in decision-making and to improve administrative practices in the future.
 - iii. That the administrative functions for constituting admission appeals panels are moved to the Welsh Tribunals Unit to enhance the perception of their independence from local authorities.

Exclusions

65. The EA 2002, and associated regulations and statutory guidance provide a specific regime on when the power to exclude may be used, and the processes to be followed for decision making and appeals. The power to exclude a learner is exercised by the head teacher and there is a right to make representations to the governing body. In the case of permanent exclusions, further appeal lies to an independent appeal panel. The Education Tribunal has jurisdiction in relation to disability discrimination and fixed-term, but not permanent, exclusions.
66. A pupil may be excluded for a fixed period (of up to 45 days in a single school year) or permanently. A decision to exclude should be taken only in response to serious breaches of the school's behaviour policy and where allowing the learner to remain in school would seriously harm the education or welfare of the learner or others in the school. Any exclusion must be made formally: it is unlawful for, what is in effect an exclusion, to be treated as a 'voluntary withdrawal' by parents or for an 'informal' exclusion to occur. Any such unlawful practice not only deprives the learner of education but also of their rights within the administrative justice system.
67. The 'relevant person'²¹ and the learner have the right to make representations to the governing body. Governing bodies must establish a discipline committee one of whose functions is to review the use of exclusion within the school. The discipline committee's role is only to review the exclusion imposed: it cannot increase the severity of an exclusion.
68. Exclusions Guidance states that 'Welsh Government would expect the LA to organise a training session for members on exclusions issues and for members to make every effort to attend.' There is, however, no legislative provision making such training mandatory.
69. The discipline committee must review the following types of exclusion and consider whether the learner should be reinstated:
 - A permanent exclusion;
 - A fixed-term exclusion which takes the pupil's total days of exclusion in the one term to 16 or more;
 - Any exclusion which would result in the learner losing the opportunity to take a public examination;

²¹ As defined in the Exclusions Regulations, reg 2, as the parent, the learner and parent, or the learner, depending on the learner's age.

- An exclusion which will take the pupil's total days of exclusion to between 6 and 15 days *and* the 'relevant person' wishes to make representations. (There is no requirement to convene a meeting for this length of exclusion if the relevant person has not made representations.)
70. For exclusions totalling 5 days or fewer in any one term where no examination opportunity is lost, the panel Chair must consider any representations that are made and *may* convene a meeting. For this length of exclusion, reinstatement may not be directed but a record of the panel's considerations may be placed on the learner's education record.
 71. The head teacher must comply with a direction to reinstate a learner.
 72. If the governing body decides that the pupil with a fixed term exclusion should not be reinstated, apart from the theoretical possibility of judicial review, no further redress system exists for the learner unless there is a possible claim to the Education Tribunal for disability discrimination. Welsh Ministers may consider complaints about the discipline committee's operation of the exclusion procedure, but they may not overturn the exclusion order (or consider complaints about the decision of an independent appeal panel).
 73. If the committee decides not to direct reinstatement of a permanently excluded learner, the 'relevant person' may appeal to an independent appeal panel. This panel must be constituted by the LA which must also appoint a clerk.
 74. The Clerk provides an independent source of advice on procedure for all parties and should not have served as Clerk to the discipline committee hearing. If the Clerk has not received legal training, and no member of the panel is legally qualified, the LA 'should consider whether the panel might benefit from an independent source of legal advice, especially where the appellant and/or the school is legally represented.' It is not therefore a matter of course that the clerk will be legally trained, and the language in this section of the Exclusions Guidance seems very weak given the importance of the Clerk's role.
 75. The hearing is not just a review of the discipline committee's decision but a full rehearing of the facts of the case (in contrast to the position in England where the Independent Review Panel is restricted to a review only). The appeal panel in Wales should decide whether, on the balance of probabilities, the pupil did what they were alleged to have done. The panel may uphold the exclusion, direct the pupil's reinstatement (either immediately or by a specified date), or decide that this is an exceptional case where reinstatement is not a practical way forward but would otherwise have been the appropriate direction. The appeal panel's decision is binding on the relevant parties. There is no further redress route from the appeal panel's decision other than by way of judicial review or a complaint to the PSOW that the process was not handled properly.
 76. If an appeal panel is regularly directing a school to reinstate permanently excluded learners, the panel should draw this to the attention of the LA so that it can discuss the underlying issues with the head teacher. This is an example of broader learning for the future from an administrative justice dispute resolution procedure.

Concerns about governing body hearings

77. One concern of research participants related to governing bodies' actual and perceived independence from the head teacher whose decision they are considering. In our participant sessions, a range of individuals also expressed concern about the perceived or actual variations in knowledge and skills among governing body members involved with exclusions and whether there was consistency across Wales.
78. A report commissioned by Welsh Government (referred to here as the 'Edinburgh Report',²²) considered the processes for challenging exclusion. The researchers received feedback from some LA staff who felt that discipline committee members 'were not always independent and neutral'.²³ Seven years on it could be useful to investigate whether this remains the case. Similar findings were made in a recent JUSTICE study on exclusions in England: JUSTICE considered that the school governing board panels lacked independence, resulting in a 'rubber-stamping' of the head teacher's decision.²⁴ Without further research, we do not know whether the same picture exists in Wales.
79. Whether there is a lack of independence in practice, it is hard to avoid the perception that a parent might have of the school reviewing its own decisions. As the President of the Education Tribunal commented to an Assembly Committee on governing body hearings: '...they could be definitely looked at as if they're unfair. I'm sure they're not, but from an outside perspective, they certainly look as if they're not because they're basically part of the body that's excluded the child in the first place.'²⁵
80. Another issue is consistency as between schools. The Edinburgh Report found variation in rates of exclusion across Wales which it considered suggested inconsistency in the application of Welsh Government's Exclusions Guidance. The Edinburgh Report referred to the previous 2008 Guidance, and it is possible that the clarity of the subsequent 2015 Guidance may have improved things: again, it would be useful to investigate. The Edinburgh researchers observed that LA staff considered schools to have an increasing understanding and awareness of their legal duties regarding exclusion, although there was some concern that this did not always extend to issues of equality and disability discrimination.
81. CAJTW and the Justice Commission made recommendations regarding exclusion appeal panels and the solutions they propose therefore deal only with permanent exclusions. For many learners with a fixed term exclusion, where the issue of disability discrimination does not apply, the only redress currently available is to the governing body discipline committee, and thereafter judicial review. The latter is not a practical reality in most cases, from the point of view of time and cost, and JUSTICE's recent research in England on school exclusions found only one such case. We are not aware of any such cases in Wales.
82. Some consideration of the system for reviewing fixed term exclusions is needed. This could be by seeking to improve the current system, replacing it or adding some further appeal or complaint.
83. Given the nature of a fixed term exclusion, even discipline committee hearings may take place after the exclusion has ended. So, a more complex route of appeal may be of little

²² G McCluskey et al, *Evaluation of education provision for children and young people outside the school system* (Edinburgh Report).

²³ Edinburgh Report, para 4.35.

²⁴ JUSTICE, *Challenging School Exclusions*, 2019, paras 4.2-4.3. (JUSTICE 2019).

²⁵ President Rhianon Walker, Oral evidence to the Assembly's Children, Young People and Education Committee on the ALN Bill, 2 March 2018, para 505.

practical benefit for all but the lengthiest exclusions. Instead, it might be more effective to emphasize more training for governors and ensuring consistency between authorities by greater collaboration between different authorities. While there is understandable caution about requiring more mandatory training for discipline committee members, this seems all the more necessary if there is no scrutiny of their decisions.

84. The President of the Education Tribunal appeared to contemplate a role for the Tribunal in relation to these cases:

One of my main bones of contention is the school exclusion appeals, which are basically dealt with, as you will know, by the actual school governors. ... I firmly believe that the tribunal is well placed to take on that sort of work as well in the future.²⁶

85. An alternative might be to extend the PSOW's remit, if not to all issues concerning schools, then at least to examining complaints about the procedures of discipline committees. The PSOW would not be able to direct reinstatement, but it might be appropriate to ask a discipline committee to revisit its decision with a view to changing it or placing a record of any changed view on the learner's record. Given that the PSOW can frequently achieve an early resolution or voluntary settlement without a full investigation, this might be a pragmatic way forward. This would be less radical and expensive than the proposal made by JUSTICE for exclusions in England, namely that a new post of Independent Reviewer is established to take on the role of the governing body committees on individual complaints.

Concerns about appeal panels

86. Welsh Government does not collect statistics on the number and outcome of exclusion appeal panel hearings, but in contrast to admission appeals, the numbers appear to be low. CAJTW observed that there had been 24 in 2011-2012 and the Edinburgh Report stated that numbers were very small. It is not clear whether this indicates that the bulk of permanent exclusions are regarded by parents and learners as fair and lawful, or if this is a sign of a lack of awareness of the system, or unwillingness to engage with it.
87. The low numbers of appeals to independent panels led the Edinburgh Report to express concern that panel members may, as a consequence, lack experience, potentially impacting on the fairness of outcomes. In its 2016 Report, CAJTW also commented: 'a system with such a low volume of exclusion appeals is unlikely to be performing optimally when it is administered by 22 different LAs who each will rarely experience a case.'²⁷ CAJTW considered that it would be difficult for LAs to appoint chairs with previous experience in panel work given the low number of cases. We heard from some LAs that exclusion appeal panels were managed and arranged by the regional consortium, and this may be an answer to some of the concerns raised here. It would be valuable to consider the extent to which this is the position.
88. CAJTW also considered that it would be more effective for LAs to have access to training on exclusion (and admissions) appeals that was planned and developed centrally. However, the recommendation to have nationwide training for panel chairs, members and clerks was

²⁶ Oral evidence to the Assembly Children, Young People and Education Committee regarding the ALN Bill, 2 March 2017, Para 505.

²⁷ CAJTW 2016, para 51.

rejected by Welsh Government which pointed out that individual appeal panels already have their own training programmes. Again, it may be that these concerns are being alleviated by action at the regional consortium level: it would be valuable to investigate further.

89. The Edinburgh Report recommended that in ‘the interests of equity and consistency, a National Appeal Panel should be established.’ In its 2016 Report, CAJTW recommended that the work of exclusion (and admission) appeal panels should become part of the jurisdiction of the Education Tribunal. This would ‘ensure a professional and independent cadre of panel chairs’ and, in addition, the Annual Reports produced by the Tribunal would make available an account of the national picture concerning school exclusion appeals. Such an overview at the national level is not currently available as statistics are not collected by Welsh Government.
90. We heard from some LA lawyers that they considered the system to be working well, with independent panels being well structured and lay chairs having sufficient knowledge and experience. They felt that some degree of oversight of exclusion panels would be appropriate but not to the extent of transferring the process to the Tribunal, which they feared would lead to a more formal process and would lose the direct local expertise. Their view was that parents’ concerns about the panels’ independence could be managed by a good introduction from the panel chair and the proper performance of the clerk’s role, with no discussions with the school before the panel. It was clear that there was some co-operation between groups of LAs so that people with expertise and experience worked across authorities on the panels. There are clearly different perceptions about the appeal panels: our feedback from parents who had been to the Tribunal did not indicate that they found the Tribunal overly formal, and we heard concerns that the ‘local expertise’ valued by LAs was perceived by some parents as a lack of independence from the schools.
91. Given the low number of exclusion appeals, this would be a more manageable addition to the Tribunal’s workload than putting admission appeals within its jurisdiction. It might also be argued that what is at stake for a permanently excluded pupil is greater than in relation to an admissions appeal, so the argument for this coming within the remit of the Tribunal is stronger. In addition, as CAJTW observed, given a high proportion of school exclusion cases concern learners with SEN, this would strengthen the argument for such appeals to come within the jurisdiction of the Tribunal. As with admissions, Welsh Government rejected this, concluding that the Tribunal was not the appropriate vehicle for these appeals. There was no reference to any distinction between exclusion and admission appeals or any indication of why the Tribunal was not the appropriate body.²⁸ This is in stark contrast to the view expressed by the current President of the Tribunal to the Assembly Committee examining the ALN Bill: she considered the Tribunal was well placed to take on this remit.²⁹
92. A less radical change would be to move the administrative functions for exclusion appeal panels into the WTU, thus enhancing the perception of independence of the appeal panels in the eyes of parents. CAJTW reported that Welsh Government had conducted a feasibility study on this.³⁰

²⁸ CAJTW 2016, recommendation 24 and Welsh Government response.

²⁹ President Rhiannon Walker, SENTW, Oral evidence to the Assembly’s Children, Young People and Education Committee on the ALN Bill, 2 March 2018, para 505.

³⁰ CAJTW 2016, para 49.

93. Annual Welsh Government statistics provide overall numbers of fixed-term and permanent exclusions, the main reasons for the exclusions, whether the excluded learners had SEN or were receiving free school meals. This makes it possible to detect trends and to identify the much higher rate of exclusion for learners with SEN than those without. However, statistics on the appeals process are not available. As CAJTW commented in its 2016 Report: ‘Data on the local authority based system concerning school admissions and exclusions appeals are simply not available on a Wales-wide basis as they are held in local authorities and are not collated nationally.’³¹ There is scrutiny of exclusions in a substantive sense, monitoring trends to identify disadvantage, discrimination and areas where improvements can be made to reducing the number of children excluded. However, focus is on an equal access to education perspective, and not from an administrative justice perspective regarding the quality of justice dispensed. Both perspectives are necessary.
94. As with admissions, CAJTW’s more modest proposal to have some system of overseeing the operation of exclusion appeals, including involvement of the office of the CCW, was rejected.³² This would have replaced the role of the Welsh Committee of the AJTC, and then of CAJTW itself, which had from time to time observed exclusion (and admission) appeal hearings in order to monitor their compliance with Welsh Government Guidance. It remains to be seen how Welsh Government will respond to the concerns of the Justice Commission that these panels now operate without any kind of judicial scrutiny, unless a rare case leads to a judicial review application. As noted above, the Justice Commission called for ‘a thorough appraisal’ of these panels and ‘oversight’ of their decision-making processes by the President of Welsh Tribunals.

Claims to the Education Tribunal regarding disability discrimination

95. Claims against fixed term (but not permanent) exclusions on grounds of disability may be brought to the Education Tribunal but represent a small fraction of the Tribunal’s work. The Tribunal President observed that in ‘the few claims that do proceed a common feature is an apparent uncertainty by responsible bodies about the duties that rest with them.’³³ It is unclear why the numbers are so low. The Tribunal cannot order financial compensation but can make orders to provide tuition for lost learning, to amend school or LA policies, for training of school staff and governors or for providing trips or other activities missed by the excluded learner.
96. In its 2008/09 Annual report, the AJTC considered that the right to bring disability grounds challenges to the Education Tribunal should be extended to children who had been permanently excluded. If accepted, this would have led to there being two different systems of redress for permanently excluded children. Of course, at present this *is* the case with fixed term exclusions. Given the high percentage of permanently excluded learners who also have SEN, we consider it worth revisiting this proposal.

Recommendation 11:

- (i) That there is a review of the governing body level of exclusion challenges. Such a review would consider: the independence, actual and perceived, of school discipline committees from the head teacher whose decision they are considering; the training available to, required for, and taken up by, members**

³¹ CAJTW 2016, p27.

³² CAJTW 2016, recommendation 22 and Welsh Government response (available at: <https://gov.wales/sites/default/files/publications/2018-11/welsh-government-response-to-cajtw-report.pdf>).

³³ SENTW, Annual report 2005/06, p2.

of school discipline committees; whether there is an alternative to these decision being made by governing bodies; or whether the decisions of discipline committees could be reviewed by an external body such as the PSOW or the Education Tribunal, whether in all cases or in cases of more lengthy fixed term exclusions.

- (ii) That Welsh Government consider making training on exclusions issues mandatory for any governors who wish to serve on the governing body's pupil discipline and exclusions committee.
- (iii) That Welsh Government considers whether the Clerk to the independent panel should be legally trained, or, if not, where the Clerk to the independent panel is not legally trained, that the local authority be required to ensure that an independent source of legal advice is provided.
- (iv) That Welsh Government, and any board or other body examining civil and administrative justice in response to recommendations of the Justice Commission, considers how the exclusions process is perceived and dealt with as a *justice* issue as well as an education issue.
- (v) That whichever body or bodies have involvement in the review of exclusion appeal panels recommended by the Justice Commission (which may include but not be limited to Welsh Government and the President of Welsh Tribunals), should consider the following matters: if the independent appeal panels remain, whether it would be more consistent and efficient for training of panel members to be conducted on a national basis; whether appeals against permanent exclusions should be brought within the jurisdiction of the Education Tribunal; whether there are other alternatives to the current system.
- (vi) That if the current system of exclusion appeals to independent panels remains in place, it is considered whether, by way of exception, permanently excluded learners with SEN / ALN should be given the right to appeal to the Education Tribunal.

Curriculum

- 97. As noted above (para 21) with provision on the curriculum existing in several pieces of legislation, this is an area of education law in need of codification, and there is an opportunity to do so as curriculum content is currently being revised, with a view to a new curriculum being rolled out from 2022.
- 98. Curriculum disputes tend to concern whether the LA or school governing body has acted reasonably in exercising its functions in relation to the curriculum. Some may focus in particular on parents' rights to have their religious or other beliefs protected in relation to their children's education. This could relate to accusations of political bias, cultural sensitivities about certain work or activities, or concerns regarding the content of, or wish to withdraw a learner from, classes on sex education or religious education or from collective worship. In the early years of implementing new curriculum arrangements, the removal of the parental right to withdraw their children from religious education, and sex and relationships education, may give rise to additional disputes.
- 99. Complaints relating to the school curriculum are not dealt with under the general school complaints process. Instead, section 409 of the Education Act 1996 (EA) applies to any complaint that the LA or the governing body has acted unreasonably in relation to the exercise of a power or discharge of a duty under the statutory provisions about the curriculum or religious worship. LAs must make arrangements for the consideration and disposal of these complaints, and Welsh Ministers must not exercise their powers of

intervention to deal with any complaint to which section 409(2) applies unless the arrangements in section 409(1) have been exhausted.

100. Guidance on the predecessor of section 409, section 23 of the Education Reform Act 1988 (ERA), which originally introduced the obligation to set up a process for dealing with curriculum complaints, indicated four stages to be followed: an informal discussion with the teacher or head teacher; a formal complaint to the governing body, and, if not resolved at that stage, a formal complaint to the LA. The final stage would be to take the complaint to the Secretary of State under sections 496 or 497 of the EA 1996, a role now undertaken by the Welsh Minister under the SSOWA. That decision could potentially be challenged by judicial review.
101. Writing in 1993 on the predecessor provision in the ERA, Harris observed that the formal stages of the procedures were under-utilised and ‘completely untested in some parts of the country’.³⁴ In light of the low level of awareness of the existence of these procedures, he recommended that LAs should monitor schools’ compliance with the obligation to publish information on them. He also recommended that the relevant Regulations should be amended to add information on these procedures to the information LAs are already required to publish on schools.
102. Although the requirement is for the LAs to make the arrangements, each school’s governing body is still obliged to publish information on how complaints are to be made under the section 409 arrangements. It is difficult to gain an overview of arrangements currently in place. In a 2005 report, the CCW found that only 16 LAs had a procedure, 4 reported that they had no procedure and 2 were unable to answer the question. An FOI request we sent to all Welsh LAs asking about their section 409 arrangements received 11 responses, of which 4 referred us to the individual complaints processes within schools, 1 said that the authority did not deal with complaints of this kind and referred us to schools, 4 said that complaints about the curriculum would be dealt with under the council’s corporate complaints process and 2 indicated that they have specific arrangements made in accordance with section 409 of the Education Act.
103. Discussion on reforming the curriculum in recent years does not appear to have considered any changes to the system for complaint avoidance or resolution. We suggest that thought needs to be given to how curriculum disputes should be dealt with. At present, it appears that the intention to have a system for curriculum complaints is not operating consistently across Wales.

Recommendation 12:

- (i) **That Welsh Government consider whether the system for dealing with curriculum disputes is fit for purpose, and, if it is not, that provision on this is included in the legislation being brought forward on the content of the curriculum.**
- (ii) **That, if section 409 is to remain, local authorities, as well as schools, should be required to publish information about the arrangements made on their websites.**
- (iii) **In order to provide some consistency, it would also be valuable for Welsh Government to issue guidance on the essential elements that the local**

³⁴ in N Harris, Local Complaints Procedures under the Education Reform Act 1988, [1993] *Journal of Social Welfare and Family Law* 19. See also A Ruff, *Education Law* (Butterworths, 2002), 483.

authorities' arrangements should include, no guidance having been issued on this topic since well before devolution.

Special Educational Needs (SEN) and Additional Learning Needs (ALN)

104. The current law on Special Educational Needs (SEN) in the EA 1996 is to be replaced by the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALN Act) with the new ALN system starting on a phased basis in September 2021.³⁵ This section makes reference to the draft ALN Code as published in December 2018, although it is likely that at least some parts will change. The definitions of SEN and ALN remain the same in substance. It is the arrangements for making provision and for challenging decisions that will change.
105. At present, the EA 1996 distinguishes between learners with SEN for whom provision could be made within the normal school resources (although how to determine whether this is the case is not specified), and those learners with more severe or complex needs for whom the LA will make provision in accordance with a statutory 'statement'. Accordingly, the statutory system applies to the minority of learners with SEN while the SEN Code sets out how schools should deal with what is in practice the majority of pupils. If the pupil is not making adequate progress under the school's graduated provision, the parents or another agency may request the LA to conduct a statutory assessment. The LA must decide whether to make a statutory assessment, and, if it does, whether to issue a 'statement' of SEN. The statement creates an enforceable duty on the LA to secure the provision that is set out in it.
106. In contrast, the ALN Act establishes a single statutory regime that applies to all ALN learners. An Individual Development Plan (IDP) must be provided for any learner who has ALN. Welsh Government indicated that it believed that this would remove 'one of the principal causes of adversarial tension.'³⁶ If it is brought to the governing body's attention that a learner may have ALN, it must make a decision as to whether this is so unless an IDP is already being maintained, or the governing body has previously decided this and there has not been a change in circumstances, or the decision relates to a young person who does not consent to the decision being made.
107. If the governing body decides that a child or young person has ALN, or if the governing body is directed by the LA or Welsh Ministers to do so, it must prepare and maintain an IDP for them unless it is a case for which the LA is responsible namely, ALN calling for ALP that it would not be reasonable for the governing body to secure, ALN the extent or nature of which the governing body cannot adequately determine, or ALN for which the governing body cannot adequately determine ALP.

Avoiding disputes and early resolution of disputes regarding SEN / ALN

108. One of the stated aims of the ALN legislation is to place greater emphasis on the avoidance of disputes, and, if necessary, ensure early resolution by informal means rather than through the formal appeals process. In Welsh Government's view, providing 'a

³⁵ Statement by the Minister for Education, 17 September 2019.

³⁶ Explanatory memo to the ALN Bill, para 3.114.

simpler' process for producing IDPs, 'should avoid the adversarial nature of the existing, overly bureaucratic approach.'³⁷

Provision of information and advice

109. The EA 1996 requires LAs to arrange for parents of children with SEN to be 'provided with advice and information about matters relating to those needs. The provision in the ALN Act is more extensive in that, in addition to information and advice about ALN, there must also be information about the system for providing for those needs. It is also on the face of the Act that this information and advice must be provided in an 'impartial manner'. However, neither Act requires that the information and advice is provided by a body independent of the authority.
110. The SEN Code states that the LA must arrange for 'parent partnership services' from which parents can obtain information and advice: this can be done entirely by the authority itself or by buying in the services of an external provider or a mixture of the two. If it is provided in-house, the SEN Code encourages the LA to ensure that the service is run at 'arm's length to ensure parental confidence.'³⁸ Whilst SNAP Cymru has funding to provide some level of service across all 22 LAs, its annual report for 2019-20 indicates that this ranges from no funding for parent partnership services in some LAs to fully funded parent partnership services in some others.
111. The draft ALN Code notes the ALN Act's requirement that LAs must have regard to the principle that information and advice must be provided in an impartial manner and it gives examples of how this might be done within the authority itself or by an external provider. The feedback we received is that the availability of accurate advice as early as possible is crucial for avoiding disputes or ensuring that any arising are swiftly resolved. Our feedback also indicated that families trust information and advice coming from an external body more than that coming from the authority itself which is perceived as lacking independence.

Advocacy

112. Both the EA 1996 and the ALN Act require LAs to arrange for the provision of 'independent advocacy services' and to refer any child or their case friend who requests advocacy to a service provider. This is applicable to any child appealing, intending or considering whether to appeal to the Tribunal or taking part in 'disagreement resolution services' in the Acts. The CCW expressed some regret that advocacy is presented in the draft ALN Code purely as a means of resolving disagreements, rather than as an opportunity for a child or young person's voice to be amplified in all the discussion and decision making. This chimes with feedback that we had where participants emphasised the importance of early advocacy to enable the voices of learners and their parents to be heard before issues turn into disagreements.
113. The draft ALN Code notes that current practice in Wales is to achieve independence by commissioning advocacy services from external providers, and recommends that the services providing advocacy *should* be funded and managed in a way that ensures independence from the commissioning organisation. We consider that the statutory power in the Act for the ALN Code to impose requirements on an LA in relation to the provision

³⁷ Explanatory memo to the ALN Bill, para 3.11.

³⁸ SEN Code, para 2.17.

of independent advocacy services should be used to require, rather than recommend, services be funded and managed to ensure independence.

Avoidance and resolution of disagreements

114. The explanatory memorandum accompanying the ALN Bill emphasises the distinction between the EA 1996 requirement for LAs to ‘make arrangements with a view to avoiding *or* resolving disagreements’ and the ALN requirement for ‘arrangements with a view both to avoiding *and* to resolving disagreements’, stating that authorities ‘are not currently required to focus on avoiding disputes.’³⁹ It is not clear if LAs have interpreted the ‘avoiding *or* resolving’ language in such a stark way, and therefore whether the difference in outcome will be that great.

115. Neither the 1996 nor 2018 Act requires that *all* of the disagreement avoidance and resolution services, must be provided by a body external to the authority. The SEN Code leaves it to the authorities to choose an approach that *includes* an independent *element* in their disagreement resolution arrangements. It offers a number of models that might be adopted to ensure this is achieved, including: using a panel of trained facilitators, affiliated to a recognised dispute resolution body, whose services could be purchased as required; expanding existing disagreement resolution services that cover other areas of the authorities work to include SEN expertise; or using regional panels funded by a number of neighbouring authorities.⁴⁰ An example of the first is the service which can be provided by SNAP Cymru to LAs⁴¹ which uses the skills of a pool of trained facilitators with specialist knowledge of additional learning needs, including SEN and disability. The aim is to arrive at a negotiated voluntary agreement which avoids the need for further action and with both parties considering that a better understanding has been achieved with all avenues having been considered. SNAP Cymru’s 2018-19 Annual Report concludes that information, advice, support including casework early intervention resulted in effective successful resolution, avoiding the need for an appeal to the Tribunal.⁴²

116. The draft ALN Code appeared to envisage that the bulk of the arrangements for avoiding and resolving disagreements would be delivered, not by independent bodies, but by LA staff. The early part of the relevant chapter in the draft ALN Code refers to the ‘staff’ delivering the arrangements.⁴³ It is only some way into the draft ALN Code chapter that it refers to provision for parties to the disagreement to access help from ‘persons who are independent of the parties.’⁴⁴ This section on the ‘independence of persons helping to resolve disagreements’ stands as a separate section and it is not clear how much of a ‘part’ of the LA arrangements this independent provision would amount to. The draft Code emphasises that the authority must ensure that staff delivering the arrangements are ‘impartial to the outcome of any potential disagreements.’⁴⁵ However, individuals acting impartially is not the same as persons who are ‘independent’ of the parties.

117. The equivalent statutory provision in England is similar to section 68 of the ALN Act.⁴⁶ However, in contrast to the Welsh draft ALN Code, the SEN Code for England gives

³⁹ Explanatory memorandum to the ALN Bill, paras 7.32, 7.36, 7.38, 8.320.

⁴⁰ SEN Code, para 2.29.

⁴¹ Information from SNAP Cymru, April 2020.

⁴² Ibid, para 3.7.

⁴³ Draft ALN Code, paras 25.11 and 25.12.

⁴⁴ Draft ALN Code, para 25.34.

⁴⁵ Draft Code para 25.12

⁴⁶ Children and Families Act 2014, s 56(1).

effect to the statutory duty by requiring that '[t]he service, while commissioned by it, must be independent of the LA - no one who is directly employed by a LA authority can provide disagreement resolution services.'⁴⁷

118. Even where the LA is not yet directly involved as a party, as for example if it were involved in arrangements seeking to resolve a dispute between children / young people / parents and a school regarding a decision on ALN or ALP, it must be borne in mind that the LA could be trying to support a family to resolve a dispute with a school in a situation where the LA might subsequently have to reconsider the school's decision.
119. Respondents to the draft ALN Code consultation show this issue causes concerns, in particular whether LAs could be impartial in this matter since they have a vested interest in the outcome.⁴⁸ Many responses considered that financial pressures on the authority would make it impossible for it to act independently. Another concern was that authorities lacked the skilled staff needed to provide arrangements themselves and would not be in a position to provide the intensive support in preparing for meetings that external bodies were currently providing. There was also concern about a potential risk of inconsistent support if this is provided at LA level rather than at a national level across Wales.
120. Based on feedback to our project and consultation responses, we consider the ALN Code should require that arrangements for disagreement avoidance and resolution are commissioned by the authorities and not provided directly by them.
121. If, however, some disagreement avoidance and resolution arrangements are to be provided from within LAs, it is essential that the ALN Code provides more detailed guidance on how the authority can achieve an acceptable level of separation around those members of staff involved in the disagreement arrangements.
122. Another concern regarding chapter 25 of the draft ALN code is whether there is sufficient clarity in the guidance as to the kind of arrangements that should be made. There is much about the value of dispute avoidance and early resolution, and on general principles but we found it challenging to form a clear and concrete picture of what LAs will be required to provide and we have concerns about whether the guidance in Chapter 25 is sufficient to ensure a level of consistency in provision across Wales.
123. Not only must there be enough scrutiny of informal disagreement resolution methods to ensure adherence to appropriate standards, there must also be some processes whereby authorities can reflect and learn from the disagreements that are referred to these arrangements.

The formal appeals system under the two Acts

124. Under the EA 1996, no statutory remedies are provided in relation to disputes with a school regarding the identification of and provision for a learner's SEN. A parent dissatisfied with progress at school level has the option of requesting that the LA assesses the learner's needs. The statutory scheme then provides appeal rights to the Education Tribunal in relation to an LA refusal to carry out an assessment or re-assessment, a refusal to make a statement or a decision to cease to maintain one, or regarding the content of a statement, including the school named, or not named in the statement. The Tribunal may

⁴⁷ SEND code of practice: 0 to 25 years (England), para 11.6.

⁴⁸ Welsh Government summary of responses.

dismiss the appeal or order the LA to carry out an assessment, to make a statement or remit the case to the LA for reconsideration, to amend the statement, or to continue to maintain an existing statement. There is also the right of appeal to the Upper Tribunal on a point of law subject to the Tribunal or the Upper Tribunal giving permission to appeal.

125. Under the ALN Act, all disputes concerning learners who may have ALN come within the statutory system. If there is a disagreement with a governing body about whether a learner has ALN, or in relation to the content of an IDP being maintained by the governing body, there is no right of appeal directly to the Tribunal. Instead, the relevant person may request the LA to 'reconsider' the decision, and the LA must decide whether the learner has ALN or reconsider the plan with a view to it being revised. Given that only an LA's decision may be appealed to the Tribunal, requesting this reconsideration is the first step on the way to a tribunal appeal. As a new process, it will be important that the use and effectiveness of reconsideration is monitored.
126. There is an appeal to the Education Tribunal against the LA's decisions including whether the learner has ALN, or whether an IDP should be prepared, maintained, reviewed or revised, or regarding the content of the IDP. In these cases, the Tribunal may dismiss the appeal, order that a person has or does not have ALN of a kind specified in the order, order the LA to prepare or revise or review an IDP, order a governing body or LA to continue to maintain an IDP, order the LA to take over responsibility for maintaining an IDP, or remit the case to the LA for it to consider whether a different decision should be made in light of the Tribunal's observations.
127. If the Tribunal makes an order, the governing body or local authority must comply within the time stated and must report to the Tribunal on how it has complied. The Tribunal may share details with the Welsh Ministers of any non-compliance. Such non-compliance could also be the subject of a complaint against a local authority to the PSOW. There will continue to be a right of appeal on a point of law to the Upper Tribunal, subject to the Education Tribunal or the Upper Tribunal granting permission.

The current system in practice

128. In terms of the statutory dispute settlement system of appeals to the Tribunal, the number of registered appeals has been reasonably stable from the first year of the Tribunal's operation to the most recent statistics available. The Tribunal President considered that an increase in appeals for 2016-17, relating to a refusal to assess and refusal to statement were probably explained by parents keen to have statements in place rather than 'testing the provisions under the new Act'.⁴⁹
129. A significant number of appeals are conceded each year. This means that the LA notifies the Tribunal that it no longer opposes the appeal and has agreed to what the appellant requested. Such cases amounted to 39% in 2016-17. This raises a question as to why cases which have reached the point of being appealed are conceded. Parents expressed the view that they were taken seriously by the LA only when they involved a solicitor or indicated that they intended to appeal to the Tribunal. This perception may be unfounded but underlines the difficulty of the authority itself being involved in disagreement resolution arrangements. If true, it represents a cynical approach that penalises families without the resources to pursue an appeal. As regards those appeals decided, more are upheld (in full

⁴⁹ SENTW Annual Report 2016-17, Foreword.

or in part) than dismissed. Of the cases brought: in 2016-17, 13% were upheld in full or in part while 5% were dismissed; in 2015-16, 14% were upheld in full or in part and 7% were dismissed; and in 2014-15, 13% were upheld in full or in part and 4% were dismissed.

Health disputes

130. A common theme during our research workshops was how education disputes often concern a cluster of related problems such as exclusions, SEN/ALN and discrimination often combining with other problems relating to health or social care. The ALN Act creates a new duty to appoint a Designated Education Clinical Lead Officer (DELCO) to provide leadership within the health board and to liaise with LAs. In relation to disputes about health provision required for a child or young person with ALN, complaints about the health provision still need to be pursued through the NHS complaints system, *Putting Things Right*. This could mean that an individual is required to follow two separate routes for redress.
131. The Tribunal may require an NHS body to give evidence about its exercise of its functions and may make non-binding recommendations to an NHS body. If a recommendation is not acted upon by the NHS body, the Tribunal has the power to share this information with the Welsh Ministers. It is important that responses from NHS bodies intending not to take action in relation to a recommendation of the Tribunal are monitored to assess whether there is a need for an alternative approach to the resolution of health disputes that arise in the context of ALN issues.

Recommendation 12:

- (i) That local authorities gather and publish statistics on the level of use, and the outcomes, of the new reconsideration remedy.
- (ii) That local authorities are required to gather information on the use and outcomes of the disagreement resolution services used, and to develop processes for reflecting and learning from the disagreements referred to these services.
- (iii) That the statutory power in section 4(5)(a) of the ALN Act, for the ALN Code to impose requirements on a local authority in relation to the provision of independent advocacy services, should be used by Welsh Government to *require*, rather than *recommend*, that services are funded and managed to ensure independence.
- (iv) That the statutory power in section 4(5)(a) of the ALN Act should be used to include a requirement in the ALN Code that the arrangements for disagreement avoidance and resolution are commissioned by the local authorities and not provided directly by them. That if this recommendation is not accepted, and some disagreement avoidance and resolution arrangements are to be provided from within local authorities, it is essential that the ALN Code provides more detailed guidance on how local authorities can achieve an acceptable level of separation around those members of staff involved in the disagreement arrangements, so that confidence in those arrangement is not undermined.
- (v) That the guidance in chapter 25 of the draft ALN Code should be more detailed so that there is enough clarity regarding what is required in the dispute avoidance and resolution arrangements to ensure consistency in provision across Wales.

- (vi) That the value of mediation is given more explicit consideration in relation to informal dispute avoidance and resolution.
- (vii) That there is careful monitoring of NHS bodies' responses indicating that action will not be taken in relation to a non-binding recommendation of the Education Tribunal, and consideration as to whether any changes are required to how health disputes within the context of ALN issues are dealt with.

Concluding reflections

132. This report demonstrates the range and complexity of routes to redress in relation to education disputes. It is unsurprising that at least some parents, learners, teachers, governors, and even some in local authorities may struggle to grapple with them. While there is good quality information available, it requires a basic knowledge of where to start and what to look for. What many people lack most is an overview of the redress system as a whole where they can locate the possible routes that they might follow, and the implications of choosing one over another. It is also important that clear and accurate information and advice is available, as early as possible in relation to an issue that has arisen or may arise, and from a source that is independent from the parties to the dispute. Those making decisions at all levels must have appropriate knowledge and understanding of the law and of general complaints handling best practice and must be supported in their decision making. Finally, a key finding of this report is that it is essential that education disputes issues are appreciated within a *justice* perspective as well as a substantive education perspective.