

## **Explanatory Memorandum to:**

1. The Additional Learning Needs Code for Wales;
2. The following Regulations;
  - The Additional Learning Needs (Wales) Regulations 2021;
  - The Education Tribunal for Wales Regulations 2021;
  - The Education (Pupil Referral Units) (Management Committees etc.) (Wales) (Amendment) Regulations 2021;
  - Independent Schools (Provision of Information) (Wales) (Amendment) Regulations 2021;
  - The Equality Act 2010 (Capacity of parents and persons over compulsory school age) (Wales) Regulations 2021.

This Explanatory Memorandum has been prepared by the Additional Learning Needs Transformation Team and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

## **Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Additional Learning Needs Code for Wales;
2. The Additional Learning Needs (Wales) Regulations 2021;
3. The Education Tribunal for Wales Regulations 2021;
4. The Education (Pupil Referral Units) (Management Committees etc.) (Wales) (Amendment) Regulations 2021;
5. Independent Schools (Provision of Information) (Wales) (Amendment) Regulations 2021;
6. The Equality Act 2010 (Capacity of parents and persons over compulsory school age) (Wales) Regulations 2021.

I am satisfied that the benefits justify the likely costs.

Kirsty Williams MS, Minister for Education  
2 March 2021

## **PART 1 – EXPLANATORY MEMORANDUM**

### **1. Description**

- 1.1. Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (“the Act”) establishes the statutory system in Wales for meeting the additional learning needs of children and young people (“the ALN system”). The Additional Learning Needs (Wales) Regulations 2021 make provision about a range of matters related to the operation of the ALN system, for example prescribing time periods within which certain duties are to be performed to operate effectively and setting out the functions of an Additional Learning Needs Co-ordinator (“ALNCo”). The Additional Learning Needs Code for Wales (“the Code”) also imposes requirements on the governing bodies of maintained schools in Wales, governing bodies of institutions in the further education sector (“FEIs”) in Wales, local authorities and NHS bodies related to the operation of the ALN system and the exercise of functions under it. The Code also gives guidance to the public authorities that have functions under the ALN system, about the exercise of those functions under Part 2 of the Act.
- 1.2. Part 3 of the Act continues the Special Educational Needs Tribunal for Wales and renames it the Education Tribunal for Wales (“the Tribunal”). In addition to the Tribunal’s jurisdiction set out in Part 2 of the Act, it has jurisdiction in relation to disability discrimination in schools (for provision about this, see section 116 of the Equality Act 2010 and Schedule 17 to that Act). The Education Tribunal for Wales Regulations 2021 make provision about the constitution of the Tribunal and set out the procedure to be followed in proceedings before the Tribunal.
- 1.3. The Education (Pupil Referral Units) (Management Committees etc.) (Wales) (Amendment) Regulations 2021 amend the Education (Pupil Referral Units) (Management Committees etc.) (Wales) Regulations 2014 (“the 2014 Regulations”) to provide that a local authority must delegate the specified functions to a management committee of a pupil referral unit (‘PRU’). The specified functions are the functions of the governing body under the Act which, in accordance with paragraph 1 of Schedule 1 to the Education Act 1996, are functions of the local authority in relation to a PRU.
- 1.4. The Independent Schools (Provision of Information) (Wales) (Amendment) Regulations 2021 amend the Independent Schools (Provision of Information) (Wales) Regulations 2003 in order to require an application to enter an independent school in the register of independent schools in Wales to include information about the types of additional learning provision made by the school for pupils with additional learning needs (if any).

- 1.5. The Equality Act (Capacity of parents and persons over compulsory school age) (Wales) Regulations 2021 modify certain provisions of the Equality Act 2010 in certain circumstances. The modifications ensure that the representative of child's parent who lacks capacity, or the representative of a young person who lacks capacity, can bring a claim on behalf of that individual under Schedule 17 to the Equality Act 2010.

## **2. Matters of special interest to the Legislation, Justice and Constitution Committee**

- 2.1. The ALN Code, the regulations and the other regulations have been laid on 2 March 2021 as a single package. This is to show the interplay of the provisions in the respective instruments.
- 2.2. The sections of the Act containing the duties to designate people to the statutory roles (sections 60 to 62) came into force on 4 January. The Additional Learning Needs Co-ordinator (Wales) Regulations 2020 (S.I. 2020/1351) ("the ALNCo Regulations") also came into force on that date. Those Regulations set out the qualifications and experience required for a person to be designated as an ALNCo and the ALNCo's functions. Those Regulations will be revoked by the Additional Learning Needs (Wales) Regulations 2021, as the provisions in the former are re-enacted within the latter (see regulations 26 to 30).
- 2.3. The Additional Learning Needs (Wales) Regulations 2021 make three amendments to the Act.
  - 2.3.1. Regulation 4 amends section 88 of the Act about rules on giving notice and documents. The amendment is to provide that a notification or document given electronically is treated as having been given, unless the contrary is proved, on the day on which it is sent. This reflects the rule in section 14 of the Legislation (Wales) Act 2019, which does not apply to the Act.
  - 2.3.2. Regulation 19 amends section 44 of the Act to provide that an NHS body's duties under section 20(5)(a) and (c) of the Act about securing a relevant treatment or service which is additional learning provision for a detained person cease to apply from the beginning of the detained person's detention. In this situation, the home authority for the detained person already has a duty under section 42 of the Act to arrange appropriate additional learning provision and that duty is apt to deal with the detention situation. The NHS body may not practically be able to secure a relevant treatment or service for a detained person (particularly as it might not be responsible for the provision of health services to the detained person during the detention period) or the relevant treatment or service may no longer be appropriate.

- 2.3.3. Regulation 33 amends section 68 of the Act to provide that for the purposes of a local authority's duties to make arrangements for the avoidance and resolution of disagreements and independent advocacy services, a local authority is also responsible for detained persons for whom it is the home authority. It is appropriate for the home authority's arrangements to apply in relation to detained persons, as it is the authority exercising functions in relation to them and it avoids any difficulties in ascertaining which local authority would otherwise be responsible (given that the test for responsibility is based upon a person being in the area of a local authority, which is difficult to determine in a detention situation).
- 2.4. As explained elsewhere in the Explanatory Memorandum, the Code imposes requirements. Chapter 1 of the Code explains how those requirements are identified in the Code.
- 2.5. It is intended to implement the ALN system on a phased basis from 1 September 2021 (see paragraph 3.7 below), which is why the regulations do not revoke law relating to special educational needs.

### **3. Legislative background**

- 3.1. Part 2 of the Act establishes the ALN system. At its heart, the system involves governing bodies of maintained schools and FEIs and local authorities having responsibility for deciding whether children or young people have additional learning needs and if they do, preparing and maintaining an individual development plan ('IDP') for them. An IDP sets out the needs that the child or young person has and the additional learning provision called for by those needs. There are duties to secure the additional learning provision and particular other things, set out in an IDP. The ALN system provides that children, their parents and young people have the right to appeal to the Tribunal about certain matters related to the identification of their needs and the provision to meet them.
- 3.2. The ALN system is to replace the system under Part 4 of the Education Act 1996 for identifying, assessing and making provision for children with special educational needs ('SEN'). Implementing the ALN system will take three years, from September 2021.
- 3.3. The Additional Learning Needs and Education Tribunal (Wales) Act 2018 (Commencement No 1) Order 2020 (S.I. 2020/1182) commenced various powers in the Act, provisions for the purposes of exercising powers within them and related provisions. It also commenced sections 60 to 62 which contain duties to designate people to the statutory roles and provisions related to the list of independent special post-16 institutions in Wales or England, which the Welsh Ministers must establish. The Additional Learning Needs (List of Independent Special Post-16 Institutions) (Wales) Regulations 2020 (S.I. 2020/1367) make provision about that list and applications to be included in it.
- 3.4. The Welsh Ministers are required by section 4 of the Act to issue a code on additional learning needs. The code may impose requirements about certain matters (set out at section 4(5) of the Act) and is required to include the particular requirements described in section 4(6) of the Act. It may also make provision setting out what is required to discharge the duties in sections 7(1) and 8(1) of the Act about local authorities and NHS bodies having regard to United Nations Conventions.
- 3.5. The Code may include guidance about the exercise of functions under the Act and any other matter connected with identifying and meeting additional learning needs (section 4(2) of the Act). It must include guidance about the exercise of a maintained school or FEI's governing body's function to take all reasonable steps to secure that the additional learning provision called for by a pupil or student's additional learning needs is made whilst an individual development plan is being prepared for the pupil or student (section 47(3) of the Act).

- 3.6. The Act also confers various regulation making powers on the Welsh Ministers which supplement the functions in the Act.
- 3.7. All of the sets of regulations provide that they come into force on 1 September 2021. If approved by the Senedd, for the Code to come into force, a commencement order must be made (section 5(4) of the Act). The intention is that the Code also comes into force on 1 September 2021. The Welsh Ministers intend to exercise their commencement powers (under section 100 of the Act) to provide for functions under the Act to come into force on a phased basis from 1 September 2021.
- 3.8. The Code is to be issued under the powers in section 4 of the Act (as well as containing provision made under sections 7(4) and 8(4) of the Act and the guidance required by section 47(3) of the Act). The procedure for making it is set out in section 5 of the Act, which requires that there has been consultation on a draft of it with particular persons (see below for details of the consultation) and that it cannot be issued unless a draft of it (which may be a modified draft following that consultation) has been laid before and approved by resolution of the Senedd.
- 3.9. The Additional Learning Needs (Wales) Regulations 2021 are to be made under sections 15(2), 21(10), 32(1)(b), 36(3), 37(1)(a) and (b), 45, 46, 60(4), 65(5), 67, 82, 83, 97 and 98(2) of the Act. These Regulations are subject to the approval of the Senedd by way of the draft affirmative procedure (as required by section 98(3) of the Act).
- 3.10. The Education Tribunal for Wales Regulations 2021 are to be made under sections 70(4), 74, 75, 76(3), 77, 91(6) and 92(2) of the Act and section 207(4) of, and paragraphs 6(1), (2) to (5) and (7) and 6A of Schedule 17 to, the Equality Act 2010. These Regulations are subject to the approval of the Senedd by way of the draft affirmative procedure (as required by section 98(3) of the 2018 Act and section 209(6) of the Equality Act 2010).
- 3.11. The Equality Act 2010 (Capacity of parents and persons over compulsory school age) (Wales) Regulations 2021 are to be made under section 207(4) of, and paragraph 6F of Schedule 17 to, the Equality Act 2010. These Regulations are subject to the approval of the Senedd by way of the draft affirmative procedure (as required by section 209(6) of the Equality Act 2010).
- 3.12. The Independent Schools (Provision of Information) (Wales) (Amendment) Regulations 2021 are made under sections 160(1), 168 and 210(1) and (7) of the Education Act 2002. These Regulations are subject to the negative resolution procedure (as required by section 210(4) of the Education Act 2002 and paragraph 34 of Schedule 11 to the Government of Wales Act 2006). The functions of the National Assembly for Wales under those provisions were transferred to the

Welsh Ministers by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

- 3.13. The Education (Pupil Referral Units) (Management Committees etc.) (Wales) (Amendment) Regulations 2021 are made under section 569(1), (4) and (5) of, and paragraph 15 of Schedule 1 to, the Education Act 1996. These Regulations are subject to the negative resolution procedure (as required by section 569(2) and (2C) of the Education Act 1996 and paragraph 33 of Schedule 11 to the Government of Wales Act 2006). The functions of the Secretary of State in Schedule 1 to the Education Act 1996 were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 S.I. 1999/672 and then to the Welsh Ministers by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

#### **4. Purpose and intended effect of the legislation**

- 4.1. The purpose of the ALN system, including the Code and regulations under the powers in the Act, is to create a fully inclusive education system where all learners with additional learning needs are inspired, motivated and supported to reach their full potential.
- 4.2. The Code contains guidance about the exercise of functions under Part 2 of the Act and other matters connected with identifying and meeting additional learning needs. It describes and explains many of the functions in the Act and some of the provisions in regulations made under the Act. The Code itself also imposes requirements, pursuant to sections 4(5) and (6), 7 and 8 of the Act. The Code's statutory guidance includes guidance on those requirements. The guidance helps give further effect to the ALN system.
- 4.3. The purpose of many of the provisions in the Additional Learning Needs (Wales) Regulations 2021 and the requirements imposed by the Code, are intended to provide the necessary or desirable details of the ALN system to supplement the provisions in the Act, for example, setting time limits for compliance with duties under the Act, provisions affecting decisions on when an IDP is necessary and providing for a child's parent or young person's right to be exercised by a representative where that parent or young person lacks capacity. The intended effect is that the ALN system is able to operate effectively.
- 4.4. In addition, the ALN Code is intended to be the principal document used by those responsible for delivering the ALN system, especially local authorities and the staff of maintained schools and FEIs. It is, in effect, an operational handbook designed to assist those exercising functions under the Act, providing them with the details of functions involved in the ALN system and giving guidance on how to exercise them in the various circumstances in which they fall to be exercised.
- 4.5. The Code as a whole explains the operational requirements of the ALN system.
- 4.6. The Code has therefore been designed to allow those exercising functions under the Act to access the statutory guidance that applies to their individual responsibilities under the Act and to understand the process as it applies to a specific child or young person.
- 4.7. The content and format of the Code therefore focusses on an explanation of legal functions and guidance on their exercise, rather than case studies on good practice. It is intended to enable professionals (such as an Early Years ALN Lead Officer, an ALNCo in a maintained school or FEI, or a local authority officer) to understand the process as it applies to a specific child or young person, and take action so as to comply with the duties under the ALN system in a way



which is appropriate to the circumstances and gives effect to the principles underlying the ALN system.

- 4.8. The Education Tribunal for Wales Regulations 2021 make provision relating to the exercise of that Tribunal's jurisdiction under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 which concerns additional learning needs appeals, and Chapter 1 of Part 6 of the Equality Act 2010 which concerns claims of disability discrimination in respect of school pupils. The purpose of the provisions in these Regulations is to provide for rules of procedure which allow for the Tribunal's proceedings to be conducted appropriately and effectively. The intended effect is that appeals and claims before the Tribunal are dealt with justly.
- 4.9. We have carried out a Justice Impact Assessment which has concluded the justice impact is low. We fully considered the impact of the reforms on Her Majesty's Courts and Tribunals Service with our colleagues in the Welsh Tribunals Unit during the development of the Bill – an overview of our assessment was included in the Regulatory Impact Assessment, which we published with the Bill. The provisions relating to onward appeals to the Upper Tribunal are not new as they replicate existing provisions within the Education Act 1996 and the SENTW 2012 Regulations. Consequently, there is no reason to believe that there will be any significant impact on the number of cases referred to the Upper Tribunal. Figures from 2018-2019 show that only five request for permission of the Tribunal to make an application were made, two of which were refused.
- 4.10. The proposals support the use of person centred practice (PCP). PCP encourages greater active participation by the learner and their family as well as seeking a greater understanding of decisions made. This should help learners and their families to understand the process and enable a greater feeling of ownership of those decisions made. It is expected this will reduce the level of confrontation, the number of disagreements and lower the level of animosity which prevents disagreements being resolved before they reach Tribunal.
- 4.11. We do not anticipate more appeals to the Tribunal as a result of the ALN reforms. The ALN system will be implemented in a phased approach over a 3 year period. The first year will not include the post 16 age group, which will help reduce any sudden impact on the Tribunal's service.
- 4.12. The purpose of the Education (Pupil Referral Units) (Management Committees etc.) (Wales) (Amendment) Regulations 2021 is to require a local authority to delegate to the management committee of a PRU the functions the local authority has in relation to the PRU by virtue of Schedule 1 to the Education Act 1996. The intended effect is that management committees exercise, in relation to the PRU, the functions of a governing body under the Act.

- 4.13. The purpose of the Independent Schools (Provision of Information) (Wales) (Amendment) Regulations 2021 is to amend, as required by section 160 of the Education Act 2002 (as amended by section 54(3) of the Act), the Independent Schools (Provision of Information) (Wales) Regulations 2003 so that applications to enter an independent school in the register of independent schools in Wales will include information about the types of additional learning provision made by the school for pupils with additional learning needs (if any). The intended effect is that this information will then be included in the register (see section 158 of the Education Act 2002 as amended by section 54 of the Act) and therefore the information will be available for local authorities when exercising their functions under the Act.
- 4.14. The purpose of the Equality Act 2010 (Capacity of parents and persons over compulsory school age) (Wales) Regulations 2021 is to modify references to parents and persons over compulsory school age in paragraph 3A of Schedule 17 to the Equality Act 2010. When a parent or young person lacks mental capacity (under the Mental Health Act 2005) at a time where they could take action under the Equality Act 2010, the references to them in paragraph 3A, which gives certain individuals the right to bring a claim to the Tribunal under the Equality Act 2010, are modified to read as references to their representative. The intended effect is that parents or young persons lacking capacity will, through their representative, be able to exercise the same right to bring a claim to the Tribunal under the Equality Act 2010 as those with capacity.

## **5. Consultation**

- 5.1. A twelve week public consultation ran between 10 December 2018 and 22 March 2019 on the:
- draft ALN Code;
  - draft regulations relating to the Education Tribunal for Wales and ALN co-ordinators and the policy intention for the exercise of other regulation-making powers under the Act;
  - revisions to the Social Services and Well-being (Wales) Act 2014 Part 6 Code of Practice – Looked After and Accommodated Children.
- 5.2. The consultation included:
- the main consultation document containing 65 questions covering the above matters;
  - a version of the consultation for children and young people and an easy read version containing fifteen questions on aspects of the draft Code and proposed regulations;

- two half-day consultation events in each of the four regional education consortia areas in Wales;
  - a series of engagement sessions with children, young people and parents attended by 228 participants.
- 5.3. A summary of responses report was published on 14 June 2019 document and can be accessed at:
- <https://gov.wales/draft-additional-learning-needs-code>
- 5.4. As that report indicated, the draft ALN Code and proposed regulations cover a huge range of different topics and so the responses to the consultation were very wide ranging, containing a huge variation in opinion and very different focuses.
- 5.5. Overall, the majority of respondents responded positively. Critical responses were greatest for matters relating to:
- the definition and identification of ALN;
  - timescales within which duties must be performed;
  - the roles of the ALNCo, the Designated Educational Clinical Lead Officer ('DECLO') and Looked After Children in Education Co-ordinator;
  - arrangements for disagreement resolution, advocacy services and appeals;
  - the delegation of duties to pupil referral units;
  - individual development plan ('IDP') templates;
  - the provision of IDPs for young people not attending an education setting;
  - the ALN system as it will apply to detained persons.
- 5.6. It is worth noting that the comments received from respondents tended to come from those who were particularly opposed to certain aspects of the draft ALN Code, or who were unsure about aspects of those policies. This was also true in terms of comments on certain matters, even where the questions related to those matters in the consultation had a positive response overall. The comments also included a great number of suggested technical amendments to the ALN Code.
- 5.7. Respondents expressed concern about various terms that appear in the draft ALN Code. There were also calls for guidance on the meaning of particular terms. In considering those points further, we have been mindful of whether further elaboration would add value or whether it might risk an inadvertent narrowing or widening of the term's meaning and the constraints set by the Act.
- 5.8. In particular, some respondents questioned various aspects of the wording of the definitions of ALN and ALP. These definitions are set out in the Act and cannot be changed by the ALN Code. The wording of

the definitions of ALN and ALP used in the Act, which is repeated in the draft ALN Code, is deliberately similar to that currently used in relation to the definitions of SEN and special educational provision, with which many professionals will already be familiar.

- 5.9. Respondents also questioned other elements of the system laid down in the Act. For example, some disagreed with the principle of local authorities being responsible for preparing and maintaining IDPs for all looked after children. Others called for the creation of new requirements for which the Act makes no provision, such as making it compulsory for parties to engage in disagreement resolution before they are able to make an appeal, or requiring NHS bodies to comply with a Tribunal order. The ALN Code and regulations must align with the Act and cannot require any person to do something for which the Act provides no power.
- 5.10. Likewise, there were frequent calls to convert many of the “shoulds” included in the draft ALN Code to “musts”. The range of things about which the Act gives powers to make mandatory requirements is limited by the Act. Even where the Act does provide such a power, there is a question of whether a mandatory requirement (a “must”) or statutory guidance (a “should”) is more appropriate. An important consideration is whether there could be occasions when non-compliance would be justified and if so, whether these would be better dealt with by having specific exceptions to a mandatory requirement or by making the matter statutory guidance, which allows the person to justify a departure from it on a case-by-case basis.
- 5.11. Some respondents also expressed concern about the language style used in the draft ALN Code. As the ALN Code will impose mandatory requirements which are law, the language used must be suitably clear and precise. Similarly, the guidance in the Code needs to be suitably clear and precise so that those who must have regard to it can understand what it is they are to do unless they have a justification for not doing it. As a result, the language is quite formal in places, although on occasions where it may be difficult to follow, examples have been given to illustrate the meaning. It is also important to note that the ALN Code is primarily intended to be read and used by professionals working in the public authorities that have functions under Part 2 of the Act, as listed in Chapter 1 of the draft ALN Code. The draft ALN Code has not been written so as to be accessible to the wider public as that is not the ALN Code’s intended audience. However, local authorities are required by the Act to make arrangements to provide information and advice about the ALN system.
- 5.12. Some respondents were concerned that the draft ALN Code says little about mental capacity in relation to young people and parents. This issue has now been addressed in the revised ALN Code. Welsh Government is also working with partners in Whitehall to ensure the

Liberty Protection Safeguards Code of Practice takes account of the ALN Act and its Code and regulations.

- 5.13. Some respondents raised issues about transport provision for post-16 learners with learning difficulties or disabilities. As mentioned in the consultation document, the Welsh Government intends to consult on revisions to the Learner Travel Statutory Provision and Operational Guidance 2014. That consultation exercise is currently underway to better understand the implications of any future changes. A report on the responses to this targeted consultation will also contain recommendations for further work on revising the Measure, and is due to be published this spring. In the meantime, a non-mandatory section for transport has been included in the IDP template, provided in the Annex of the Code.
- 5.14. Some respondents suggested that the Code needs to include guidance on other relevant legislation or on matters set out elsewhere in statutory guidance. The Act is clear that the guidance the Code may contain is about the exercise of functions under Part 2 of the Act and about any other matter connected with identifying and meeting additional learning needs. Generally, therefore, it is not appropriate for the Code to provide guidance about other matters, although where appropriate, references are made to other relevant areas of law and guidance.
- 5.15. Many respondents considered that the implementation of the new ALN system would have a considerable financial impact, particularly on local authorities in Wales. The key financial implications of the Act were included in the Regulatory Impact Assessment (RIA) which accompanied the Bill. In particular, the RIA was subject to intense scrutiny by the National Assembly's Finance Committee, including a delayed vote on the financial resolution motion whilst further independent analysis was undertaken. This analysis was considered by the National Assembly before it passed the financial resolution in relation to this matter. The RIA for the Bill discussed the key provisions and associated costs with the ALN system, whereas the RIA for the Code provides further details on and considers these key provisions, reflecting more specifically on duties imposed by the Code. The Code's RIA also provides a detailed section on the amendments to the Code following the consultation in 2018/19. None of these areas were re-considered in this work, unless specific evidence was provided to counteract the original findings.
- 5.16. In recognition of the costs of moving from the current legislative framework to the new ALN system, implementation grant funding is being provided on a regional basis, co-ordinated by Regional ALN Transformation Leads, to roll-out regional, multi-agency training and professional development on the new legislative framework and its implications for all those involved in supporting learners with ALN. The training will target key practitioners with specific roles in the new

system (including the ALNCo and DECLO roles) to ensure the effective implementation of the new ALN system.

- 5.17. A number of respondents requested that the Welsh Government consider developing an electronic system to support the IDP process. Work is already underway in this area and we are currently undertaking an initial scoping exercise to establish both the feasibility and appropriateness of developing a Wales-wide online system.
- 5.18. Finally, respondents also raised concerns about the capacity of the specialist workforce, including educational psychologists, to deliver elements of the new system described in the draft ALN Code. Work is already being undertaken to improve the capacity of the specialist workforce).
- 5.19. The changes as a result of the consultation responses to the proposed revisions to the Social Services and Well-being (Wales) Act 2014 Part 6 Code of Practice – Looked After and Accommodated Children are being dealt with separately and are therefore not covered here.

#### Consultation on Representatives for Young People, and Parents of Children, Lacking Capacity

- 5.20. A separate consultation on proposals for representatives for young people, and parents of children, lacking mental capacity ran from 3 September to 29 October 2020.
- 5.21. The consultation documents included a draft version of Chapter 31 of the ALN Code (Representatives for young people, and parents of children, lacking mental capacity) and the draft “Young people, and parents of children, lacking capacity Regulations 2020”.
- 5.22. Following the consultation, those draft regulations were incorporated, with amendments, into the Additional Learning Needs (Wales) Regulations 2021 as Part 4.
- 5.23. The consultation found broad support for the proposals. A summary of responses was published on 22 January 2021 which can be accessed at <https://gov.wales/sites/default/files/consultations/2021-01/representatives-young-people-and-parents-of-children-lacking-capacity-summary-of-responses.pdf>

#### Changes to the draft Code following both consultations

- 5.24. A huge number of comments were received covering nearly every aspect of the consultation draft of the Code and proposed regulations. The Welsh Government have carefully considered what changes to make in the light of respondents’ comments. These changes, and the reasons for them, are explained in the following table. Welsh Government have also restructured the Code to improve its structure

and readability, including introducing some new chapters. Flowcharts have been removed because we found that they could be interpreted in different ways and there was a risk the flowcharts could detract from the legal text.

| New Chapter   | Old Chapter    | What has changed   |
|---|----------------|--|
| 1 – Introduction  | 1              | <p>The introduction has been amended to reflect changes to the content of the Code (such as new chapters) and the provisions in the Additional Learning Needs (Wales) Regulations 2021. It has been streamlined to improve readability.</p> <p>There is also now more detailed explanations of how requirements imposed by the Code and descriptions of requirements in the Act or regulations are to be interpreted (for example, in relation to cases where a child has a case friend or a child's parent or a young person lacks capacity).</p> |
| 2 – The definition of ALN & ALP   | 7 (first part) | <p>This chapter has been created from the first part of what was previously chapter 7 in the draft version of the Code. (The second part has created Chapter 20)</p> <p>Following consideration of the consultation responses; the chapter has been moved towards the beginning of the Code, with the structure and content amended to provide further guidance and greater clarity in relation to the definitions of ALN and ALP and their application in the ALN system.</p>   |
| 3 – Principles of the Code  | 2              | <p>This chapter has been significantly cut back and streamlined to highlight the principles of the Code, without providing extensive examples which may have detracted from its key message.</p>   |
| 4 – Involving and supporting children, their parents and young people         | 3              | <p>This chapter has been significantly redrafted to improve the structure and flow of the chapter; and to provide further guidance and greater clarity in certain areas. In particular, there is much more statutory guidance about young people's consent.</p>  |
| 5 – Duties on local authorities & NHS bodies to have regard to UNCRC & UNCRDP | 4              | <p>This chapter has only had minor amended; no significant changes were required.</p>  |
| 6 - Advice and Information  | 6              | <p>This chapter has only had minor amendments, in order to reflect changes elsewhere in the Code and to improve clarity in some areas. One piece of</p>  |



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|  |                  | statutory guidance is now a requirement and there is a little more statutory guidance.  |
| 7 – Duties on local authorities to keep additional learning provision under review | 5                | Chapter 7 (which was Chapter 5 in the consultation version) has been streamlined, with certain amendments made to clarify matters in some areas. Other changes have been made to bring the chapter in line with changes made elsewhere in the Code. The key aspects of this chapter have only had minor amendments, if any at all; it is mainly the supporting guidance around it which has been amended or the structure reorganised.  |
| 8 – Role of the ALN Co-ordinator   | 24               | <p>We have strengthened the chapter to provide further clarity on advice already provided within. Examples of this include the consideration a head of an education setting should give to the allocation of sufficient time for the ALNCo to undertake their role and the expectations around ALNCoS undertaking training and development.</p> <p>In accordance with the ALNCo Regulations, amendments have been made to some of the duties on ALNCoS set out within the chapter. These amendments include clarity on who has responsibility for undertaking certain tasks (regulations 5(h) and 6(h) of the draft ALNCo Regulations – previously regulations 5(i) and 6(i) of the previous version of the regulations consulted on in 2019) Furthermore, some ALNCo duties previously set out in the draft of this chapter have been removed, namely: the duty to prepare and review of information required to be published by the governing body pursuant to the code; and the duty to provide information to the individual (and in the case of a pupil, their parent) about their ALN, IDP and ALP being made. These have been removed from the chapter following their removal from the ALNCo Regulations.</p> |
| 9 – Role of the Designated Education Clinical Lead Officer                         | 15 (second part) | This chapter was created by removing the section relating to the role of the Designated Education Clinical Lead   |

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|---|-----------------|---|
|   |                 | Officer (DECLO) from the previous Chapter (15) on multi-agency working. This was done to allow a single chapter for each of the statutory roles within the ALN Code and system. The substance of the chapter has not been amended significantly, however it has been streamlined and there have been changes to improve clarity and for greater similarity in the structure to the other chapters on the statutory roles.   |
| 10 – Role of the Early Years ALN Lead Officer (ALNCo)   | 8 (second part) | The substance of this chapter has not significantly changed. There have been some structural changes, formatting changes and other small amendments to improve clarity.   |
| 11 – Duties on LA’s about children under CSA (Compulsory School Age) and not at a maintained School | 8               | These chapters have been significantly amended. These chapters comprise the main duties in relation to the ALN system for the majority of children and young people. In the draft version of the Code, the requirements were set out across 4 chapters; however, having considered the responses to the consultation, they have been separated out into more specific circumstances and age ranges.<br><br>Provisions related to the preparation of an IDP have been removed to Chapter 23, since many of them apply in most or all of the separate circumstances and can also be relevant when maintaining an IDP. |
| 12 – Duties on maintained schools & LA’s for children at a maintained school                        | 9               |   |
| 13 – Duties on LA’s about children of CSA not attending a maintained school                         | 11              |   |
| 14 – Duties on LA about children they look after  | New Chapter     |   |
| 15 – Duties on Schools & LA’s about Young People (YP) attending a maintained School                 | New Chapter     |   |
| 16 – Duties on Further Education Institute (FEI) & LA about YP at a FEI                             | 10              |   |
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|  |    | <p>requirements on local authorities to consult an Educational Psychologist. These requirements have been changed, so that when a local authority is required to decide whether a child or young person has ALN; the authority <b>must consider</b> whether to seek advice from an educational psychologist, and, where it considers such advice necessary to determine certain things, it <b>must</b> seek it. This change was as a result of responses to the consultation about the requirements being too burdensome and provides both a statutory footing for the Educational Psychologist role, but also reduces the potential significant burden that a blanket requirement to consult an Educational Psychologist in all circumstances could cause.</p>   |
| 17 – Duties on LA’s about YP not at a maintained school or FEI | 12 | <p>This chapter has been significantly redrafted to correspond to the details in regulations 6 to 10 of, and Schedule 1 to, the Additional Learning Needs (Wales) Regulations 2021. However, the policy principles as originally set out in the previous draft chapter have not changed. The chapter sets out the considerations and requirements a local authority must undertake in determining whether an IDP is necessary to meet a young person’s reasonable needs for education or training (where the young person is not at a maintained school or FEI in Wales). The principle considerations for securing a specialist post-16 placement reflect those under the existing system (whereby the Welsh Ministers secure such placements).</p> <p>In addition, other changes have been made along the lines of those described in respect of chapters 11 to 16.</p> |
| 18 – Children & young people in specific circumstances         | 23 | <p>This chapter has been significantly redrafted to improve the structure and flow of the Chapter; and provide more guidance on a range of different circumstances. There is also a new requirement in respect of children and young people whose parent is Service personnel.</p>  |

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| <p>19 – Children &amp; young people subject to detention orders</p> | <p>22</p>              | <p>There have been changes to explain more clearly how the ALN system applies in respect of children or young people subject to a detention order (including detained persons), including explaining what definitions mean in practice and mentioning other matters relevant to detention situations and giving more practical guidance.</p> <p>The Chapter also deals with referrals to NHS bodies under section 20 of the Act where an IDP is being prepared for a detained person, giving guidance on when this would be appropriate and imposing a related requirement where a relevant treatment or service is identified. The amendment to section 44 of the Act regarding an NHS body’s duty under section 20 (about it not applying during the detention) is reflected.</p> <p>With regards to the timescales in this chapter, and in-keeping with similar amendments throughout the Code, there is now a specified period within which the action (e.g. to decide on ALN and prepare an IDP or to review an IDP) must be taken, subject to the usual exception. Previously, the requirement was just to take the action promptly.</p> <p>What was previously guidance about reviewing an IDP upon release of a detained person has become a requirement and there is supporting guidance around that requirement.</p> <p>There are also changes to align requirements with how similar ones elsewhere have been refined, to improve the cross-referencing (and reflect the structural changes) and changes to reflect requirements in the Additional Learning Needs (Wales) Regulations 2021, including the regulations dealing with the necessity of an IDP.</p> |
| <p>20 – Identifying ALN &amp; deciding upon the ALP required</p>    | <p>7 (second part)</p> | <p>As with Chapter 2 (Definition of ALN and ALP), this chapter has been created from the second part of what was previously Chapter 7 in the draft version of the</p>  |

|                                       |                 |  |
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|                                       |                 | Code. Following consideration of the consultation responses; the structure and content has amended to provide further guidance and greater clarity in relation to identifying ALN, deciding upon the ALP required, and gathering and using evidence to support those decisions and to align with changes elsewhere   |
| 21 – Multi Agency working             | 15 (first part) | This chapter has been amended to give greater clarity and more detail in certain places; but the majority of the content has not changed. The key change is that the section on the DECLO role has been removed and placed in a separate chapter (Chapter 9). In particular, statutory guidance on the Local Health Board to which a referral under section 20 should be made has been added, as has provision about where a Local Health Board ceases to be responsible for a child or young person.  |
| 22 – Meetings about ALN & ALP's       | 18              | This chapter has been amended to give greater clarity and detail in certain places and to improve the structure; but the content and duties have not significantly changed. However, there is additional guidance about holding meetings virtually, as well as further guidance about matters that may need to be considered in order to enable better participation from children and young people.   |
| 23 – Preparing an IDP and its content | 13              | This chapter has been redrafted significantly. There were certain elements contained within the main duties chapters (now 11 to 17), relating to preparing or maintaining an IDP, which applied to all or most circumstances, and were repeated across each of those chapters and some elements that were only dealt with in one of those chapters but were potentially relevant in other situations. In order to streamline the main duties chapters, and to provide greater clarity and guidance when preparing an IDP or reviewing it, those elements of guidance have been moved and included here instead. The structure and wording within this chapter has also been amended to improve flow and ease of use. A section |

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|  |    | has also been added both here and in the standard form templates at Annexes A and B to provide for information about travel arrangements.  |
| 24 – Preparing an IDP and its content for LAC                              | 14 | This chapter has been amended in line with the changes to Chapter 23; and has been streamlined to avoid a duplication of the information contained in that Chapter. This Chapter now simply explains the difference in the process and the content of an IDP for a looked after child, but the guidance on the relevant content of each part of the IDP is set out in Chapter 23.  |
| 25 – Review and Revisions of IDP's   | 16 | This chapter has been amended to give greater clarity and more detail in certain places. It has also been restructured and streamlined where possible but the essence of the content has not significantly changed.  |
| 26 – Local authority reconsiderations & taking over responsibility for IDP | 17 | This chapter has been amended to give greater clarity and more detail in certain places, including improving the connections to other parts of the Code. Structurally, the chapter has changed but the content has not significantly changed. Provisions about consulting an educational psychologist have been removed.   |
| 27 – Planning for and supporting transition                                | 19 | This chapter has been significantly redrafted. The chapter is now less prescriptive with less statutory guidance. This responds to the many conflicting comments received during the consultation which made apparent that transitions are flexible and will require an individualised approach. Details about seeking the consent of a child who becomes a young person to their IDP continuing to be maintained are now dealt with in Chapter 4. |
| 28 – Transfer of responsibility for maintaining an IDP                     | 20 | This chapter has been amended to give greater clarity and more detail in certain places, including making connections to other parts of the Code and reflecting the detail of the Additional Learning Needs (Wales) Regulations 2021. Structurally, the chapter has changed but the content has not significantly changed.   |
| 29 – Ceasing to maintain an IDP  | 21 | This chapter has been amended to give greater clarity and more detail in certain   |

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|  |             | places. Structurally, the chapter has changed but the content has not significantly changed.   |
| 30 – Case friends for children who lack capacity                             | 27          | This chapter has been updated to reflect technical changes made to the regulations. It clearly explains how a child who lacks capacity, can use a case friend to act on their behalf when exercising certain rights. It also provides information on the role of a case friend, and how they are appointed and removed by the Tribunal.  |
| 31 – Representatives for parents of children & young people lacking capacity | New Chapter | Following the public consultation that ended on 29 October 2020, the chapter has been amended to include additional cross-references particularly to the Mental Capacity Act's Code of Practice. The chapter has also clarified that representatives can access independent advocacy services. The chapter also includes new footnotes referring to the impact of the Re: D case.                                      |
| 32 – Avoiding & resolving disagreements & Independent Advocacy               | 25          | This chapter has been amended to give clarity and more detail where it was needed. Structurally, the chapter has not changed and the content and duties have not significantly changed.  |
| 33 – Appeals & Applications to the Education Tribunal                        | 26          | This chapter has been updated to reflect technical changes made to the regulations. To ensure that the chapter describes the appeal process and the timescales involved. It provides clarity in what can be appealed and by who. It includes information about how to make an application to the Tribunal regarding lack of capacity. It also includes a section about children bringing their own appeal to Tribunal. |

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **ALN Code including post-consultation amendments**

#### **6. Options**

- 6.1. This chapter outlines the options associated with establishing the Additional Learning Needs Code for Wales.
- 6.2. As part of these essential reforms, the ALN Code will replace the existing Special Educational Needs (SEN) Code of Practice for Wales. Over a phased three year implementation period starting from 1 September 2021, all statutory guidance in the SEN Code of Practice will be switched off with new provisions being introduced via the ALN Act, the ALN Code and related regulations.
- 6.3. This Regulatory Impact Assessment (RIA) has been developed to consider the regulatory implications for mandating requirements on local authorities and governing bodies in relation to duties set out in the ALN Code (and associated regulations).
- 6.4. The Welsh Government proposes to lay the ALN Code, along with related regulations, before the Senedd on 2 March with a plenary debate on 23 March. This RIA reviews the proposals on whether to bring into force the ALN Code.
- 6.5. The RIA reviews two options, described below.

#### **Option one: do nothing**

- 6.6. Under option one, the existing SEN system will continue with the SEN Code of Practice setting out the role of education providers in identifying and improving the experience of children with special needs.

#### **Advantages**

- 6.7. Option one does not involve any additional costs.
- 6.8. Additionally, part of the £20.244m funding agreed on 7 February 2017 to cover the costs of transition from one statutory system to another and deliver the wider system transformations could be spent elsewhere.

#### **Disadvantages**

- 6.9. The current system is inequitable. Children and young people with the most severe needs and who fall above the threshold for having a statement of SEN, have service provision which is protected by law.



In contrast, children and young people whose needs are less severe and who fall below the threshold for having a statement of SEN do not have protected provision or statutory rights.

- 6.10. The existing practices and processes associated with statements of SEN are inefficient and inflexible, and can result in ineffective provision for children and young people.
- 6.11. The current arrangements for reviewing and amending statutory plans are administratively cumbersome and involve schools inviting a prescribed set of professionals, regardless of whether their presence and input is necessary to the effectiveness of the review. Statutory reviews take considerable time to organise and prepare for. Amending a plan can, therefore, be a lengthy process and can result in learners experiencing delays in receiving the most appropriate support.
- 6.12. In addition, there is little flexibility when reviewing the provision for children and young people who are on the threshold for receiving statutory support. Where, for example, the outcomes of a statutory plan have been achieved for a child or young person, concern from parents about losing statutory entitlement may result in pressure for the plan and its provision to be maintained, despite this not necessarily being the most effective provision for the young person.
- 6.13. Finally, without the ALN Code, the reforms to the SEN system and the introduction of the new ALN system could not proceed.

## **7. Option two: replace SEN Code of Practice with ALN Code**

- 7.1. Under option two, the existing SEN system including the SEN Code of Practice will be entirely replaced with the ALN system including the statutory ALN Code.
- 7.2. Option two is the preferred option.
- 7.3. A potential third option could have been to progress with the draft ALN Code as published in June 2019 before the consultation. However, this would not have been a genuine option given the legal requirements to conduct a meaningful consultation on the draft ALN Code, and the public commitment to making improvements to the Code before it is laid before the Senedd.

## **8. Advantages**

- 8.1. The advantages of continuing with the planned reforms, including laying the revised ALN Code and introducing the legislative system the Code helps underpin, will be discussed in more detail under section 7. However, the key advantages relate to the reasons for reforming the SEN system in the first place; that the revised ALN

Code will make significant improvements to the support offered to children and young people with ALN in Wales.

## 9. Disadvantages

- 9.1. Likewise with the advantages, the disadvantages are discussed in detail below. However, the main point to note is the potential risks involved with introducing a new legislative system. There is a risk that costs will increase, both in terms of financial cost and pressure on resources. However, according to [Estyn Annual Report 2018-2019](#) "Schools and PRUs with clear leadership roles and excellent practice are well placed to make the transition from the current SEN system to the new ALN system."
- 9.2. There is also the risk of introducing these reforms at unprecedented times in education settings, with COVID-19 potentially impacting on the ability of local authorities and governing bodies (and other statutory bodies) to manage with implementation. However, this risk relates more to implementing the system rather than introducing the ALN Code.

## 10. Costs and benefits

- 10.1. The ALN Code includes statutory guidance about the exercise of functions under Part 2 of the ALN Act, which establishes the statutory system in Wales for meeting the ALN of children and young people. The Code also includes statutory guidance on other matters connected with identifying ALN and meeting the needs of children and young people with ALN, and describes relevant statutory requirements, including ones in the Act.
- 10.2. There are many hundreds of individual statutory duties throughout the Code, where the requirements (written as a "**must**" in the Code) takes its powers from subordinate legislation - either from the Code itself or from regulations - as opposed to deriving the powers directly from the ALN Act. These duties relate to the detail and processes of how the system will operate, including details on the roles and tasks set out in the ALN Act.
- 10.3. It is not the purpose of this RIA to discuss the impact of every statutory duty in the Code. Rather, this RIA discusses the duties in a thematic way, with specific references to the new duties as amended following consultation on the draft ALN Code.
- 10.4. To better understand the impact of the statutory duties made under subordinate legislation, every "**must**" in the Code was compiled, analysed and organised into categories of the likely cost of each duty in terms of their significance, rather than a financial estimate for each individual duty. All duties considered to be greater than a low cost

related to small, administrative tasks (such as sending a notification) were compiled into themes. These themes are discussed in detail below.

- 10.5. Where relevant, references to the costs as set out in the [Regulatory Impact Assessment](#) for the ALN Act (published in January 2018), are used here.

## **11. £20m funding package for delivering the ALN system**

- 11.1. The £20.244m package of funding is being used to support implementation of the Act and delivery of the wider ALN Transformation Programme.
- 11.2. A large part of this funding will be used to develop the workforce so that all partners understand and are prepared for the changes being introduced. This includes workforce development to help build capacity and ensure practitioners have the skills to effectively operate the new system in order to meet learners' needs.
- 11.3. We are targeting workforce development at three levels; core skills development for all practitioners, advanced skills development through the establishment of the role of Additional Learning Needs Coordinators (ALNCos), which will replace the current SENCo role; and specialist skills development for local authority provided specialist support services available to education settings.
- 11.4. Five ALN Transformation Leads have also been in post since April 2018. Their role is to provide advice, support and challenge to local authorities, schools, early years settings and further education institutions, as they prepare for implementation of the reforms. This includes through readiness self-assessments and the development of local implementation plans. The ALN transformation leads will be responsible for rolling out implementation training on a multi-agency regional basis.

## **12. Themes identified from the statutory duties in the ALN Code**

- Designating statutory roles (ALN co-ordinating officers)
  - DECLO
  - ALNCO
  - Early Years ALN Lead Officer
- Individual Development Plans (IDP)
  - Preparing an IDP
  - Securing ALP
  - Reviewing an IDP
- Independent Advocacy Services
- Costs for reviewing system

## **13. Costing of subordinate legislation**

- 13.1. The RIA for the ALN Act concluded that the new ALN system itself should not increase in cost compared to the current SEN system.
- 13.2. Welsh Government has asked local authorities to provide evidence if they believe the new system will be more costly, but to date no such evidence has been received.
- 13.3. Based on the currently available evidence, we continue to support the position set out in the ALN Act's RIA. However, we do recognise there may be risks in implementing a new system when the level of funding available to local authorities, schools, FEIs and health boards is limited. This issue clearly goes wider than ALN, and relates to public sector finances more generally; however, these concerns continue to persist in any public discourse about the ALN reforms.
- 13.4. This RIA should assist the reader to understand the potential costs and benefits associated with the revised ALN Code, whilst giving an overview of the impact of the ALN Code in general, using the thematic method described above.
- 13.5. The costs and benefits discussed below are based on agreeing to Option 2.
- 13.6. The duty to designate Additional Learning Needs Co-ordinating Officers
- 13.7. Additional Learning Needs Co-ordinator (ALNCo)

## **14. Benefit**

- 14.1. Option two will require all education settings including pupil referral units (PRUs) and FEIs to appoint an ALNCo. This extends current arrangements where existing non-statutory SENCo are used in most schools in Wales. Making the ALNCo a statutory role will bring a consistent approach to co-ordinating ALP for learners in Wales and help foster better working relationships across sectors.

## **15. Post-consultation additions**

- 15.1. Following the consultation on the ALN Code, we have strengthened the ALNCo chapter to provide further clarity on advice already provided within. Examples of this include the considerations head teachers should give to the allocation of sufficient time for the ALNCo to undertake their role and the expectations around ALNCos undertaking training and development.
- 15.2. In accordance with the ALNCo Regulations 2020, amendments have been made to some of the duties on ALNCos set out within the chapter. These amendments provide clarity on who has responsibility for undertaking certain tasks (regulations 5(e) and 6(e) of the ALNCo regulations 2020) and on what aspects of record keeping the ALNCo must undertake (regulations 5(c) and 6(c) of the ALNCo regulations 2020). Furthermore, some duties previously set out in the draft of this chapter have been removed. These relate to what was the preparation and review of information required to be published by the governing body pursuant to the ALN Code, and the duty to provide information to the individual (and in the case of a pupil, their parent) about their ALN, IDP and ALP being made. These have been removed from the chapter and the ALNCo Regulations 2020 due to changes made elsewhere to the ALN Code in this regard.
- 15.3. These amendments are unlikely to make any significant impact on the cost or benefits associated with this part of the ALN Code, but may provide clearer support for those with statutory duties relating to the ALNCo role.

## **16. Cost**

- 16.1. The cost for creating the ALNCo role were discussed in the ALN Act's RIA and the [integrated impact assessment](#) for the ALNCo regulations. Given the broad scope of the role and the way it will vary from setting to setting, it will not be possible to provide an estimated cost for the role. The most significant impact identified in this IIA was how the proposed regulations will contribute to the raising of standards in the co-ordination or ALP for children and

young people with ALN. Local authorities will do this by providing assurance that the new ALNCo role will be undertaken by qualified individuals (i.e. qualified teachers or experienced SENCOs) who are required to undertake the co-ordination of ALP in a consistent way, irrespective of education setting. This should result in an improvement in the way in which ALP is planned and delivered for children and young people.

- 16.2. No further financial costs have been identified within the ALNCo chapter of the ALN Code.
- 16.3. There is a theoretical risk that the new ALNCo requirements may be perceived as creating an additional burden on local authorities which may discourage current SENCOs from applying to become an ALNCo. However, there was broad support for making the ALNCo a professional role and we have not received any evidence to suggest this risk will transpire.

## **17. Designated education clinical lead officer (DECLO)**

### **Benefit**

- 17.1. Option two will ensure every local health board (LHB) will designate a DECLO to take responsibility for ensuring the day-to-day health provision for children and young people with ALN is effectively managed and co-ordinated.
- 17.2. Although much of the work the DECLO will be responsible for under the ALN system will already have been undertaken within each LHB currently, without this designated role the work involved to supervise the provision of health related special educational provision has been inconsistent and difficult to measure.
- 17.3. Appointing a DECLO within each health board will have the benefit of facilitating the delivery of effective, co-ordinated health services to improve outcomes for children and young people with ALN. The DECLO will also support the health board to discharge their responsibilities under the ALN system and facilitate the effective collaboration between health boards and their partners in the delivery of services for learners with ALN.
- 17.4. The DECLO will also ensure there is a robust structure for assuring the quality and safety of services and collect data about service quality, outcomes and performance; simplify the system for children, young people, parents and partners by providing a single point of contact for local authorities and others within health boards on ALN matters. In addition, the appointment of the DECLO should ensure ALN provision is a strategic priority for health boards.

- 17.5. One of the key benefits of introducing the DECLO role will be the improved links between health and other sectors, and the co-ordination of multi-agencies centred on the needs of the individual. The system is designed to cut the number of meetings and assessments required to receive ALP, and to ensure continuity of support for the individual as they transition, in age, key stages and educational development.

## **18. Post-consultation additions**

- 18.1. There is a new chapter in the ALN Code on the role of the DECLO. This chapter was created by removing the section relating to the role of the DECLO from the Chapter 15 on multi-agency working. This was done to allow a single chapter for each of the statutory roles within the ALN Code and system. The substance of the chapter has not been amended significantly, but is now easier for the reader to follow.

## **19. Cost**

- 19.1. The cost of introducing the DECLO role was discussed in the ALN Act's RIA where it was concluded there would be no new costs to local health boards.
- 19.2. This is because the role is expected to be fulfilled by an existing member of staff, and the DECLOs and other health professionals will undertake the required training within the hours allocated for them to undertake continuous professional development (CPD). Although the role itself is new, the duties the DECLO will be responsible for as set out in the Code are already being undertaken within health boards by exiting members of staff under the SEN system. The purpose of having a DECLO will be to standardise this role and improve multi-agency working by having a named individual in each health board. On average, each of the seven local health boards in Wales will have a healthcare professional undertaking DECLO responsibilities for approximately two days per week.
- 19.3. The duties in the ALN Code chapter relating to the DECLO role provides more details on the role itself, with guidance used to set out how DECLOs are expected to undertake their tasks. The introduction of the DECLO role and the estimation of the resource this will take poses a low and manageable risk to local health boards, particularly as DECLOs are not expected to be full time positions and will likely be undertaken by existing senior members of the health board.
- 19.4. With the duty to provide health related ALP for learners up to the age of 25, there could be an increase in the number of cases referred to

an NHS body requiring health related ALP. This risk, although not based on evidence the Welsh Government has seen, could potentially increase costs for LHBs in terms of the systems they introduce to support the DECLO role and their statutory functions under the ALN system. Although it is difficult to estimate how extending the age range to 25 will effect these costs, the Act's RIA did explain that young people who have the most complex needs and attend a specialist FE establishment will currently have a statutory learning and skills plan. Where a young person needs medical care whilst at a specialist FE establishment, the health board will be asked to contribute to the learning and skills plan. Under the ALN system, this practice will continue but health boards will be asked to contribute to the IDP instead. It was concluded that there will be no additional costs to health boards where a young person attends a specialist FE establishment.

## **20. Early years additional learning needs lead officer (Early Years ALNLO)**

### **Benefit**

- 20.1. Under option two, an Early Years ALNLO will be appointed by every local authority in Wales to have responsibility for co-ordinating the local authority's functions under the Act in relation to children under compulsory school age who are not attending maintained schools.
- 20.2. The Early Years ALNLO will play an important role in raising awareness of the ALN system and how it applies to children under compulsory school age; promoting early identification and prevention of ALN; and other strategic responsibilities. These duties will help families understand their children's ALN and the options available to support their education. The role should therefore include a social benefit by reducing the fears associated with ALN and reassuring parents that support is available in early years settings.
- 20.3. Another advantage of including this new role in the ALN Code will be to improve the co-ordination of provision for children in early years settings and ensure there is a single, named officer where issues can be directed to. This will help concerned families who under the SEN system may have struggled to engage with the relevant individuals.

## **21. Post-consultation additions**

- 21.1. No significant changes to the content have been made since consultation.



## **22. Cost**

- 22.1. The cost of introducing the Early Years ALNLO role was also mentioned in the ALN Act's RIA. As set out there, for illustrative purposes a salary of £49,700 is used to estimate the ongoing costs of introducing the early years ALN lead officer. The estimated ongoing cost to the 22 local authorities in Wales is, therefore, estimated to be approximately £1,093,400 a year. Since local authorities already undertake the functions associated with the early years ALN lead officer, this will not be an additional ongoing cost.
- 22.2. It is estimated local authorities will incur transition costs of £126,700 related to training early years ALN lead officers. The estimated cost of training early years ALN lead officers is based on the same cost model used to estimate the ALNCo training costs. That is, it is assumed the early years ALN lead officers will be trained to masters level at a cost of £3,600 per degree, with a total estimated cost of £79,200 to the 22 local authorities in Wales, and will take 10 days of paid study leave over the two year period at an estimated cost of £47,520.
- 22.3. There are no other duties in the Early Years ALNLO role chapter apart from the local authority's duty to designate an officer.

## **24. Individual Development Plans**

- Preparing an IDP
- Securing ALP
- Reviewing an IDP

### **Context**

- 24.1. Data shown in the Act's RIA has revealed the number of children and young people recorded as having SEN from 2011-12 to 2015-16 has been relatively stable at 23% of pupil population. Although the ALN system extends the age range to 25 years, the number of young people between the ages of 19-25 in education or training with ALN, who consent to having an IDP, is likely to be low. Welsh Government's latest figures show 83 post-19 specialist placements were secured in 2018/19. Using the figures available in the Act's RIA and from Stats Wales, there will be around 110,000 school age IDPs, with around 1,000 for below compulsory school age, and around 2,000 in all post 16 education and training.

## 25. Benefit

- 25.1. If option two is chosen, the introduction of the ALN Code will result in all children and young people with ALN being treated equally under the law, regardless of the severity of their need. All learners in early years settings, schools (including maintained nurseries, pupil referral units and special schools) and FEIs who require additional learning provision (ALP) will be entitled to a statutory, individual development plan (IDP) with rights of appeal. This will improve the equity of the system of support for learners whilst contributing a social benefit by extending the rights of children and young people and working towards improved educational outcomes.
- 25.2. Introducing statutory plans for all children and young people with ALN will enable a greater focus on early identification of need which should prevent or reduce conflict within the system. This could result in a long term reduction in the number of appeals going to Tribunal, however the number of potential appellants will necessarily grow with all children and young people with ALN having rights of appeal. Equitable statutory plans should also improve the way provision is secured and ensures it remains in place as long as it is required (up to the age of 25).
- 25.3. The duties in the ALN Code on local authorities and governing bodies to prepare an IDP, secure the ALP and review IDPs are broadly set out in the ALN Act and its impact has been documented in the ALN Act's RIA. However, the revised ALN Code sets out in detail how these arrangements must be undertaken. For example, many of the requirements imposed by the ALN Code and associated regulations related to IDPs are around the timescales to complete certain tasks. A local authority, for instance, should act "promptly" to decide whether it should take over responsibility for maintaining the IDP and give the notification within the period of 7 weeks from the request to take over responsibility for the IDP, unless it is unable to do so within that period due to circumstances beyond its control.
- 25.4. The benefit of imposing timescales to the specific duties related to this core function of the ALN system enables children, young people and their families to have a realistic expectation of when certain decisions or processes should be completed. This should help alleviate much of the current tension in the SEN system where delays and inconsistencies have caused significant anxiety in the past. It is also expected these timescales will help reduce the time it currently takes to complete certain decisions or processes, such as preparing a statutory plan of support. By using the word "promptly", the ALN Code expects duties to proceed without delay, whereas

only using a set timescale for every duty without first using the term “promptly” may lead to the maximum amount of time allowed to carry out any particular duty to become the default timescale.

## **26. Post-consultation additions**

26.1. Chapters 11-15 of the ALN Code comprise the core duties in relation to the majority of children and young people with ALN. Additionally, chapters 16 and 17 comprise duties in respect of young people FEIs or not in a maintained school. These have been significantly redrafted in response to the consultation. They now appear in separate chapters, based on age specific circumstances to provide greater clarity on the roles of statutory bodies to support learners with ALN. The elements of guidance applicable to all these age groups now appear in a single chapter to provide greater clarity and guidance when preparing an IDP or considering the ALP it should contain. However, in the main, the essence of the key duties across these chapters remains unchanged.

## **27. Cost**

- 27.1. As stated in the ALN Act’s RIA, local authorities will be responsible for preparing, maintaining and reviewing IDPs for all children with ALN who are looked after by them. It was estimated at the time of the Act’s RIA that local authorities will spend approximately one hour preparing the application at a cost of approximately £18 per application based on 20 applications each year (this number is not expected to change as a result of introducing the ALN system). As identified in the Act’s RIA, local authorities are not expected to incur any additional costs under option two. Currently, local authorities put together a case when applying to the Welsh Ministers for consent for a child or young person with a statement of SEN to be placed at an independent school which is not generally approved to admit learners with statements of SEN. Under option two, local authorities will continue to have to satisfy themselves the placement is appropriate.
- 27.2. Numerous calls for evidence, from the Deloitte research in 2015 to Welsh Government officers asking local authorities for data, has provided no indication to challenge the estimate in the ALN Act’s RIA, and ultimately that the new system is estimated to be cost neutral compared to the current SEN system.
- 27.3. Reviewing an IDP will be an ongoing process and although there are requirements to review IDPs (such as annual reviews), the work to inform these meetings should be done

continuously. The cost of reviewing IDPs will predominately be the time it takes for the ALNCo or other member of teaching staff to conduct the review meeting.

- 27.4. Likewise with preparing an IDP, there will be circumstances when plans start from scratch (a new learner from across the border, a new disability which calls for ALP), however in most cases, those with ALN will already have been identified and will likely have some provision already in place. Preparing an IDP will not be a significant cost to the school or local authority, although it could be seen as a moderate cost in the most complex cases. However, in cases where an FEI had a duty to prepare or maintain an IDP, this would be a new cost and could be seen as onerous to begin with. Therefore, FEIs may see an increase in their costs but the system as a whole is not expected to create an overall increase in cost.
- 27.5. In 2018/19, 11,095 young people, aged 16-24 years of age, were recorded as having learning difficulties and/or disabilities (LDD) in FEIs. Although it is not expected FEIs will need to prepare all IDPs from scratch (in time, many young people will arrive in the FEI with an IDP), as part of the implementation planning for the roll out of the new ALN system, consideration is given to ways of supporting FEIs to undertake their new duties.
- 27.6. Given that Statements of SEN are already being prepared for children and young people up to the age of 19 years, and individual education plans (IEPs) are in place for many more learners, the exact duties in the ALN Code are new, but in reality, they replace and improve the existing duties within the SEN system.
- 27.7. Increasing the number of children and young people who have statutory entitlement to provision could result in increased pressure for those responsible for securing ALP. Although the previous RIA for the ALN Act did not identify unmet need within the SEN system (and we do not believe the ALN system will create new demand), there is a risk the improved system may be challenging with regards to the resource currently used to deliver the SEN system.
- 27.8. With regards to the introduction of new timescales on many duties in the ALN Code and regulations, there is a small risk that the current level of resources dedicated to the SEN system will not be adequate to fulfil duties (with new timescales) under the ALN system. Although there is no evidence to suggest this, and the timescales introduced by the ALN system have been carefully chosen in consultation with stakeholders, there is a

potential for the new system to require greater resources to fulfil duties within the set timeframe.

## **28. Advocacy**

### **Benefit**

28.1. The ALN Code sets out duties on local authorities to establish independent advocacy services (IAS) for the children and young people for whom it is responsible.

28.2. IAS will provide expert advice and assistance, by way of representation or otherwise, to a child or young person, where the child or young person is:

- making, or intending to make, an appeal to the Tribunal;
- considering whether to appeal to the Tribunal; or
- taking part in, or intending to take part in arrangements for avoiding or resolving disagreement.

28.3. The service will be provided free of charge at the point of delivery.

Although advocacy is frequently used under the SEN system, there is no requirement to provide an equivalent service under SEN Code of Practice. IAS is therefore necessary to provide a consistent approach to advocacy service that specifically deals with issues relating to ALN. IAS, along with a local authority's duty to make arrangements for avoiding and resolving disagreements is intended to significantly reduce the number of disputes that currently occur within the SEN system, and should, in the medium to long term, reduce the numbers of cases going to the Tribunal. This could potentially save time and money for those who may have pursued an appeal had these services not been available.

## **29. Post-consultation additions**

29.1. The amendments made post-consultation have clarified the difference between IAS and other advocacy services. It is also now clearer that representatives for young people, and parents of children, who lack capacity, also have the right to access these services. These amendments will benefit those reading the ALN Code without increasing any costs.

## **30. Cost**

30.1. The cost of running the new service will be met by local authorities, and will vary considerably from one authority to another. The Act's RIA provided an estimate cost of £5,300 to the local authority for dispute resolution services relating to appeals under the SEN system. Many of the advocacy

services currently available in Wales are provided by the third sector or volunteers, where costs are sometimes covered by contributions from Welsh Government. However, there are other professional advocacy services that will charge for their service.

- 30.2. There is a potential risk with the introduction of IAS over the cost of running the service to local authorities. This is related to its potential use, and the difficulty in estimating how much demand there will be for advocacy services. As the new ALN system beds in, there is a risk of an increase in cases requiring arrangements for avoiding and resolving disagreements or using IAS, which could be costly and time consuming, although careful planning and a successful implementation of the new system should counter such difficulties.

## **31. Reviews**

### **Benefit**

- 31.1. Under option two, the ALN Code will set out the details regarding the Welsh Ministers' duty to review the demand for, and supply of, ALP delivered through the medium of Welsh. The requirement is that such a review is undertaken once every 5 years from implementation.
- 31.2. The review will facilitate the ability to make informed policy decisions about ALP through the medium of Welsh and support the Welsh Government's Cymraeg 2050 strategy.

## **32. Cost**

- 32.1. There will be a financial cost to reviewing the Welsh ALP which has not been worked out. However, the cost will be met by Welsh Government rather than statutory bodies, and is on the face of the Act. As an estimate, this work may be undertaken by a small team made up of one Senior Executive Officer (£47,000 per annum) and one Team Support (£23,830 per annum) for a total of 3 months. This assumes the Welsh Government will not require any external researches, and instead rely on their own Knowledge and Analytical Services to undertake any analysis of the data. The estimated costs associated with these two roles for 3 months is £17,707.50.

### 33. New musts in ALN Code (post-consultation)

33.1. The table below contains all new duties (**musts**) included in the ALN Code following the public consultation, with the exception of small, administrative tasks (such as sending notifications) which have been filtered out.

33.2. The table below is designed to help the reader understand the potential costs of these new duties.

| Ref.  | Text   | Topic                               | Cost   |
|-------|--|-------------------------------------|--|
| 19.81 | Where a relevant local authority has to decide whether the child or young person has ALN, it <b>must</b> :<br>(a) designate an officer to be responsible for coordinating the actions required to make that decision, any decision as to whether an IDP is necessary for a young person and, if an IDP is subsequently required, to be responsible for preparing it;<br>(b) record the date on which it is brought to its attention, or otherwise appears to it that the child or young person may have ALN;<br>(c) in the case of a young person, record the date on which they consented to the decision being made;<br>(d) record a summary of how the possibility that the child or young person has ALN has been brought to its attention or why it otherwise appears to the authority that they may have ALN;<br>(e) give the relevant notification referred to in paragraphs 22.64 – 22.65. | LA duty to designate a co-ordinator | Low<br><br>The designation itself is a relatively straightforward administrative task. |
| 16.14 | The decision <b>must</b> be taken and the notification given promptly and in any event within the period of 35 term time days from the young person consenting to the decision being made  | Decision and time scale             | Low to Medium  |
| 16.26 | The FEI <b>must</b> make the decision on ALN, prepare the plan and give a copy of it promptly and in any event within the period of 35 term time days from the young person consenting to the decision being made.   | Decision and time scale             | Low to Medium  |
| 19.65 | A local authority maintaining an IDP for a previously detained person following their release <b>must</b> review the IDP and complete that review (including, as the case <b>may</b> be, giving a copy of the revised IDP or notification of another conclusion of the review) promptly and in any event, by the end of the period of 7 weeks starting with the person's release from detention. But this requirement to complete the review by the end of the 7 week period does not apply if it is impractical for the local authority to do so due to circumstances beyond its control.   | IDP review                          | Low to Medium  |
| 19.67 | In cases where the released child or young person is to attend a maintained school or FEI in Wales, the local authority <b>may</b> consider that it would be more appropriate for the school or FEI to maintain the IDP. Depending upon the circumstances, it might also be more appropriate for that institution to review the IDP. This might be the case where, for example, the IDP was recently prepared by the authority and the released person has low level needs or where the  | IDP review                          | Low to Medium  |

|       |   |                                 |   |
|-------|---|---------------------------------|---|
|       | <p>institution previously maintained the IDP and the period of detention was very short. If the IDP is transferred to a school or FEI[775 This would be following a direction by the local authority under section 14(4) of the Act in the case of a school or following an FEI agreeing to the authority's request under section 36(2) that the FEI become responsible for the IDP. Also, a transfer can only take place if the released person is a registered pupil of the school or is a young person enrolled as a student at the FEI. Without the local authority having reviewed it following release, the school or FEI <b>must</b> review the IDP promptly and in any event within the period of 35 term time days from the child or young person's release from detention. But the requirement to complete the review by the end of that period of 35 term time days, does not apply if it is impractical for the school or FEI to do so due to circumstances beyond its control.</p> |                                 |   |
| 15.60 | <p>As part of the process of deciding whether a young person has ALN, a local authority <b>must</b> consider whether to seek advice from an educational psychologist and, where it considers that seeking such advice is likely to be worthwhile, it <b>must</b> do so.</p>   | <p>Consider and seek advice</p> | <p>Low</p> <p>Consideration will not be overly burdensome, and will likely become part of the process. Since educational psychologists are already involved in the current system, this new provision is designed to standardise the process rather than creating something brand new. Seeking advice will therefore be small administrative task.</p>        |
| 17.32 | <p>The local authority <b>must</b> first identify if the young person has desired outcomes and what they are.</p>   | <p>Review</p>                   | <p>Low to medium.</p> <p>Local authorities should already be adopting a person centred approach to understanding the needs of the individuals and this could include in respect of identifying desired outcomes.</p> <p>In many cases, the LA will be aware of the individual through any previous engagement they had with them through the IDP process.</p> |



|       |  |                        |   |
|-------|--|------------------------|---|
| 17.36 | The local authority <b>must</b> consider what programmes of study may be available that would be suitable for enabling the young person to meet their desired outcomes.  | Review                 | <p>Low to medium.</p> <p>This will be a largely new requirement on Local authorities who until now have only had to consider post16 education for those who remain in school. This should become less burdensome over time as LAs develop their knowledge of post-16 education and training that is on offer.</p> |
| 17.38 | Otherwise, the local authority <b>must</b> first consider programmes of study at mainstream maintained schools or FEIs (this could include such schools and FEIs in England). More often than not, those settings will be able to provide a suitable programme of study for a young person with ALN and the young person's reasonable needs to ALP would be met in undertaking it. | Review                 | <p>Low to medium.</p> <p>This will be a largely new requirement on Local authorities who until now have only had to consider post16 education for those who remain in school. This should become less burdensome over time as LAs develop their knowledge of post-16 education and training that is on offer.</p> |
| 31.12 | The local authority <b>must</b> ensure that the staff delivering these arrangements are impartial to the outcome of any potential disagreements.   | Training               | <p>Low</p> <p>This may require staff training or guidance to ensure staff are reminded of their duties.</p>   |
| 32.13 | The local authority <b>must</b> ensure the arrangements made are accessible to children and young people and delivered in a way which meets their communication preferences and needs (see Chapter 3 on involving and supporting children, their parents and young people).  | Accessible information | <p>Low or medium</p> <p>Every local authority should already ensure the information they provide to the public is accessible. There may be a one-off cost for preparing these materials, but little to no ongoing costs.</p>  |

|       |   |          |  |
|-------|---|----------|--|
| 32.11 | The local authority <b>must</b> ensure that the staff delivering these arrangements have a detailed understanding of the ALN system. To do so, the local authority <b>should</b> ensure that staff providing the arrangements receive appropriate training and development to undertake their role effectively and training is refreshed to improve standards.  | Training | Low<br><br>This training may be adapted from the Welsh Government training material, keeping the cost low.   |
| 32.63 | The local authority <b>must</b> ensure that all advocates:<br>(a) understand the ALN system including the arrangements for avoiding and resolving disputes and Tribunal procedures;<br>(b) are suitably trained, including in communicating with children and young people and those with communication difficulties, and continue to receive appropriate training and development to undertake their role effectively and to improve standards;<br>(c) have relevant knowledge of the child's or young person's ALN;<br>(d) maintain confidential records;<br>(e) are not on the children's barred list (in the case of advocates for children) or the adults' barred list (in the case of advocates for young people who are considered to be "at risk"). If this information is not held by the advocacy providers, the local authority <b>must</b> ensure the advocates apply for an enhanced level disclosure and barred list check from the Disclosure and Barring Service before they can proceed. | Training | Low or medium<br><br>The costs for training advocates should be relatively low. Welsh Government are investing in training for the ALN system and will provide free training material online.<br><br>It may take some time to train everyone, but given the low numbers involved, the cost should low. |

## 34. Consultation

34.1. A consultation on the draft ALN Code was held between 10 December 2018 and 22 March 2019.

34.2. The consultation sought views on the draft ALN Code and proposed regulations in order to consider comments and make improvements before it is laid before the Senedd.

34.3. The consultation was aimed at maintained schools, further education institutions, local authorities, local health boards, early years settings, third sector organisations and anyone else with an interest in additional learning needs.

35.4. 65 consultation questions were asked covering the following five themes:

1. The draft ALN Code;
2. Draft Education Tribunal for Wales regulations;
3. Draft ALN Co-ordinator regulations;
4. Looked after children; and
5. Impact of proposals.

35.5. A total of 644 people responded to the main consultation. A summary report can be found here:

<https://gov.wales/sites/default/files/consultations/2019-06/summary-of-responses-draft-additional-learning-needs-code.pdf>

35.6. The main themes raised during the consultation included;

- frequent calls to convert many of the “shoulds” included in the draft ALN Code to “musts”;
- concern about the language style used in the draft ALN Code;
- issues about transport provision for post-16 learners with learning difficulties or disabilities;
- calls for guidance on other relevant legislation or on matters set out elsewhere in statutory guidance;
- concerns that the new ALN system would have a considerable financial impact;
- requests to develop an electronic system to support the IDP process; and
- the capacity of the specialist workforce, including educational psychologists, to deliver elements of the new system described in the draft ALN Code.

35.7. A summary of the changes made to the ALN Code following the consultation can be found in the table from page 15 of the Explanatory Memorandum.

## **36. Competition Assessment**

36.1. The provisions within the Act will not affect business, or charities and/or the voluntary sector in ways that raise issues related to competition. The competition filter has not been applied.

36.2. The provisions in the Act are not expected to have any impact on competition or place any restrictions on new or existing suppliers. The majority of the costs associated with the legislation are expected to fall on public bodies, who already meet these costs.

36.3. The legislation is not expected to have any negative impact on small and medium sized enterprises (SMEs) in Wales.

## **37. 10. Post implementation review**

37.1. The phased rollout of the new ALN system will be monitored and evaluated by the Welsh Government during and post implementation. During implementation, the main focus of the work will be to establish the extent to which stakeholders are compliant with the provisions in the Act and to consider the initial effects and impacts of the Act using available data.

37.2. Additionally, Welsh Government has committed to undertaking a post-implementation review of the Act in 5 years' time; this will consist of a baseline study of the current system to inform a future evaluation of the impact of the Act. The baseline study was published by Arad Research in February 2019. The post-implementation review will be predominately focused on the outcomes of the Act for young people and parents.

37.3. Section 89 of the ALN Act sets out the duty on Welsh Ministers to reviews the sufficiency of additional learning provision in Welsh and to publish a report on the outcome within five years of the new system coming into force.

37.4. In the meantime, local authorities have an ongoing duty under section 63 of the Act keep under review the arrangements made by the authority and by the governing bodies of maintained schools in its area for children and young people who have additional learning needs.

37.5. To ensure the arrangements for providing health related ALP are sufficient and appropriate, the ALN Code sets out expectations on the DECLO to oversee the development of processes to collect and analyse robust data to measure its compliance with duties under the Act. It should also measure the effectiveness of arrangements for partnership working, and provide quality assurance of its activities in relation to children and young people with ALN.

37.6. This provides a counterweight to similar duties on local authorities to ensure both health related ALP and the ALN system itself are continuously reviewed, allowing for internal systems to be improved where necessary.