



## Families First in Education Wales

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Date: 21 February 2023

To: [SeneddLJC@senedd.wales](mailto:SeneddLJC@senedd.wales)  
& [huw.Irranca-Davies@senedd.wales](mailto:huw.Irranca-Davies@senedd.wales)

Huw Irranca-Davies MS  
Chair: Legislation, Justice and Constitution Committee  
Welsh Parliament, Cardiff Bay, CF99 1SN

Dear Mr Irranca-Davies,

We write to you as Chair of the Legislation, Justice and Constitution Committee, having noticed a reference in the minutes of your meeting on 9 January to "Correspondence from the Minister for Education and the Welsh Language in relation to home schooling." (7.1)

Families First in Education Wales advocates to preserve the freedom of families to make choices in the best interests of their individual children. We fully appreciate, as you pointed out in your letter to Education Otherwise published in the same papers pack, that your Committee cannot consider subordinate legislation until it is laid before the Senedd.

Consequently, at this stage we are writing not to request any other action than that you place the attached documents on file so that your Committee can refer to them when considering both the new statutory guidance for elective home education and the proposals for local authority databases of every child in their areas. The first matter was consulted on in 2019, with a consultation on the second being postponed until 2020, and then extended due to the Covid-19 lockdowns. In June that year Kirsty Williams MS, then Minister for Education, announced that neither proposal would be taken forward during the term of that administration.

The current Government revived the proposals, but in May last year the Minister informed the Chair of the CYPE Committee that there would be a delay in putting them before Senedd. He originally hoped that this would have been done in June, but by that point expressed the intention that they would be tabled in September. Importantly he added, "However, it is not expected to impact on the timescale for the implementation of the proposals in April 2023." At the time of writing nothing has been laid before Senedd, yet as recently as 7th February his department has been writing to home educating families stating that the implementation date remains this April. Whilst we understand that secondary legislation does not require the same level of scrutiny as primary bills, it would seem that there is now very little time available for your committee and members of Senedd to give any meaningful thought to these proposals if they are indeed to be implemented this spring.

In response to the 2019 consultation, Protecting Home Education Wales [PHEW] crowdfunded a legal opinion from David Wolfe QC, which they included in their submission. This was raised at a meeting of the Petitions Committee on 4 February 2020, and Michelle Brown MS commented, "I would dearly like to understand from Welsh Government why they don't seem to be giving that [the QC's opinion] the attention that I think they should be giving it, given the issues that it's raised." In the event, as you know, lockdowns disrupted the Senedd's programme of work and consequently this matter was taken no further by CYPEC.

PHEW also responded to the 2020 consultation, again including crowdfunded comment from Wolfe QC. At no point since then has the Department for Education commented on the important points raised in either of these submissions, therefore at present it is not possible to be confident that the Welsh Government has given them the attention they should have done. The first was raised as recently as 9 December by Laura Anne Jones MS, who asked in a Written Question (WQ86963) "What assessment has the Welsh Government made of the legal advice David Wolfe QC provided on the elective home education proposals in response to the

consultation on new home education guidance in Wales?" The Minister's reply was only that they "have been considered by my officials."

In October 21, being concerned that the then Children's Commissioner was not accurately applying the UNCRC in regard to electively home educated children, Families First in Education Wales provided the Minister with a submission to rebut her arguments. The author of the rebuttal is a pro-bono legal advisor who is providing assistance to us. They are a solicitor specialising in human rights law employed by an international advocacy charity, and if you had any questions when the proposals come before your Committee, they would be happy to meet with you. Even though we have met with the Minister's officials since providing this rebuttal, there has been no response from his department specific to the important matters it raises.

Lacking clear assurance that informed observations on the legality of the proposals have been properly engaged with by the Minister, we are attaching copies of each of them, in order that your Committee might have them to hand whenever the relevant secondary legislation is presented to Parliament. We are doing this in the hope that the Committee will properly scrutinise the proposals to ascertain as far as possible that they have each been properly engaged with by the Department to ensure that they conform with existing Welsh, UK and international legislation.

When you acknowledge this correspondence, we would very much appreciate it if you can confirm that this is within the remit of your Committee, and that you will scrutinise the proposals fully when they are published in Senedd. If you are able to do so, not only will it reassure our team, but also many home educating children and their families from across Wales who are concerned about the nature of these proposals.

We look forward to hearing from you.

Yours sincerely,

*The FFiEW Team*  
*Families First in Education Wales*

#### Accompanying documents

- 1] Protecting Home Education Wales Submission to 2019 consultation on new EHE guidance and handbook - this includes David Wolfe QC's legal opinion
- 2] Protecting Home Education Wales Submission to 2020 consultation on local authority databases of all children containing David Wolfe QC's comments on the proposals
- 3] Families First in Education Wales submission to the Minister for Education seeking to rebut the Children's Commissioners use of the UNCRC - October 2021

# **A Submission to Rebut the Children's Commissioner's use of UNCRC**

submitted by

**Families First in Education - Wales**

to

**Jeremy Miles MS,  
Minister for Education**

October 2021

Contents:

- An open letter to the Minister
- A summary of the submission
- The full submission





## Families First in Education Wales

Website: [familiesfirst.wales](http://familiesfirst.wales)

Email: [correspondence@familiesfirst.wales](mailto:correspondence@familiesfirst.wales)

Date: 6 October 21

To: Jeremy Miles - Minister for Education

Dear Mr Miles,

We are writing to submit to you **the enclosed rebuttal** of the unjustifiable use of the UNCRC by the Children's Commissioner for Wales in her February 2021 "Review of the Welsh Government's exercise of its functions." We also seek the opportunity to liaise with you to ensure that the home educating community is represented and treated as fairly and honourably as any other community within our society.

The Welsh Government states that it seeks to encourage, promote and celebrate diversity in Wales, advocating for a pluralistic and tolerant society.[1] Any such society has to have a diverse and pluralistic approach to education.

As home educators in Wales, we embrace this approach. A register of home educators is completely at odds with a tolerant and pluralistic society.[2] One would certainly never envisage mandatory registers for people on the grounds of their religious, political or philosophical beliefs or because of sexuality.

A tolerant society protects the clear legal principle of "innocent until proven guilty," by adopting a reactive stance to the investigation of any potential crime or infringement of the law. One does not take action against subgroups of the community without evidence, "just in case" there *might* be a risk of harm to individuals or the community; the authorities only act if there are reasonable grounds to believe there *is* risk of harm, and any measures taken have to be reasonable and proportionate.

Evidence would be required that home educated children were at significantly increased risk of harm, such as abuse and neglect, in order to justify registration. There is no such evidence. Indeed, research has shown that home educated children are statistically at significantly *less* risk of abuse and neglect within the home than their school educated peers.[3]

Furthermore, home educated children are not at risk from the considerable rates of peer and adult-mediated sexual, physical and emotional abuse which the Welsh Government are starting to acknowledge occur so frequently in school-based education.[4] The concept of alleged "visibility" cannot possibly be taken as a safeguarding gain when schoolchildren are "seen" and a register taken on a daily basis, and yet so many of them still suffer from abuse and neglect

We would welcome further opportunity to familiarise you with our experiences of the wonderful diversity of educational approaches being used by home educators. We look forward to a change of narrative in future, accompanied by a more constructive dialogue between the Government and home educators here in Wales.

*Families First in Education Wales*

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### References

- 1] Curriculum for Wales guidance - page 42, "Diversity" paragraphs 1 & 2  
<https://hwb.gov.wales/api/storage/afca43eb-5c50-4846-9c2d-0d56fbffba09/curriculum-for-wales-guidance-120320.pdf>
- 2] Forcing homeschooling parents to sign up to register 'risks treating them like sex offenders'  
<https://www.dailymail.co.uk/femail/article-9783345/Forcing-homeschooling-parents-sign-register-risks-treating-like-sex-offenders.html>
- 3] Home Education and the Safeguarding Myth: Analysing the Facts Behind the Rhetoric  
<https://www.educationotherwise.org/home-education-and-the-safeguarding-myth-analysing-the-facts-behind-the-rhetoric>
- 4] Inspectors to visit schools as part of sexual harassment review - Wales Online  
<https://www.walesonline.co.uk/news/education/sexual-harassment-schools-wales-review-21571540>

## **The Welsh Children’s Commissioner is wrong to recommend that the home education model should be limited**

### A Summary

The UK has historically given home educators a large degree of freedom in choosing the method and manner of their child’s education. Yet in February, the [Welsh Children’s Commissioner called](#)<sup>1</sup> for the Welsh government to do more to reform home education policy and enact the [Dylan Seabridge Child Practice Review recommendations](#).<sup>2</sup> Central to this was the recommendation that children’s voices and wishes should be heard and recorded by local authorities on an annual basis. As a ‘critical friend’ to the Welsh Government, the Commissioner advised that the United Nations Convention on the Rights of the Child (CRC) demanded a stronger State-led child focus on home educated children. She urged policy makers to increase the supervision of home educated children, even when parents are not suspected of inflicting harm.

In pushing this recommendation, the Commissioner urged the Senedd to reverse the presumption that parents look after the best interests of their children and provide a suitable education when they home educate - unless there’s evidence to the contrary. She also assumed that the local authority should be the primary arbiter of children’s views and that these are more important than parental views.

Yet, home educators should take heart. The Commissioner’s legal arguments were weak.

First, the report’s recommendation goes against the legal presumption that parents *do* act in the best interests of their children when home educating. Under section 7 of the Education Act 1996, it is parents’ sole responsibility to ensure that children receive efficient full-time education suitable to their age, ability, aptitude, and specific educational needs – “*by regular attendance at school or otherwise*”. This judgement call lies within the sole hands of parents. The assumption underwriting this is that parents have the primary responsibility to determine the method of education that is most suitable to their child. Without risk of harm or poor education, local authorities should not intervene. The Education Act 1996 gives local authorities [powers to address these issues](#)<sup>3</sup> if they arise. This is also written into the [Welsh government’s statutory guidance](#).<sup>4</sup>

Secondly, neither the CRC nor any other international legal text relevant to the UK assumes that government employees should intervene in private educational provision. Parents are legally recognised as primarily responsible for the ‘upbringing and development’ of their children, and the family stands as “*the fundamental group unit of society and the natural environment for the well-being of all its members, particularly children*.”<sup>5</sup> The family is entitled to “*protection and assistance*” if they require it; yet, the State must respect parents’ ‘rights and duties’ without undue interference or intrusion. A child’s right to be cared for (primarily and predominantly) falls within the scope of parental oversight in international law.

Even when individual European countries have imposed outright bans on home education, there has been UN pressure to reinstate the model. For example, the UN Special Rapporteur on the Right to Education has [directly advised Germany](#)<sup>6</sup> (which has banned home education since 1919) to reverse the ban and allow parents to formally teach their children within the home.

Third, the Commissioner’s assumption that the CRC requires public bodies to talk to home educated children under the ‘right to be heard’ is incorrect. This claim ignores at least two fundamental human

rights that the UK is obliged to honour: the right to a private and family life, and the right to privacy. It is also not true to the plain meaning of the CRC text.

Article 8 of the European Convention on Human Rights (ECHR, which is directly applicable in UK) provides: “*There shall be no interference by a public authority with...this right except such as is in accordance with the law and is necessary in a democratic society*”. The European Court has held that this right, when applied to the topic of safeguarding, means that countries cannot presume that the interests of the child are different to those of their parents unless there’s clear and compelling evidence of harm. Yet, the recommendation for children to be interviewed outside their parents’ consent, and absent of any threat of risk to the child, introduces a “preventative” measure; it tries to introduce public authority interference in legitimate private activities without justification. This could infringe Article 8 and could create complications between the Senedd and Westminster. The [current legal challenge](#)<sup>7</sup> to Holyrood’s law making regarding the CRC should give the Senedd caution here.

The right to privacy is also a core human right. The CRC provides “*no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence*”. Underlying this, “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*”. This means that children’s physical and mental immaturity places parents as their privacy shields until they can appreciate their evolving capacities. As children are forming their own private views, parents should inform, guide and nurture development. Any intrusion on a child’s privacy when overseen by parents, such as by local authority interviews in the absence of harm or blatantly negligent educational provision, could disproportionately interfere with this principle.

Moreover, the Commissioner has misunderstood the context of the ‘right to be heard’ as a legal right within her report. The right was included in the CRC *primarily* for countries to acknowledge and encourage the voice of the child in ‘judicial or administrative proceedings’ on matters impacting them – including relating to health, living conditions, education, or protection. Whilst the [UN Committee on the Rights of the Child](#)<sup>8</sup> has also acknowledge that the ‘right to be heard’ should *additionally* be relevant to school and education, it has advised that the right does not include views about the type or method of education provided to the children. Instead, the guidance highlights situations of “*authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms*”, where a child’s voice should be heard and listened to. It encourages governments to build opportunities for children to speak about their negative experiences for the “*elimination of discrimination, prevention of bullying and disciplinary measures*” and also to participate in decision-making processes such as class councils, student councils and student representation boards to discuss school policies and codes of behaviour. This is a far cry from the Commissioner’s recommendations.

Therefore, the Welsh Children’s Commissioner will need to provide a more robust and legally persuasive case for the limitation of parental freedoms in home education if she wants to be successful in changing the law. Home educating families should continue to hold the Senedd to account to make sure that any proposed legislation is in compliance with national and international obligations.

**References** - Summary of a submission to the Welsh Government obtained by Families First in Education - Wales

- [1] [https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG\\_FINAL\\_ENG.pdf](https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG_FINAL_ENG.pdf)
- [2] [https://www.whatdotheyknow.com/request/452376/response/1084174/attach/2/CYSUR%202%202015%20CPR%20Report%20080716.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/452376/response/1084174/attach/2/CYSUR%202%202015%20CPR%20Report%20080716.pdf?cookie_passthrough=1)
- [3] <https://www.legislation.gov.uk/ukpga/1996/56/section/437>
- [4] <https://gov.wales/sites/default/files/publications/2020-09/statutory-guidance-help-prevent-children-young-people-missing-education.pdf>
- [5] <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- [6] <https://www.refworld.org/docid/4623826d2.html>
- [7] <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56725145>
- [8] <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>



## **The Children's Commissioner for Wales is wrong to recommend that the home education model should be more heavily restricted**

### **(a) Introduction**

1. *Families First in Education* represents the voices of home educators throughout Wales. We are a network of home educators and interested parties from a variety of backgrounds across Wales who are united by a desire to protect the rights and freedoms of parents to educate with autonomy and in a child's best interests.
2. We urge the Minister for Education to recognize that the UK has historically given home educators a large degree of freedom in choosing the method and manner of their child's education.
3. In February, the [Children's Commissioner for Wales called](#) for the Welsh government to reform home education policy and enact the [Dylan Seabridge Child Practice Review recommendations](#)<sup>1</sup>; namely, that children's voices should be heard and recorded by local authorities (LAs) on an annual basis. As a 'critical friend' to the Welsh government, the Commissioner urged greater consideration of child rights in the review and updating of policy and legislation. She suggested that the United Nations Convention on the Rights of the Child (CRC) required the government to introduce a stronger public authority-led child focus on home educated children. In short, she urged policy makers to increase LA supervision of home educated children.
4. We consider it likely that home education will be an agenda item for the Senedd in the forthcoming parliamentary season and the recommendations of the Children's Commissioner will guide discussions.
5. We urge the Minister for Education to carefully review the Commissioner's recommendations to see that they have not been sufficiently substantiated. The Commissioner's legal arguments were not persuasive, and her safeguarding arguments were weak. The Commissioner also did not prove that CRC's 'the right to be heard' would have prevented Dylan Seabridge's death, since he was not an 'invisible' child to the Authorities. In short, these unsubstantiated concerns are misdirected at the expense of parents who are turned into the objects of suspicion when in reality they have often made significant sacrifices to raise children according to what they believe best for them as is their right in international and domestic law.
6. Therefore, there is no justifiable need for the Senedd to reform the current home education model in Wales.

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Children's Commissioner for Wales, A review of the Welsh Government's exercise of its functions (February 2021)



**(b) The Welsh Commissioner’s legal arguments are not persuasive**

7. Although neither a lawyer nor legal professional by background, Ms Holland made several legal claims and demands. Her main claim was that the UK’s ratification of the CRC required the Welsh government to reform the long-standing tradition of parents taking the primary decisions for their children in private arrangements for home education.

8. This claim should not be accepted by the Welsh government without thorough legal analysis and scrutiny, for the following reasons:

i. **International law affirms that parents, not the State, have the primary responsibility for deciding the manner and method of their child’s education**

9. International law strongly protects the rights of children to receive an education. Article 28 of the CRC says that State parties should ensure that primary education is compulsory and available free to all, and that secondary education should be promoted and accessible to all.

10. However, neither the CRC, nor any other international legal text that the UK has ratified, demands that a child’s education must be primarily provided for by the State under the assumption that it can provide a ‘better’ education than parents. Instead, parents are recognised as responsible for the ‘upbringing and development’ of their children, and the family stands as *“the fundamental group unit of society and the natural environment for the well-being of all its members, particularly children”*<sup>2</sup>. The family is entitled to *“protection and assistance”* if they require it; yet, public authorities must respect parents’ ‘rights and duties’ without undue interference or intrusion (Articles 5 and 14). A child’s right to be cared for (primarily and predominantly) falls within the scope of parental oversight in the CRC.

11. Indeed, the [United Nations Committee](#) on the Rights of the Child (made up of independent experts who monitor the implementation of the CRC) has confirmed via General Comments that the CRC’s right to education does not specify that education should be provided centrally or that this is a better model<sup>3</sup>. Moreover, Article 29 of the CRC provides that State parties agree that a child’s education shall be directed to the development of respect for the child’s parents; a textual reading of the Convention text shows that the drafters were keen to affirm that parental views in education are *de facto* good for children. The right to education should not be construed in a way which limits the liberties of individuals to establish and direct educational institutions. Namely, the rights of individuals to design and manage the methods of educational provision should not be limited.

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Preamble to the United Nations Convention on the Rights of the Child (1989)

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See United Nations Human Rights Office of the High Commissioner, Committee on the Rights of the Child, General Comment No. 12 on the ‘right of the child to be heard’ CRC/C/GC/12 (1 July 2009)

12. Other international legal texts also have a high regard for the natural family in decision making about children. Various texts affirm the primacy of parents in directing the personal and educational development of their children. The role of the State is secondary – intervening when parental primacy is inadequate or harmful. The Universal Declaration of Human Rights, the cornerstone document of the human rights movement, provides, “[parents] have a prior right to choose the kind of education that shall be given to their children”<sup>4</sup> because they “have the primary responsibility for the upbringing and development of the child”<sup>5</sup>. States also need to respect the “liberty of parents...to ensure the religious and moral education of their children”<sup>6</sup>; and respect the rights and duties of the parents to direct the child “in a manner consistent with their evolving capacities”<sup>7</sup>.

13. The European Convention on Human Rights (ECHR) also protects parental rights and primacy. It protects the rights of men and women to found a family (Article 12) and the integrity of family and private life against arbitrary State interference (Article 8).

14. Standing as perhaps the strongest international legal text for parental rights, Article 2 of Protocol 1 to the ECHR provides:

*“In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.*

15. This Article gives parents the right to choose not just the religious education of their children, but also the broad education of their children in general terms. In reviewing this Article, the European Court of Human Rights has held that “respect” means more than simply “acknowledge” or “take into account”<sup>8</sup> – it has a deeper meaning and application. Moreover, it has affirmed the principle of ‘pluralism’ in education, considering that multiple forms and methods of education are valuable to children and wider society. This includes a parents’ choice to home educate.

16. From caselaw, the Court has held that *how* individual States organise their education systems in respect to the method and suitability of education sits under their ‘margin of appreciation’. In other words, the European Court has left the details about *what* education looks like to each individual country.

17. Even in the rare instances when individual European countries have imposed outright bans on home education, there has been UN pressure to reinstate the model. For example, the

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4 Article 26 of the Universal Declaration of Human Rights (1948)

5 Article 18 of the United Nations Convention on the Rights of the Child (1989)

6 Article 18 of the International Covenant on Civil and Political Rights (1966)

7 Article 14 of the United Nations Convention on the Rights of the Child (1989)

8 European Court of Human Rights, *Campbell v The United Kingdom*, Application no. 13590/88 (25 March 1992)

UN Special Rapporteur on the Right to Education has [directly advised Germany](#) (which has banned home education since 1919) to reverse the ban and allow parents to formally teach their children within the home<sup>9</sup>. Moreover, even where the European Court of Human Rights has refused to strike down country prohibitions against home education, it has never said that is right for the country in question to retain the prohibition.

ii. **Interference in the home education model could be incompatible with other human rights**

18. The Children’s Commissioner for Wales used Article 4 of the CRC (“*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*”) as her linchpin for reform of the home education model. She argued that this Article placed a duty on the government to more fully realise child rights, and specifically to do so by upholding the child’s ‘right to be heard’ under Article 12 of the CRC<sup>10</sup>.

19. However, this claim ignores at least two fundamental and enshrined human rights: the right to a private and family life, and the right to privacy.

20. Both Article 12 of the Universal Declaration on Human Rights and Article 8 of the ECHR protect the right to private and family life. Article 8 of the ECHR provides:

*“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society”*

21. Any interference with this fundamental right legally needs to be narrow and strictly defined.

22. [Caselaw](#) of the European Court of Human Rights on the topic of safeguarding has affirmed that national laws cannot presume, absent clear and compelling evidence of harm to a child, that the interests of the child are different to those of their parents<sup>11</sup>. If a State is to withdraw an aspect of parental authority, it must do so only in limited circumstances: a high threshold should be reached. Yet, the Welsh Commissioner’s calls for LAs to interview home educated children annually outside their parents’ consent, and absent of any threat of risk to the child, introduces a “preventative” measure; it tries to introduce interference in legitimate private activities without justification. This could infringe Article 8 of the ECHR as well as the presumption that parents act in their child’s best interests. Absent any compelling evidence of serious harm, this presumption should not be legally open to LAs.

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United Nations Human Rights Council, Fourth Session, Report of the Special Rapporteur on the right to education, Vernor Munoz Mission to Germany 13-21 February 2006, A/HRC/4/29/Add.3 (9 March 2007)

10

Article 12 of the United Nations Convention on the Rights of the Child (1989):

(1) *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

(2) *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

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For example, Fifth Section Wunderlich v Germany (Application no. 18925/15, 10 January 2019)

23. The right to privacy is also found in the CRC and other texts such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In the CRC, the right is mentioned twice; once in relation to privacy in criminal proceedings, and once as “*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation*” (Article 16). This Article was drafted because “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*” (as provided in the Preamble). The CRC calls for parents to protect their child’s evolving capacities in both Article 5 and Article 14. While children have the right to form religious beliefs, the CRC upholds the rights of parents to inform, guide and nurture development as the child matures.

24. Any intrusion on a child’s privacy as overseen by parents, such as by LA interviews in the absence of compelling evidence of serious harm, could disproportionately interfere with important aspects of parental rights.

iii. **The CRC ‘right to be heard’ does not require home educated children to be annually interviewed by Local Authorities**

25. By reiterating the core Seabridge Child Protection Review Panel’s recommendation that home educated children need to have their voices heard and wishes recorded annually (allegedly derived from Article 12 CRC), the Children’s Commissioner indicated that children would be better protected from harm if LAs could listen to their views, annually. Implicitly, she argued that within a new, formal child-public authority relationship, children should be able to “*express a view about their educational experiences*” (outside their parents’ earshot), which would avoid the safeguarding risks associated with home education and provide greater oversight to the “*well-being and education of children*”.

26. But, in pushing this recommendation for reform, she urged the Welsh government to reverse the presumption that parents look after the best interests of their children and provide a suitable education when they home educate, unless evidence is shown to the contrary. In doing so, she implicitly argued that LAs should look after the best interests of children in education, unless parents can demonstrate suitability and children can affirm a preference to remain educated in the home.

27. Yet, this recommendation goes against the legal and social presumption that parents *do* act in the best interests of their children when home educating. Under section 7 of the Education Act 1996, it is parents’ sole responsibility to ensure that children receive efficient full-time education suitable to their age, ability, aptitude, and specific educational needs – “*by regular attendance at school or otherwise*”<sup>12</sup>. This judgement call lies within the sole hands of parents, and permission from a government employee does not need to be sought if a child is home educated from the outset. The assumption underwriting the law here is that parents have the primary

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Section 7 of the Education Act 1996

responsibility to determine whether formal schooling or home education is most suitable to their child.

**28.** Without risk of harm or poor education, LAs should not intervene. The Education Act 1996 gives LAs [powers to address these issues](#) if they arise<sup>13</sup>. This is also written into the [Welsh government's statutory guidance](#)<sup>14</sup>.

**29.** In other words, and since safeguarding risks to 'hidden' or 'isolated' home educated children are so incredibly rare, the proposal will achieve a far more wide-reaching consequence than just looking out for children like Dylan Seabridge. The proposal elevates child views about home education *above* the legitimate decision of parents to home educate, and it places the LA as the arbiter of such views (even though the CRC is silent on this). The 'right to be heard' in the home education context tries to give children the right to opt-out of the model if they dislike it, in turn alienating them from their natural family.

**30.** However, this is contrary to the [Department for Education's \(DfE\) home education guidance \(2019\)](#). The DfE advises that while Article 12 of the CRC requires countries to give *due weight* to the views of children (according to the age and maturity of the child), it does not override the decision-making authority of parents to decide whether home education is preferred to school education. A child's negative attitude to home education as a method of educational provision, for example, "*should not bear on the Authority's conclusions as to suitability*"<sup>15</sup>; it should – at most – be a reason to discuss the child's feelings with the parent. [DfE guidance for parents](#) also affirms that on the topic of child views, "*This does not give children authority over parents, and a decision to educate a child at home is a matter for you as parents*"<sup>16</sup>. Therefore, the DfE does not place the voice of the child, nor the intervention of public authorities, above parental primacy to decide that home education is most suitable for the child.

**31.** The DfE has further advised that [s.17\(4\) of the Children Act](#), which puts a duty on public authorities to take a child's wishes and feelings into account as far as is reasonably practicable, does not "*place an obligation on Local Authorities to ascertain the child's wishes about elective home education, as that is not a service provided by the Local Authority*"<sup>17</sup>. Since home education is a service provided by parents, the LA does not have an obligation vis-à-vis the CRC to listen to child views about home education when legitimate and independent safeguarding risks are not material.

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13 Section 437 of the Education Act 1996

14 Welsh Government, Statutory guidance to help prevent children and young people from missing education, circular no: 002/2017 (March 2017)

15 Department for Education, Elective home education: Departmental guidance for local authorities (April 2019), at 10.1

16 Department for Education, Elective home education: Departmental guidance for parents (April 2019), at 2.13

17 Section 17(4) of the Children Act 1989

32. Adding international weight to this interpretation of Article 12 of the CRC, the [UN Committee on the Rights of the Child General Comment on the ‘right of the child to be heard’ \(2009\)](#) affirms that the a State’s duty under Article 12 is to allow children to, in particular, be “*given the right to be heard in any judicial or administrative proceedings affecting him or her*”. The Comment has quoted the legal analysis of the Commission on Human Rights on Article 12, which assessed that the child’s right to be heard “in all matters affecting the child” applies to “*matters under consideration...includ[ing] children in the social processes of their community and society*”<sup>18</sup>. The primary contextual application of Article 12 is for the State to acknowledge and encourage the voice of the child in *court or judicial proceedings* on matters impacting them – including relating to health, living conditions, education, or protection.

33. Whilst the General Comment goes on to acknowledge that there are other settings in which the ‘right to be heard’ should be implemented domestically, including in relation to education and school, it does not include views about the type or method of education provided to the children. Instead, the non-binding guidance highlights situations of “*authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms*”, where a child’s voice should be heard and listened to. It encourages States to build opportunities for children to speak about their negative experiences for the “*elimination of discrimination, prevention of bullying and disciplinary measures*”<sup>19</sup> and also to participate in decision-making processes such as class councils, student councils and student representation boards to discuss school policies and codes of behaviour.

34. It is therefore inappropriate for the Children’s Commissioner to quote the ‘right to be heard’ in the context of home education without a thorough legal analysis of Article 12 of the CRC and supporting comments by human rights bodies, and consideration of the “prior right” of parents.

iv. **Domestic law remains directly effective in Wales; the CRC is not**

35. The UK ratified the CRC in 1991 with it coming into force in 1992. The Welsh Senedd additionally passed the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) which outlines that Welsh Ministers must have *due regard* to the CRC and its Protocols when exercising any of their functions. This law goes farther than England in outlining a Children’s Scheme and Child Rights Impact Assessments for legislation and policy proposals. However, this legislation does not enable children to seek redress from the courts if a public authority has breached the Agreement’s principles; the CRC has no direct legal effect. The CRC in Wales is therefore a policy intention but does not make the CRC domestically legally binding.

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18

[United Nations Committee on the Rights of the Child, General Comment No. 12 on the ‘right of the child to be heard’ CRC/C/GC/12 \(1 July 2009\)](#), at 27

19

Ibid. at 109



36. This is different to the ECHR which does have direct legal effect via the [Human Rights Act 1998](#). As explained above, Convention rights do not limit home education or require LA checks upon home educated children. Indeed, the ECHR strongly protects parental rights and responsibility, and the European Court of Human Rights has generally left the matter of home education to each individual State to decide upon.

37. Moreover, UK domestic law cannot be overridden without repeal of statute. [Section 436\(a\) of the Education Act 1996](#) places the duty on LAs to make arrangements to identify children out of school not receiving suitable education, but not to seek out and interview any home educated children. [DfE non-statutory guidance](#) for LAs explains this by advising them to have arrangements for finding out whether education in the home is suitable which “*are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully [home educating]. Often, having in place a system which is based on a presumption that it will be parents who initiate contact with the authority if necessary will yield good results when the parents are known to be providing good education*”<sup>20</sup>. Regarding ‘suitability’ of education, the law provides no specifics, and [DfE non-statutory guidance for parents](#) affirms that parents have discretion in how they direct education to the age and aptitudes of children.

38. Therefore, the Senedd should be careful not to use provisions of the CRC to overrule domestic legislation without first repealing primary legislation and undertaking a thorough analysis of whether the human rights regime requires reform. Without doing so, the Senedd could run the risk of infringing their devolved powers with Westminster. The [current legal challenge](#) about some Holyrood bills, including the Scottish parliament’s domestic adoption of the CRC, should create caution to the Senedd. Moreover, the Scottish lessons learned through the [‘Named Person Scheme’ litigation](#), which led to the abolition of a scheme that tried to wedge a State-shaped gap between children and parents when there was no wrongdoing or harm, should be remembered. As poignantly noted by the Supreme Court Justices:

*“The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world.”*

and

*“Within limits, families must be left to bring up their children in their own way.”*<sup>21</sup>

### **(c) The Welsh Commissioner’s safeguarding claims are unsubstantiated**

39. Apart from the legal arguments being misguided, Ms Holland’s assertions that home educated children face greater safeguarding risks than in full time school is simply inaccurate. With sole reference to the tragic [Seabridge](#) case of parental neglect, she assumed that home educated children are naturally at risk. Her implicit argument was that children are safer within

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20

Department for Education, Elective Home Education: Departmental guidance for local authorities (2019), at 5.2

21

The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, at 73



the hands of the LA or schools than the hands of parents. This is unsubstantiated, and the Senedd should be cautious to legislate for increased LA powers to interfere with private and family life.

**i. There is little evidence that children are ‘hidden’ from Local Authorities**

**40.** As awful as the Dylan Seabridge case was, and despite being so frequently cited as the classic example of abuse, it was a rare case of parental neglect. The family lived in a remote and secluded community, and they remained isolated from mainstream universal services such as healthcare appointments. This is not to say the LA did not know of the children – they did, since the mother was identified by her employer as a potentially vulnerable adult. Discussions with the Authority were not recorded here – and the [Concise Child Practice Review](#) cites this as an error<sup>22</sup>. There were potential opportunities to intervene before Dylan tragically died. He was not ‘invisible’.

**ii. There is little evidence to show that children face safeguarding risks when home educated**

**41.** The Commissioner has failed to provide evidence that home educated children needed greater surveillance to protect them from abuse and harm. Independent research actually shows that home educated children are even half as likely to be subject to Child Protection Plans as children referred in school-based education. Indeed, FOI research from Wales has revealed that *“home educated children, although more likely to be scrutinised by social services than their schooled peers, are less likely to be at risk than all children in Wales”*<sup>23</sup>.

**42.** Moreover, research that has emerged in mainstream media over the past few months has testified to the sex abuse scandals prevalent in many independent and state schools where abuse happens *in school*– reported by the [Guardian](#), [Times](#) and [Telegraph](#). The majority of perpetrators have been male teachers or other educational staff who have groomed and manipulated pupils. It is simply untrue to claim that children at home face greater risk than under the supervision of school employees.

**43.** There is also a lack of evidence that LA processes are inadequate to protect children who are home educated. The DfE has maintained that *“there is no proven correlation between home education and safeguarding risk”*<sup>24</sup>.

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22

See the Child Practice Review Report, CYSUR Mid and West Wales Safeguarding Children Board, Concise Child Practice Review Re. CYSUR 2/2015

23

See the research of Wendy Charles-Warner, Home Education and the Safeguarding Myth: Analysing the Facts Behind the Rhetoric (February 2015)

24

Department for Education, Elective home education: Departmental guidance for local authorities (April 2019) at 7.3

**(d) Summary**

44. Any proposals to drastically alter the parental primacy over children in education and increase public body interference in the home must be seriously weighed against domestic and international legal obligations. While the CRC places the child at the forefront of political decision-making, it does not invent new obligations for LAs to act in the 'best interests of children' when there are no justifiable reasons to intervene in parental primacy and responsibility. This extends to home education. There is no *de facto* 'right to be heard' by public authority employees absent evidence of serious harm.

45. Moreover, in both domestic and ECHR law, the UK is required to respect the right of parents to home educate their children in accordance with their values and beliefs.

46. While parents have a right to home educate their children as they see fit and in accordance with their values and education philosophy, LAs have a statutory duty to oversee the safeguarding of children in cases of perceived harm or inadequate educational provision when this has become evident.

47. While children are not *de facto* safer being home educated than being in school, the evidence suggests that placing a child in school is not a protective factor for their safety. Moreover, since home educated children are already twice as likely to be monitored by Social Services, they are already receiving a greater degree of oversight than school educated children

48. It is feared that if more intrusive powers were given to LAs to enter into family home life by questioning children at least annually about their education preferences and methods of education in the home, then these powers would be used to a greater extent than intended, in order to be risk adverse. There is no justified and legal reason to increase the power of LAs and to make them the arbiter of the 'right to be heard' or a child's 'best interests'.

49. If the Senedd wishes to reform the home education landscape to expand LA powers to interview children who are not at risk, it would need to produce substantiated evidence that such reforms would be economically viable; beneficial to the deployment of LA statutory duties; compatible with the prior right of parents to direct the education of their children, and fully accountable to Parliament. A full Public Sector Equality Duty impact assessment would also need to be done under the Equality Act to analyse and evaluate the implications for intervening into private and family life.

## Internet links embedded in above text:

### Para. Embedded Links:

- 3 [https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG\\_FINAL\\_ENG.pdf](https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG_FINAL_ENG.pdf)  
<http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf>
- 10 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- 11 <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>
- 12 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23977&LangID=E>  
<https://archive.crin.org/en/home/rights/convention/articles/article-18-parental-responsibilities.html>  
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#:~:text=freedoms%20of%20others.-,4.,conformity%20with%20their%20own%20convictions>  
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- 15 <https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>
- 17 <https://www.refworld.org/docid/4623826d2.html>
- 22 <https://laweuro.com/?p=188>
- 28 <https://www.legislation.gov.uk/ukpga/1996/56/section/437>  
<https://gov.wales/sites/default/files/publications/2020-09/statutory-guidance-help-prevent-children-young-people-missing-education.pdf>
- 30 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/791527/Elective\\_home\\_education\\_guidance\\_for\\_LAV2.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_guidance_for_LAV2.0.pdf)  
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- 31 <https://www.legislation.gov.uk/ukpga/1989/41/section/17>
- 32 <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>
- 35 <https://www.legislation.gov.uk/mwa/2011/2>
- 36 <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- 37 <https://www.legislation.gov.uk/ukpga/2006/40/section/4>  
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- 38 <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56725145>  
<https://www.supremecourt.uk/cases/uksc-2015-0216.html>
- 39 <https://www.bbc.co.uk/news/uk-wales-31039895>
- 40 <http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf>
- 41 <http://www.home-education.org.uk/articles/article-safeguarding-myth.pdf>
- 42 <https://www.theguardian.com/uk-news/2020/dec/17/child-sexual-abuse-in-schools-often-an-open-secret-says-inquiry>  
<https://www.thetimes.co.uk/article/schools-cover-up-sexual-abuse-by-pupils-htqjix05s>  
<https://www.telegraph.co.uk/news/2021/03/31/schools-have-duty-face-sexual-assault-claims-will-need-support>
- 43 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/791527/Elective\\_home\\_education\\_guidance\\_for\\_LAV2.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_guidance_for_LAV2.0.pdf)

# The Draft Children Act 2004 Database (Wales) Regulations 2020 and the Draft Education (Information about Children in Independent Schools) (Wales) Regulations 2020 Consultation

## Consultation response form

Your name:

Organisation (if applicable): **Protecting Home Education Wales**

e-mail/telephone number:  
[protectinghewales@gmail.com](mailto:protectinghewales@gmail.com)

Your address: Cardiff

Responses should be returned by **22 April 2020** to:

Learner Support Team  
Support for Learners  
Education and Public Services Directorate  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

or completed electronically and sent to:

e-mail: [WELLBEINGshare@gov.wales](mailto:WELLBEINGshare@gov.wales)

**Question 1** – The draft regulations require local health boards and independent schools to disclose to local authorities (LAs) the information listed in Schedule 1 to the regulations. This will assist the LA in identifying children of compulsory school age in their locality currently not known to them.

i) Do you think that the information requested is reasonable and proportionate? What are the reasons for your answer?

No, the information requested is neither reasonable nor proportionate.

Question 1 i) is misleading. How can we say or even assess whether the information requested is reasonable and/or proportionate when the draft regulations are not telling us how or for what purpose such information will be used?

The draft regulations do not state what the information will be used for and on that basis the disclosure of such information is unreasonable and disproportionate and if the draft regulations are enacted as proposed they will be unlawful. In this regard, we refer to the [legal opinion](#) we obtained from [David Wolfe QC](#) (a renowned education law and human rights lawyer) which is attached.

The draft regulation does not specify what the purpose of the database is and it is not clear (it is not stated) what local authorities can or have to do with such information. The regulations do not say how the data will be used.

In addition, Section 29(1) of the Children Act 2004 states that the purposes of a database can only be arrangements under [section 25](#) or [28](#) of the 2004 Act or under [section 175](#) of the Education Act 2002, but the draft regulations does not say which of those arrangements the purpose of the database is. **The Welsh Government is hereby asked to please explain exactly which of the three and on exactly what basis and for exactly what purpose the database is being established.**

As stated in the legal opinion, the draft regulations need to comply with the Human Rights Act 1998 and in particular its [Article 8](#) which enshrines the right to respect for private and family life. Article 8 is one of the **human rights and fundamental freedoms** recognised and protected by the [European Convention on Human Rights](#).

That means that the draft regulations must be justified and must be proportionate to the justification. The draft regulations should not go further than is necessary to achieve a legitimate aim, but David Wolfe's view is that they go well beyond it, which means they are not proportionate and therefore would not be legal.

By way of example, David Wolfe says that "regulation 9 is drafted extremely widely. First off, it allows people employed in relation to the 9(2) functions to access the information, without then saying they can only use it for those functions." "On the face of the draft, they could then use the information for other purposes."

David Wolfe also says that the draft regulation 9(2) is very widely cast, and notably so given that the regulations themselves don't say whether they relate to arrangements under section 25 or 28 of the 2004 Act or section 175 EA 2002 which, is a requisite for section 29(1) to apply. The justification given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. But the regulation 9(2) list goes far beyond that. There is a good argument that the wider list **is not and cannot be justified by the claimed purpose and so would be unlawfully wide.**

Regulation 5 requires the local health board to disclose to each local authority personal data of children. This is too broad and should be limited to the local authority of the area of the residence of the child rather than all local authorities in Wales.

Regulation 8 concerning the provisions for retaining data goes well beyond what could be justified. How, for example, might it be necessary to keep the data on a 22 year old in relation to issues around section 436A?

Finally, this question is also misleading because it suggests that LAs have a duty to know the identity of children not known to them. LAs do not have such legal duty. Please see response to questions 2 and 3.

The Welsh Government should be reminded that the State, including LAs, are institutions which reason of existence is the service of their citizens.

ii) If you do not think that the information requested is reasonable and proportionate, what would you propose is the best way(s) for LAs to meet their duty to identify children of compulsory school age to ensure they are receiving a suitable education?

This question 1 ii) is misleading. LAs do not have a duty to identify children of compulsory school age to ensure they are receiving a suitable education. Their duty, as set out in [section 436A of Education Act 1996](#), is in relation to children in their area who are of compulsory school age but not registered pupils at a school, and not receiving suitable education otherwise than at a school. In other words, it is not LAs' duty to ensure children are receiving suitable education but to identify the children that are not.

It is primarily the parent's prerogative and duty to ensure their children receive suitable education. This is recognised in [Article 26\(3\)](#) of the Universal Declaration of Human Rights which states that "parents have a prior right to choose the kind of education that shall be given to their children." and [Article 2](#) of the First Protocol of the European Convention on Human Rights which says: "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, **the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.***" (emphasis added).

This duty to educate your children is part of what is called "parental responsibility" in the Children Act 1989. A local authority would only acquire parental responsibility if named in the care order for a child pursuant to [section 33](#) of the Children Act 1989. Thus the suggestion that it is the LAs duty to ensure that children are receiving a suitable education is incorrect and totally inappropriate.

**Question 2** – Currently there is a situation where LAs are responsible for children in their area that they do not know about. Under section 436A of the Education Act 1996 LAs must make arrangements to enable them to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but i) are not registered pupils at school, and ii) are not receiving a suitable education otherwise than at school. Do you think the database will help LAs, as far as it is possible to do so, to identify children not currently known to them and/or children missing education in their area? What is the reason for your answer?

The database will not help LAs as the draft regulations that set up the database are unlawful as, among other things, they breach Article 8 of the European Convention on Human Rights. Please see our reply to Question 1 above.

In addition question 2 is misleading as it first quotes section 436A of the Education Act and then wrongly suggests that LAs have a duty "*to identify children not currently known to them*". Section 436A does not impose such duty and LAs do not have such duty in any event. There is no such duty.

Thus, a database that is set up for the purpose of fulfilling such inexistent duty would be unlawful.

**Question 3** – Without a database, what reliable and consistent alternative method would enable the LA to identify a child they have no prior knowledge of?

Question 3 is misleading. LAs have no duty to identify a child they have no prior knowledge of. Therefore, it would be unlawful to impose a method to enable LAs to do so. In a democratic society the rule is that the State (including LAs) can only do what they are empowered to do so by the law; everything they purport to do outside the law would be ultra vires and therefore unlawful.

The justification for the database given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. However, LAs already know where those children are and that is clear from the numerous emails and letters LAs have been sending to parents and on many occasions unlawfully demanding those parents complete a form explaining the education arrangements and/or meet with LAs' officials.

It is therefore not clear why LAs are seeking to obtain further powers encroaching on the parents' and children's human rights and fundamental freedoms.

**Question 4** – The draft Children Act 2004 Education Database (Wales) Regulations 2020 propose local health boards disclose the information in Schedule 1 to LAs annually. Do you agree with an annual return? If not, how often do you think this information should be provided to LAs and when would the most appropriate time be?

We do not agree with any such disclosure at any time. As stated previously if the draft regulations are enacted as proposed they would be unlawful and we cannot agree to a disclosure in breach of a basic human right such as the right to privacy enshrined in Article 8 of the European Convention on Human Rights.

**Question 5** – The Draft Education (Information about Children in Independent Schools) (Wales) Regulations 2020 propose independent schools disclose the information in Schedule 1 to LAs annually. Do you agree with an annual return? If not how often do you think this information should be provided to LAs and when would the most appropriate time be?

See reply to Question 4.

**Question 6** – What would be the implications of a more frequent data return in terms of technical, administrative and resource implications on:



i) local health boards

n/a

ii) independent schools

n/a

iii) LAs

n/a

iv) other.

There should not be more frequent or any data returns. As said if the draft regulations are enacted as proposed they would be unlawful.

**Question 7** – Who, within the LA, would need access to the database in order to carry out their functions?

There is no legal justification for a database and the proposed database would be unlawful.

**Question 8** – Do you think anything in the draft regulations could have a disproportionate impact on those with protected characteristics, and if so, what?

Yes, we do. As stated previously, the draft regulations are very broadly drafted to the extent that potentially the information could be used and/or shared for any purpose whatsoever and that would render them unlawful.

On that basis, the draft regulations could lead to abuse and have a disproportionate impact, not only on those with protected characteristics, but any person whose personal data is entered into the proposed database.

**Question 9** – Does this proposal allow for the LA to meet their section 436A duty to make arrangements to identify children in their area who are of compulsory school age and not receiving a suitable education?

No, it does not. As aforesaid, if the draft regulations are enacted as proposed they would be unlawful, thus no LA would be able to rely on such regulations to meet their duty.

**Question 10** – In order to identify the effectiveness of the database the Welsh Government will request from LAs an annual return on the number of children identified using the database not currently known to LAs. When would be the most appropriate and reasonable time to request this?

As stated previously, if the draft regulations are enacted as proposed they would be unlawful, thus the question of effectiveness of the database does not come into play.

**Question 11** – Do you think a voluntary database of all statutory school-age children ordinarily resident within an LA area would assist LAs to meet their section 436A duty?

A voluntary database that is respectful of the parents' and children's right to privacy and the parent's right to educate and that is conducive to a good working relationship with the LAs would certainly be preferable to a compulsory database. It is doubtful that a compulsory database would achieve the best results for the children's education or to a good working relationship with the LAs. The LAs would have to ensure that parents or children are not coerced or harassed in any way in taking part of such voluntary database.

Any database should be mindful of the special status of home educated children and their parents recognised in the Equality Act 2010.

On that basis, a voluntary database would probably assist LAs to meet their statutory duties and would probably contribute to a mutual understanding between stakeholders.

**Question 12** – What, if any, advantages and disadvantages do you think there would be in the disclosing of the required data to populate the database? Complete section relevant to you.

i) Parents/carers

As already mentioned, if the draft regulations were enacted as proposed they would be unlawful. Thus nothing positive (no advantage) could come out of a disclosure in breach of a human right and fundamental freedom.

If the database was lawful, which we deny, there would be several concerns such as the risk of personal data being lost, stolen, unlawfully shared, or used for a purpose outside the law.

ii) Children and young people

Ditto

iii) Local health boards

iv) Independent schools

v) LAs

vi) Other

### Local health boards

**Question 13** – Do existing protocols concerning data of children who have died ensure that any processing of that data does not lead to any inappropriate communications with families?

**Question 14** – Can you identify any key privacy risks and the associated compliance and corporate risks?

**Question 15** – Do you have any previous experience of this type of data disclosure/processing?

**Question 16** – What are the resource and technical implications of processing and disclosing the required data to LAs?

### **Independent schools**

**Question 17** – Can you identify any key privacy risks and the associated compliance and corporate risks?

**Question 18** – Do you have any previous experience of this type of processing?

**Question 19** – What are the resource and technical implications of processing and disclosing the required data to LAs?

### **LAs**

**Question 20** – Is there anything missing from the Schedule of Information to be included in the database?

**Question 21** – Do existing protocols concerning data of children who have died ensure that any processing of that data does not lead to any inappropriate communications with families?

**Question 22** – Can you identify any key privacy risks and the associated compliance and corporate risks?

**Question 23** – Do you have any previous experience of this type of processing?

**Question 24** – We would like to know your views on the effects these draft regulations would have on the Welsh language, specifically on:

- i) opportunities for people to use Welsh
- ii) treating the Welsh language no less favourably than the English language.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

**Supporting comments**

**Question 25** – Please also explain how you believe the proposed regulations could be formulated or changed so as to have:

- i) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language
- ii) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

**Supporting comments**

**Question 26** – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

At least one of the Table Talk Workshops was conducted in breach of the terms of the Consultation, in breach of the Welsh Government's very own Guidance on Making Good Decisions and the Gunning principles which were adopted by the said guidance and unfairly discriminated home educators in breach of the Equality Act 2010.

In that regard we refer to [our letter](#) to the First Minister of Wales and [his response](#) which did not address any of the serious issues raised.

We consider the workshop in question unlawful and that this renders the whole consultation null and void.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here:



**THE CHILDREN ACT 2004 EDUCATION DATABASE (WALES) REGULATIONS 2020 (DRAFT)**

**BRIEF TO COUNSEL**

This is a summary of the brief Protecting Home Education Wales sent to [David Wolfe QC](#) and his legal advice on The Children Act 2004 Education Database (Wales) Regulations 2020 (draft).

The questions raised by Protecting Home Education Wales in the brief to David Wolfe are in black below.

David Wolfe's responses are identified in purple.

1. The draft regulation does not specify what the purpose of legal basis for the database is (including the legal basis for the use of personal data); and it is not clear (it is not stated) what the local authorities can or have to do with such information. The regulations do not say how the data will be used. Regulation 9 is the only part of the regulations which refers to LAs functions but these functions are only referred to for the purpose of establishing who can add or read the information in the database. Does this raise data protection issues?

Please consider whether the gathering of information for a non-specified purpose could be a breach of Data Protection law.

“Whatever this regulation authorised would then be permitted within the Data Protection Act 2018 and the GDPR. But the regulations would still need to comply with the Human Rights Act 1998 (and its Article 8 in particular) so that becomes the focus of any legal challenge to the regulations.

In broad terms, that means that the regulations must be justified and must be proportionate to the justification. In that regard, regulation 9 is drafted extremely widely. First off, it allows people employed in relation to the 9(2) functions to access the information, without then saying they can only use it for those functions. What happens if someone has one of those things as part of their job, but also does other things within the LA? On the face of the draft, they could then use the information for other purposes.

Moreover, the regulation 9(2) is very widely cast, and notably so given that the regulations themselves don't say whether they relate to arrangements under section 25 or 28 of the 2004 Act or section 175 EA 2002 which, as you say, is a requisite for section 29(1) to apply. As you say, the justification given in the consultation document relates to identifying children not on a school roll and not receiving suitable education. The 9(2) list goes far beyond that. I think there is a good argument that the wider list is not and cannot be justified by the claimed purpose and so would be unlawfully wide.”

2. S.29(1) states that the purposes of a database can only be arrangements under [section 25](#) or [28](#) of the 2004 Act or under [section 175](#) of the Education Act 2002, but the draft regulations does not say what the purpose of the database is. Please consider:

“I agree that, as above, that is odd and potentially problematic including given that the consultation document makes no mention of any of those.





You should certainly push them to explain exactly which of the three and on exactly what basis and for exactly what purpose the database is being established.

And whatever the answer to that it is hard to see how they can sustain the wide formulation at regulation 9, as above.”

3. The regulations do not say on what basis personal data will be shared. The consultation document does say that data will only be shared if there is a purpose, a legitimate aim such as ensuring a child’s wellbeing, but this has not been included in the regulations.

“I agree. As above, there is a good argument that the regulations are not compatible with Convention rights arising from Article 8 in that they allow for interferences which go well beyond what is even claimed as the justification.”

4. Are the regulations in line with data protection (including GDPR) laws?

“As above, the regulations, if themselves lawful, cover off the GDPR point. However to be lawful, they need (as above) to be within the powers under which they say they are made, and be compatible with Convention rights.”

5. Are the regulations in line with human rights, in particular right to private and family life (art 8 ECHR) and the prohibition on interference with privacy and home (art 16 UNCRC)? There does not appear to be any justification for the regulations’ interference on the right to privacy.

- a) As mentioned above, the regulations do not have an express purpose and I wonder whether this could show the lack of justification on the interference of the right to privacy and whether this could render the regulations unlawful.

“I agree, as explained above.”

- b) The consultation document does say that the government has considered any potential human rights issue but then it goes on to say that the regulations do not interfere with a parent’s right to educate. I think this analysis is wrong and the government has missed the point and what they should have considered is the impact of the regulations in respect of the right to privacy (the regulations dealing mainly, if not only, with the sharing and use of personal data).

“I agree. The consultation document says that the regulations are proportionate because they support a legitimate aim. But that gets the law wrong. There must be a legitimate aim and then the regulations must be proportionate to that aim (including in not going further than is necessary to achieve that aim). Assuming the aim relates to section 436A then the regulations should not go further than is necessary to achieve that aim. My view is that they go well beyond it, which means they are not proportionate and therefore would not be legal.”

- c) The [Children’s Rights Impact Assessment](#) (the IA) briefly touches on the interference on the right to privacy and the minister then says that “*she is of the view this is a reasonable and*



proportionate *step*” but she does not explain how she has formed such view. The IA has a section entitled “*Explain how the proposal is likely to impact on children’s rights*” but it does not include an assessment on the impact on the right to privacy. Instead the IA appears to concentrate on the “benefits” of the regulation.

“As above.”

6. Regulation 5 requires the local health board to disclose to each local authority [...]. Shouldn’t this be limited to the local authority of the area of the residence of the child rather than all local authorities in Wales?

“I agree. That is another way in which they go beyond what appears to be justified.”

Finally, [ ] about the archiving under regulation 8. The provisions for retaining data appear to me to go well beyond what could be justified. How, for example, might it be necessary to keep the data on a 22 year old in relation to issues around section 436A.

# Protecting Home Education Wales

[protectinghewales@gmail.com](mailto:protectinghewales@gmail.com)

<https://protectinghomeeducationwales.wordpress.com/>



Rt Hon Mark Drakeford  
First Minister of Wales  
[PS.FirstMinister@gov.wales](mailto:PS.FirstMinister@gov.wales)

23 March 2020

## Complaint against the Minister for Education Ms Kirsty Williams

Dear Rt Hon Mark Drakeford

We are writing to make a complaint against the Minister for Education Ms Kirsty Williams in relation to the consultation process on the Draft Children Act 2004 Database (Wales) Regulations 2020 and the Education (Information about Children in Independent Schools) (Wales) Regulations 2020 (the **Regulations**) on the basis that the same has been carried out unlawfully.

On 30 January 2020 the Education Minister launched a [consultation](#) on the Regulations.

As part of the consultation the minister arranged for "Table Talk" Regional Workshops to take place on 6, 13 and 26 March 2020 in three different locations in Wales. Please see [The Invitation to the 'Table Talk' Regional Workshops](#) (the **Invitation**).

████████████████████ attended the first of such workshops in Llandudno, and the following issues arose:

1. The workshop was poorly advertised, at short notice and home educating stakeholders received no response to applications to attend. The Invitation says:

*"Places are limited and will be allocated on a 'first-come, first-served basis...Once registered, you will receive an email confirming whether you have been successful in securing a place at your chosen workshop."*

As a result, the meeting was attended by only 8 individuals: 3 home education stakeholders, 3 local authority education officers and 2 women who had some connection with a commercial business working with looked after children. Neither of the two women were stakeholders in the issue at hand.

2. The organisers used report sheets to record votes from the group on each point, thus in our view skewing the outcome as a result of point 1 above.
3. The workshop was dominated by irrelevant references to unconnected concerns and the facilitator repeatedly supported that, whilst closing down any discussion of the actual issue at hand. This was stated to be on instruction from the Welsh Government. By way of example, the facilitator cut an attendee off by stating that the event was not about home education and that the Government had instructed the them to exclude discussion on that subject.

## Protecting Home Education Wales

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That is at odds with the Invitations which states:

*"To gain your feedback on the draft regulations the Welsh Government would like to invite you as stakeholder to a 'Table Talk' workshop."*

*"[...] your views and experiences are important in helping to inform Welsh Government policy."*

To put it into context, the consultation on the Regulations is only but the second part of the Education Minister's plans concerning home education, the first part was the [consultation the statutory guidance for local authorities and handbook for home educators](#) which closed last year. You will note that reference to the Regulations is made throughout the documents in relation to that first consultation. Thus, it is clear that the purpose of the Regulations is to create a database of home educated children and to consider the Regulations in isolation (ie without considering that is intended to do in relation to home education) would be non-sensical and unlawful.

4. The questions asked by the facilitators were leading and clearly designed to elicit results which were pre-determined. The facilitator stated unequivocally that the questions were designed by the Welsh Government.
5. The discussion time was cut short at 11 am to accommodate the local authority staff attending (who said they had to leave at 11 am), despite it being advertised as being from 10am -1pm and discussion from the home education stakeholders cut off, without them being given proper opportunity to make relevant points. This is precisely what happened at the consultation meetings last year in respect of the guidance on home education.

This constitutes a clear breach of one of the Gunning principles set out in R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 which states:

*"Adequate time must be given for consideration and response. The timing and environment of the consultation must be appropriate, sufficient time must be given for people to develop an informed opinion and then provide feedback, and sufficient time must be given for the results to be analysed."*

Therefore, it is clear that the workshop was conducted:

1. in breach of the terms of the consultation, more particularly the Invitation; and
2. in breach of the Welsh Government's very own [Guidance on Making Good Decisions](#) (the **Guidance**) and the Gunning principles which were adopted by the Guidance.

The above is proof that the workshop was not carried out in a fair manner (for example, home educators were not treated in the same manner as the other stakeholders). This amounts to a breach of the Welsh Government's obligation to carry out consultations fairly (see page 35 of the Guidance).

In addition, we feel that as home educators we have been unfairly discriminated against in breach of the Equality Act 2010 and we are considering making a complaint with the Equality and Human Rights Commission.

## **Protecting Home Education Wales**

[protectinghewales@gmail.com](mailto:protectinghewales@gmail.com)

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We therefore ask that you address these serious concerns, treat the workshop as void and request the Minister for Education to arrange for new workshops to be scheduled when conditions permit.

Yours sincerely

***Protecting Home Education Wales***



Ein cyf/Our ref FM -/00459/20

Protecting Home Education Wales

[protectinghewales@gmail.com](mailto:protectinghewales@gmail.com)

14 April 2020

I am writing in response to your letter on 23 March 2020.

I am sorry to read about your complaint that the consultation event in relation to the draft Children Act 2004 Database (Wales) Regulations 2020 and the Education (Information about Children in Independent Schools) (Wales) Regulations 2020 on 6 March did not meet your expectations and was not a positive experience for you.

The consultation is specifically about the regulations requiring local authorities to develop and maintain a database of all compulsory school age children regardless of where they receive their education.

The regulations concentrate on requirements for local authorities, health boards and independent schools and is wider than home education. The purpose of the regulations is to enable local authorities to ensure all compulsory school age children in their area are receiving a suitable education – not to create a database of home-educated children.

The particular consultation event you highlight in your letter was arranged to supplement the consultation process. The organisation, which delivered the event in North Wales is a trusted facilitator, which has been used by the Welsh Government on a number of occasions. We received feedback from other participants at the event, which was positive.

This is an emotive subject and balancing the views of a range of stakeholders at these events can be challenging. Not everyone is always satisfied with either the process or the outcome – we will take account of your feedback for future events.

The consultation on the regulations remains open until 22 April. If you feel there are further points you wish to make or points you would like to reinforce, I hope you will take the opportunity to contribute your views.

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1NA

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The consultation is available at <https://gov.wales/local-authority-education-databases>

Best wishes

A handwritten signature in black ink that reads "Mark Drakeford". The signature is written in a cursive, slightly slanted style.

**MARK DRAKEFORD**

# Home Education – Statutory Guidance for Local Authorities and a Handbook for Home Educators

## Consultation response form

Your name:

Organisation (if applicable): Protecting Home  
Education Wales

e-mail/telephone number:  
protectinghewales@gmail.com

Your address:

Responses should be returned by **21 October 2019** to

Support for Learners  
Education and Public Services Directorate  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

or completed electronically and sent to:

e-mail: [WELLBEINGshare@gov.wales](mailto:WELLBEINGshare@gov.wales)



**Question 1** – Does the draft statutory guidance provide suitable information to enable local authorities to assess the suitability of the education received by home educated children?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

The draft is unsuitable as on many occasions states the law wrong leading local authorities to believe that parents have less rights than they actually have and that local authorities have more rights/duties than they are legally entitled to/have. See legal advice from David Wolfe QC of Matrix Chambers attached.

**Question 2 – Chapter 1: legal responsibilities** – Does this chapter clearly set out the rights of parents to home educate their children and the duty on local authorities to identify children and make enquiries about their educational provision?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

As stated above the draft states the law wrong suggesting that parents have less rights than they actually have and that local authorities have more rights/duties than they are legally entitled to/have. By way of example see paragraphs 6 to 8 of the legal advice from David Wolfe QC attached.

**Question 3 – Chapter 2: identifying children not known to the local authority** –

- a) Does this chapter clearly outline the requirement under Section 436A of the Education Act 1996 for local authorities to make arrangements to enable it to identify, so far as it is possible to do so, the identities of children in its area who are not receiving a suitable education?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

Section 436A of the Education Act 1996 requires local authorities to identify children that are not receiving a suitable education whereas Chapter 2 proposes to unlawfully encroach on the right to private and family life of home educating families. If the child is in receipt of suitable education the local authority has no right to get involved/interfere.

b) Do you think that the development of a database is a reasonable and proportionate approach?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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### Supporting comments

It is impossible to assess whether such database would be reasonable and proportionate without considering the draft Children Act 2004 Database (Wales) Regulations 2020 and Education (Information about Children in Independent Schools) (Wales) Regulations 2020. A public consultation should be launched in respect of the proposed regulations.

c) Do you think there should be a system in place requiring independent schools and local health boards to share limited specified information with local authorities, to enable them to identify children who are not known to them, in order to make arrangements to ensure that these children are receiving a suitable education?

If 'no', how would you suggest the local authority complies with the requirement to identify children who are not known to them in order to make arrangements to ensure that these children are receiving a suitable education?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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### Supporting comments

Such system would be unlawful as it would illegally encroach on the right to private and family life of home educating families.

The second question is incorrect; Section 436A of the Education Act 1996 requires local authorities to identify children that are not receiving a suitable education otherwise than at school; there is no requirement on local authorities to identify children not known to them [...].

**Question 4 – Chapter 3: efficient and suitable education** – This chapter focuses on the requirement for local authorities to consider whether the education provision is suited to the needs of the individual child; whether learning is taking place; and whether the child is making reasonable progress in line with their age, aptitude and any special education needs they may have.

- a) Families opting to home educate should be able to offer a suitable education from the outset and have made preparations with that aim in view. That said, do you think there should be a reasonable period of adjustment for families before the local authority considers whether a suitable education is being provided? If 'yes', please note what would be considered reasonable in your opinion?

<b>Yes</b>	✓	<b>No</b>	<input type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

A reasonable period is a must and would depend on the specific circumstances of the family and child. A child would need a period to adapt and deal with any trauma before education can resume.

- b) Section 4.15–4.18 of the statutory guidance refers to the suggested characteristics of a suitable and efficient education for local authorities to consider. Is there anything else you think should be included?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	✓	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

What the guidance suggests as being the criteria for a suitable and efficient education is unlawful as it is not supported by statute or case law.

- c) Article 12 of the UN Convention on the Rights of the Child (UNCRC) states that children have the right to have opinions and for these opinions to be considered when people make decisions about things that involve them. The statutory guidance states that in order for a local authority to satisfy itself of the suitability of education provided, the local authority should see and speak with the child. Do you agree with this statement? If 'Yes' what would be the best way to gather the views of the home educated child?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	✓	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

In this regard the guidance is unlawful (see David Wolfe QC advice in full). You will note from the advice that local authorities have no right to demand to meet, see or speak with the child.

- d) In your view, how often would it be reasonable for the local authority to meet with the home educating family to assess the suitability of education provided? Please explain your views.

### **Supporting comments**

As often as the parents of the child requires it. See response to c) above.

- e) In your view, who would be best placed to conduct the visits and assess the suitability of the education provision and why? For example, this could include (but is not limited to):
- local authority home education officers
  - an independent panel of education professionals
  - a qualified teacher
  - a teaching assistant
  - other.

### **Supporting comments**

Assuming that the parents of the child had (in their absolute discretion) allowed such visit, it should be a home education expert from the home educating community. See responses to c) and d) above.

- f) In your view, who else should input be sought from when the local authority is assessing the suitability of the education provision and why? For example, this could include (but is not limited to):
- educational psychologists
  - a speech and language therapist
  - other specialist professionals.

### **Supporting comments**

Assuming that the parents of the child had (in their absolute discretion) allowed such visit, whoever the parents of the child consider suitable at that time. See responses to c), d) and e) above.

g) Do you have any other comments on this chapter?

**Supporting comments**

See David Wolfe QC advice

**Question 5 – Chapter 4: school attendance orders (SAOs) and education supervision orders (ESOs)** – This chapter focuses on existing powers available to local authorities when they are unable to satisfy themselves that a home educated child is receiving a suitable education.

Whilst home educators are under no duty to respond to reasonable requests from the local authority, case law has established that it would be unwise for them not to respond. In the absence of information that suggests that the child is being suitably educated, it is reasonable for the local authority to conclude that the education provision does not appear to be suitable.

Is this chapter clear about:

- a) local authority responsibilities to issue SAOs and ESOs?; and

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input checked="" type="checkbox"/>	<b>Not sure</b>	<input type="checkbox"/>
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**Supporting comments**

The guidance suggests that local authorities have powers that they do not actually have.

Para. 5.3 of the guidance says "The most obvious course of action is for local authorities to meet with the parents and home educated child regarding the education they are providing for their child."

There is no legal basis for the above. In Phillips v Brown the court said "The most obvious step to take is to ask the parents for information."  
See paragraph 12 of the advice from David Wolfe QC.

- b) clear about the process to follow when issuing SAOs and ESOs?

Yes	<input type="checkbox"/>	No	<input checked="" type="checkbox"/>	Not sure	<input type="checkbox"/>
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### Supporting comments

See answer to a) above.

**Question 6 – Chapter 5: educational support** – This chapter considers the advice, information and support local authorities could make available to home educating families. Do you think this chapter is useful?

Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	Not sure	<input type="checkbox"/>
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### Supporting comments

Yes, provided such information and support is only offered if requested by the parents of the child. It should be clarified that this would be a service provided by local authorities (ie not something forced on families).

**Question 7 – Chapter 6: Safeguarding** – This chapter outlines existing safeguarding duties that apply to local authorities. Whilst there is no proven correlation between home education and safeguarding, specific safeguarding duties apply to all children regardless of how they receive their education. Do you think this chapter is useful?

Yes	<input type="checkbox"/>	No	<input checked="" type="checkbox"/>	Not sure	<input type="checkbox"/>
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### Supporting comments

Education otherwise than at school and safeguarding concerns are totally different matters and it is disappointing that the Guidance is somewhat linking them, despite the fact the Guidance says the opposite.

Besides there is no legal basis for local authorities to conclude (as it does at para. 7.17 of the Guidance) that "a lack of information about a child's educational provision is capable of satisfying the 'reasonable cause to suspect' significant harm test under that provision section 47 of the Children Act 1989". Such a conclusion would be unlawful and the Guidance gets the law wrong.

We draw your attention to para. 10 of the legal advice where it says: "There is no lawful basis for a local authority to behave that way simply because a child is being home educated. That must be made clear in the Guidance which currently gets the law wrong."

**Question 8 – Handbook for home educators** – This handbook provides information for those who are or are considering educating their child at home. Is there anything else you think should be included?

Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	Not sure	<input type="checkbox"/>
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**Supporting comments**

The handbook does not fully set out what the parents rights are vis-a-vis the local authorities. See responses to questions 1 to 3 above.

**Question 9** – Whilst we acknowledge that flexi-schooling is not home education, we are aware that some home educators would welcome information on what it is. Do you think this information (see sections 6.15–6.19 in the statutory guidance and 1.20–1.21 in the handbook) is useful?

Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	Not sure	<input checked="" type="checkbox"/>
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**Supporting comments**

Flexi-schooling should be in a different stand alone handbook as it has nothing to do with home education.

**Question 10** – We would like to know your views on the effects that statutory guidance for local authorities regarding home education would have on the Welsh language, specifically on:

- i) opportunities for people to use Welsh
- ii) treating the Welsh language no less favourably than the English language.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

**Supporting comments**

It is not clear how the guidance would have any effect (whether positive or negative) on the Welsh language

**Question 11** – Please also explain how you believe the proposed policy could be formulated or changed so as to have:

- iii) positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.
- iv) no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

### Supporting comments

See response to question 10 above.

**Question 12** – We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

The draft letters and forms were prepared on the basis of a guidance which in many respects is unlawful. They should be redrafted.

The guidance fails to acknowledge that schooled education and home education have equal standing before the law, and unlawfully discriminates against home education. In that regard, see para. 16 of the QC's opinion.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here:



RE: CONSULTATION ON NEW HOME EDUCATION GUIDANCE IN WALES

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**ADVICE FOR 'PROTECTING HOME EDUCATION WALES'**

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1. I am instructed to provide advice to Protecting Home Education Wales on some legal matters arising from the Draft Statutory Guidance for Local Authorities on home education on which the Welsh Government is currently consulting.
2. I understand that this advice will be submitted as part of one or more responses to that consultation.
3. Additional legal points may arise if and when the Welsh Government makes information sharing regulations of the kind contemplated by the draft guidance. The legality of those regulations cannot be judged at this stage.
4. The points I make are in the order of the paragraphs of the Draft Guidance itself.
5. Paragraph 1.4 of the Draft Guidance explains that principles of the UNCRC guide how the rights of the child are protected. It says that “these principles are”, and then lists Articles 2, 3, 6 and 12 UNCRC. However, and importantly, that list fails to include or recognise the obligations arising under Article 14 (rights and duties of parents) or Article 16 (prohibition on interference with privacy and home).

6. Paragraph 2.19 correctly notes the established legal position that local authorities may make enquiries of parents as part of discharging their legal obligations. However, paragraph 2.23 says that “Where a child has been de-registered, the local authority should meet with the family as soon as possible to determine the reasons for home education [my underlining].” That sentence goes too far in suggesting that such a meeting is mandatory (either for the local authority and/or the family), and in implying that there is some obligation on parents to give a reason for de-registering their child with a view to home education. In particular, the power to ask, does not require local authorities to ask, let alone require parents to answer.
7. While local authorities can request meetings and explanations, they cannot lawfully demand them. As drafted, the sentence gets the law wrong.
8. Similarly, in paragraph 2.31, the Draft Guidance says that “Where they can identify early signs of an intention to de-register, local authorities should contact parents to discuss their reasons.” In implying an obligation on parents to respond to such requests, the guidance goes too far and gets the law wrong.
9. Paragraph 4.21 says that “In order for a local authority to satisfy itself of the suitability of education provided by the parents, the local authority **should** see and speak with the child.” The word “should” is in bold in the text, and has a footnote which explains that a local authority would need a good reason not to comply with the guidance (and that refusal to comply by a family does not provide a good reason). That goes too far in suggesting that children/parents are under some sort of obligation to meet with the local authority – they are not.

10. The text also risks being read by local authorities as suggesting that they can (or indeed should) insist on seeing a child without its parents. There is no lawful basis for a local authority to behave that way simply because a child is being home educated. That must be made clear in the Guidance which currently gets the law wrong.
11. Paragraph 4.22 touches on that issue again in saying that “There may be occasions it is not in the best interests of the child for the local authority to meet with them, or in exceptional circumstances, the local authority can conclude without seeing the child they are receiving a suitable education.” Two points arise: first of all the question of whether the child sees the local authority in relation to just the question of home education is entirely a matter for the child’s parents and (for an older child) the child. This is not a question of “best interests”, and it is entirely inappropriate for the Guidance to suggest that such a threshold or test applies.
12. Secondly, sections 436A and 437 Education Act 1996 require the local authority to reach a view on whether a child is not receiving suitable education. Unless there is positive evidence that the education is not suitable, then the local authority could not reach a rational and therefore lawful conclusion to that effect. There is certainly no proper basis to create a presumption that the education is not suitable unless the local authority has seen the child in question, let alone provide that the local authority should only “exceptionally” depart from such a conclusion. While the Welsh Government can provide guidance on how a local authority approaches its statutory obligations, it cannot distort or subvert those obligations in the way which this Draft Guidance would appear to do here.

13. Paragraph 4.24 refers to information provided by a child and to what use may be made of it. That too implies some form of entitlement on the part of local authorities to insist on seeing a child, or on the part of parents/children to agree to that. There are no such legal entitlements or obligations and the guidance gets the law wrong in suggesting the contrary.
14. The paragraph continues “If it is clear that a child does not wish to be educated at home although the education provision is satisfactory, the local authority should discuss the reasons for this with the parents and encourage them to consider whether home education is in the best interests of the child when clearly it is not what the child wants.” That is unlawful in suggesting some form of hierarchy or presumption in favour of education at schools and against home education, when the law (and Education Act 1996 section 7 in particular) is entirely agnostic as between the two: they are equal in the eyes of the law with the only issue for each being whether the education being provided is suitable.
15. That same sentence is also unlawful in implying that the local authority can insist on discussions with parents and/or children (or that the latter have to engage in such discussions); also in suggesting that the local authority has any role in questioning the parental choice to home educate in circumstances where that education is agreed suitable.
16. Those are clear interferences with, for example, Article 8 ECHR (right to respect for private and family life) which means that Article 14 ECHR (prohibition of discrimination) is engaged. That leads to the conclusion that there would be unlawful discrimination (contrary to Article 14 read in conjunction with Article 8) for a local authority to be taking the action in contemplation in that sentence of the guidance when it would not be doing the same for

other children – there is (I assume) no equivalent guidance suggesting that local authorities should ask children at school whether they would like to be educated in a different way and then challenging parents on that basis.

17. To ask about those things - and certainly to insist on answers from, and then to act on those answers - from parents and pupils involved would be incompatible with Convention rights under the Human Rights Act 1998, and so unlawful.
18. Overall, if the matters set out above are adopted in the final guidance following consultation, then that final guidance will mis-state or misunderstand the law and so be unlawful (and/or leads to illegality by local authorities acting in the light of it).

David Wolfe QC

MATRIX

14 October 2019