

Dear Petitions Committee members,

We refer to our Petition to stop the Welsh Government's [draft guidance on home education](#) (the **Guidance**) and our main points are the following:

1. LEGAL ADVICE

[Protecting Home Education Wales](#) has obtained [legal advice](#) from [David Wolfe QC](#) (a human rights and education law specialist) on the Guidance which states that if the same is issued in its current form it unlawful and/or lead to illegality by local authorities acting in the light of it.

A statutory guidance should be just that, a guide on the law concerning home education, the powers and duties of local authorities and rights and obligations of parents and their children so as to enable local authorities to fulfil their duties within the legal framework. A guidance must be clear and unambiguous and should not lead to confusion or even suggest that local authorities have powers or duties that they do not actually have or that parents have obligations that they do not exist. However, the Guidance is ambiguous and gets the law wrong on many occasions, as pointed out in the legal advice which among other things states:

- A. *"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 Paragraph 1.4 of the Draft Guidance explains that principles of the UNCRC guide how the rights of the child are protected.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)."*
- B. *"[...]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."*
- C. *"While local authorities can request meetings and explanations, they cannot lawfully demand them. As drafted, the sentence gets the law wrong."*
- D. *"Similarly, in paragraph 2.31, the Draft Guidance says that "Where they can identify early signs of an intention to de-register, local authorities should contact parents to discuss their reasons."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."*
- E. *"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."*
- F. *"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."*
- G. *"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."*

- H. *"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 "exception-ally" 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."*
- I. *"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. "*
- J. *"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."*
- K. *"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."*
- L. *"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."*
- M. *"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 un-lawful."*

The advice concludes: ***"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). "***

It is not clear how local authorities would be guided to conduct themselves in accordance with the law by a document (the Guidance) that gets the law wrong and fails in so many respects.

2. EDUCATION MINISTER'S LETTER DATED 28 OCTOBER 2019

You have requested our input in respect of the Education Minister's [letter](#) of 28 October 2019.

Far from addressing our concerns the letter suggests that no change will be made to the Guidance in respect of mandatory meetings and this can be clearly implied from the following paragraphs:

“With reference to the comment that the draft guidance “mandates that home educating parents must meet with their local authority and allow their children to be interviewed”, the guidance advises meeting families at least once a year to ensure the suitability of education is maintained.

Whilst there are no new legal duties placed on local authorities, the draft statutory guidance does represent a shift in current expectations of local authorities, it has been developed to assist them to carry out their existing duty to ensure children receive a suitable education.” [emphasis added]

To suggest that the Guidance only advises (as opposed to mandates) and to say that “there are no new legal duties” is disingenuous, if not misleading. The legal advice raises serious concerns about the language used in this regard and the Guidance itself expressly confirms its mandatory status on several occasions, such as:

- *“1.1. [...] Local authorities must have regard to this statutory guidance in exercising their functions under that section.” And the footnote to that paragraph reads: “‘Must have regard’ means to take account of this guidance and carefully consider it. Having done so, there would need to be a good reason to justify not complying with it.” [emphasis added]; and*
- Paragraph 4.21 which, crucially, is referred to in the QC’s advice (please see paragraph 1. E above).

Consequently, as it was held in *R v Islington LBC ex p Rixon* [1998] 1 CCLR 119, local authorities would only have liberty to deviate from the Guidance where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.

Contrary to the minister’s assertions, the Guidance does create new legal duties on local authorities, ie the duty to comply with the Guidance (the only justification for not doing so being a good reason) which in turn advises local authorities to meet with families, child, see the child etc. Given that local authorities can only depart from the Guidance if there is a good reason, such “advice” becomes a legal duty (ie mandatory).

We are unable to see how the Minister can justify stigmatising home educating families by making them and their children the only inhabitants of Wales, who would not be suspected of committing an offence, but yet subject to mandatory interviews. This is not least because where a social worker is refused consent to interview a child, they cannot interview that child without first obtaining a Court order. Consequently, parents suspected of causing significant harm to their children are entitled to have evidence of the requirement for a child interview to be presented to a Court, by the Authority and to have opportunity to challenge that application. How does this sit with home educating families being given no such choice and subjected to the serving of a school attendance order if they decline an interview with their child? School attendance orders are served by Authorities with no oversight by the Court. Furthermore, such school attendance orders could lead to criminal proceedings (not civil, as with social services applications) if the parent declines to comply. To add weight to this point, a child who is suspected of committing a crime may not be compelled to give evidence (UNCRC Article 40 iv) and yet the Guidance suggests that parents should allow their children to give such evidence unless they want to face a school attendance order.

The letter from the Minister goes on to say:

“I fully expect the guidance will undergo drafting changes as a result of the consultation.”

It is not clear if such changes will address the issues raised in the legal advice or whether the revised wording will be put to consultation before it is issued in its final form. Clarification should be sought from the Minister in this regard. Notwithstanding that, our contention is that the legal issues with Guidance are such that the same should be scrapped altogether. If the Guidance was to survive it would have to be totally redrafted (as its current version relies heavily on the unlawful mandatory meetings, interviews, etc) and any such redraft would have to be put before public consultation which in turn should comply with the [Welsh Government Guidance on Making Good Decisions](#).

Finally, the letter says:

"We are seeking to strike a balance between the expectations of local authorities to discharge their duties in assuring themselves of the suitability of education being delivered, while protecting the choice to home educate and the flexibility home educators have in choosing how they educate their children."

Any such balance can only be sought within the limitations of a statutory guidance which cannot create new legal duties on local authorities or suggest that they have any such duties.

In addition, in striking such balance due regard must be had to the European Convention on Human Rights, including Article 8 ECHR (right to respect for private and family life) and the Welsh Government should be reminded of its obligations under the Human Rights Act 1988, particularly section 6(1) which states that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right."

3. THE CHILDREN, YOUNG PEOPLE AND EDUCATION COMMITTEE'S LETTER DATED 19 NOVEMBER 2019

The Children, Young People and Education Committee (the **Education Committee**) has given significant time and attention to the views of the Children's Commissioner, but simply 'noted' concerns of home educating families without opportunity to hear directly from those with the greatest knowledge and experience of home education. In their [letter](#) to the Minister dated 19 November 2019 the Education Committee said:

"As part of these exchanges, we have stated clearly our belief that action is needed to ensure that children educated at home are seen and spoken to about the education they are receiving, and that they are happy, healthy and safe, and would like to reiterate these views at this stage".

There is no corresponding requirement to seek the views of schooled children as to their education (please see paras. 1. J to M of the legal advice above) and according to a [response](#) from the Children's Commissioner following a FOI request, only 2% of those children have given their views.

4. RESEARCH

Based on information obtained from local authorities under the Freedom of Information Act 2000 we conducted a full analysis (see [2015](#) and [2019](#) reports) of the facts and found that the proportion of school teachers found guilty of abusing children in their care, is greater than the proportion of home educated children who are subject to child protection plans, despite those children being under considerably greater scrutiny than other children. By way of example, please see [report](#) by York Consulting. Notwithstanding the above, the Children's Commissioner has confirmed that only 2% of schooled children have been enabled to give independent views in respect of their education. Home educated children in Wales are considerably less likely to commit an offence leading to a disposal than are schooled children, attain higher average academic results, are found to be at least as well socialised than are schooled children and far from being 'invisible' are uniquely visible.

"Rates of home educated children subject to a Child Protection Plan at 0.17 - 0.24% of the population, were also found to be less than teaching staff guilty of abuse offences 0.18 – 0.46%. Home educated children are found to not be at increased safeguarding risk, rather they are shown to be at lower risk than other children."

"Home educated children were found to be subject to statistically significant higher rates of referral for assessment under the Children Act 1989 s47 at 4.17% than were children under 5 years of age at 2.34 % and children aged 5 to 16 years at 2.03%. Despite these higher rates of referral, no significant difference was found between rates of child protection plan in children who are home educated at 0.44% and children aged 5 to 16 years at 0.43%. Difference in rates of child protection plan in children under 5 years of age compared to home educated children and children aged 5 to 16 years were statistically significant at 0.71%. Conversion rates from referral under the Children Act 1989 s47 to child protection plan were 11.06% in home educated children compared to 35.40% in children under 5 years of age and 26.81% in children aged 5 to 16 years".