

## Comments on the Home Education (Duty of Local Authorities) Bill [HL]

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### General Points:

In some respects the Bill simply confirms and clarifies *existing* duties of local authorities – that they already have duties and responsibilities to secure the education of all children in their area. Emphasising this fact might be strategically useful. Some local authorities already see and monitor home educated children once a year. They sometimes face difficulties doing this and the Bill will confirm their duties and in doing so save time by helping avoid confusion and disputes and at the same time reassure other local authorities uncertain about their existing duties.

One way to make it clearer that the Bill in many respects is not creating new duties is showing in the Bill itself how it refers to and builds on existing statutory duties. Below I indicate ways in which this might be possible. I also note where the provisions in the Bill confirm the law as laid down by relevant case law. That is also a well-established role for legislation. Even if these specific details might more appropriately be a matter for Committee stage I hope they will be useful in the second reading of the Bill.

In other respects the Bill clearly does create new duties. The most important is the duty on parents to register. But in addition placing the Guidance on a statutory basis is also new as it is currently not referred to or required by any statute.

The Bill would be the first time that the expression 'elective home education' or indeed 'home education' have been referred to by statute. I think it is worth noting that. Following specific comments on the Bill I have added other points and references to sources that might be of use in supporting the Bill.

### Specific Comments on the Bill

- **S 436B(1).**

Inserting the new provision after s 436A makes a lot of sense. That duty makes clear that a local education authority:

*'... must make arrangements to enable them to establish ... the identities of children in their area who are of compulsory school age but- ... (b) are not receiving suitable education otherwise than at a school.'*

It makes clear that a duty already exists on local authorities.

The new provision here in s 436B(1) also confirms the position established clearly by case law (*Philips v Brown*, 1980) that a local authority has a positive

duty to take action in order to comply with their existing duty under section 437(1).

Consequently on the basis of two existing statutory duties and established case law the new provision in s 436B (1) simply clarifies and confirms the current position.

I suggest that 'physical and emotional development' in s 436B(1) should be deleted. The safeguarding function of monitoring elective home education is important but can be dealt with elsewhere. Including it here weakens the argument that the key provision is simply clarifying the existing law. The key education duties on parents and local authorities in sections 7 and 437(1) refer to 'suitable education' only. This provision should mirror those provisions as much as possible.

- **S 436B (2)** – the new duty on parents to register.

Where a new statutory duty is created it is usual and good practice to create a sanction for non-compliance with the duty. This is also important as it is likely that arguments will be raised about the point of a duty to register if people will can ignore it. The point can be dealt with easily by including a provision that makes clear that: 'where a parent fails to register a Local Authority may take this into account in determining whether to issue a notice under the Education Act 1996 s 437(1)'.

Section 437(1) is the key statutory duty that instructs local authorities about their duties 'if it appears' to them that 'a child is not receiving sufficient education'. Including it here in the Bill is building on and coheres with existing duties. Moreover case law has established that 'if parents refuse to answer it could very easily conclude that prima facie the parents were in breach of their duty' (*Phillips v Brown*, 1980). In other words the inclusion of a sanction here for non registering is proportionate and coheres with existing law.

- **S 436B(3)**. As currently drafted this could be interpreted as saying that a local authority can only assess once a year. In practice some local authorities monitor once a year or less or sometimes more. I suggest that the provision should make clear that an assessment once a year is the minimum requirement:

'Local authorities must undertake an assessment of each child receiving elective home education in their area not less than once a year (hereinafter referred to as 'the assessment').'

- **S 436B (4)**. For the reasons noted above I suggest the deletion of '(b) physical; and (c) emotional development'.

I think it would be clearer if the provision simply read, ' . . . must include an assessment of the education of each child'.

In order to make it clear that it refers to the existing statutory duty on parents under section 7 of the Education Act 1996 I suggest that here should be added:

'Education for these purposes refers to efficient full-time education, including provision of instruction in reading, writing and numeracy, suitable – (a) to his age, ability and aptitude, and (b) to any special educational needs and disabilities he may have'

This is what the assessment must monitor and it makes sense to say so clearly here.

- **S 436B (5).** I think it would be clearer to state here:

'In undertaking the assessment the local authority may: (a) visit the child's home; (b) speak with the parent and the child; and (c) see the child's work.'

I think the word 'interview' might be overly formal, especially with a younger child. It is very close to 'Child Protection' in terms of tone (see references to Commons Select Committee findings below).

- **S 436B (6).** I suggest inserting after 'provide': 'within a reasonable time period'. This is because case law emphasises the importance of fairness in proceedings and requests for information. See *R v Gwent County Council, ex p Perry* (1985) 129 SJ 737, CA where it was held that 'a sufficient time to set in motion their arrangements for home education' and 'a fair and reasonable opportunity' to satisfy the concerns of the LEA'.

As this creates a duty on parents a sanction for non-compliance is I suggest required and could take the same form as noted above and for the same reasons:

'where a parent fails to register a Local Authority may take this into account in determining whether to issue a notice under the Education Act 1996 s 437(1)'

- **S 436B (9) and s 3.** In defining 'elective home education' I suggest that the Bill should adopt the terminology used in the existing provisions that enable a parent to opt to home educate under section 7 of the Education Act 1996:

"elective home education" refers to the provision by parents of efficient full-time education suitable – (a) to his age, ability and aptitude, and (b) to any special educational needs he may have, otherwise than by regular attendance at school'.

This approach emphasises that the Bill is clarifying existing law and the terminology currently used in the Bill might prove problematic as some home educated children are not educated exclusively 'at home' and some have some connections with 'the school system'.

- **S 2 The Guidance.** Suggest change (1) to : the Secretary of State must issue guidance about elective home education for local authorities . . . '.

'Update' is confusing as currently there is no statutory requirement or reference to the guidance and that is what is being created here. Of course the existing guidance does indeed need updating, but that is regardless of whether new legislation is enacted. It is a separate issue.

Suggest delete s 2(2). It is better covered above in the context of the assessment. In that context however I suggest deleting the word 'supervised' as it is open to too many interpretations – best left to guidance – and the while the case law (*Harrison and Harrison v Stevenson* [1982]) supports the idea it opens the Bill up to pedagogical debates about non-directed learning that might not be helpful here. And 9(b) is very vague (which children and parents?). The importance of their views is covered by the reference to a public consultation in s 2(3). This is an important provision as it legitimises a government department spending resources on a consultation.

- **S 3 Interpretation,** for 'elective home education' see above.

#### Other Possible Relevant Information/strategic arguments to support the Bill.

##### 1. Safeguarding.

This is, understandably, a highly emotive issue for home educating parents. Keeping the focus of the Bill on 'education', narrowly defined' might be strategically helpful. Moreover existing statutory duties already make clear that local authorities have safeguarding duties in the context of home education.

The Education Act 2002 s 175(1) states that: 'A local education authority shall make arrangements for ensuring that the functions conferred on them in their capacity as a local education authority are exercised with a view to safeguarding and promoting the welfare of children'.

*R (SD and PD) v Essex County Council* [2012] CO/6935/2012 upheld the right of a local authority's Home Education Service to make a referral to the local authority's social welfare services where they had not seen the child and had not had any response to requests for information about home education. So clear in law was this right that parental challenge was refused leave to apply for judicial review by the High Court and the Court of Appeal to even consider the argument.

New legal duties arguably are not required but new guidance could clarify these issues and they certainly support the case for allowing local authorities to see a child as part undertaking the assessment.

The distinction between 'education' and safeguarding' has become blurred by including concerns about 'radicalisation' within the safeguarding agenda and

statutory duties. This is particularly relevant here in the context of the government's consultation about 'out of school setting' and unregistered schools:

The review states that 'Ofsted would not 'be tasked with looking at the suitability of education' but goes on to state that one of the 'prohibited activities' that are to be specifically targeted by inspections is: 'Undesirable teaching, for example teaching which undermines or is incompatible with fundamental British values, or which promotes extremist views'.

Out-of-school education settings: call for evidence, DfE, November 2015.  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480133/out\\_of\\_school\\_education\\_settings\\_call\\_for\\_evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480133/out_of_school_education_settings_call_for_evidence.pdf)

## 2. Unregistered schools

If these 'schools' are to be regulated, for whatever reasons, home education will have to be considered too. Sir Michael Wilshaw initial letter to the Secretary of State for Education, which raised OFSTED'S concerns, recommended that the government: 'review the arrangements for home education *to ensure that they cannot be exploited in order to avoid registration*'. In other words wherever the threshold is set requiring out of school sites to be registered, anyone wanting to avoid this can just opt to home educate. The provisions in this Bill address that loop hole and crucially this can be done here without the need to consider out of school settings.

## 3. Parent and child rights

The education rights of parents under the Human Rights Act (art 8 and art 2 of first protocol) and in domestic law are not absolute rights. They are conditional on the provision of efficient education to children. In *H v United Kingdom* (1984) No 10233/83 DR 105 it was held that under Art 2 of Protocol No 1 (no person shall be denied an education and respecting the rights of parents), that:

*'requiring the applicant [the parent] to cooperate in the assessment of children's educational standards . . . can not be said to constitute a lack of respect for the applicant's rights'.*

## 4. The Wood Review of the role and functions of local safeguarding children boards, 26 May 2016

<https://www.gov.uk/government/publications/wood-review-of-local-safeguarding-children-boards>

A recent and very clear expression of concern about home education regulation. The government has not responded. See relevant paras below:

A number of Directors of Children's Services (DCSs) and chairs of LSCBs have raised the lack of effective statutory provision about children in unregistered school settings or receiving home education. They point to the fact that public agencies do not have the right to gather information on the children in such settings and have no way of assessing the level of risk children face. This issue is not covered in multi-agency arrangements and it needs to be (para 102)

A similar issue exists in respect of children who are home educated. The majority of parents who arrange home education for their children work closely with, and share information with, the local authority. However, this is a voluntary act on behalf of the parent and a number of parents are not willing to provide information to the local authority. In both of these cases the local authority is not able to assess either the quality of education being received by the child or whether there are any safeguarding issues that require attention. This needs to be addressed urgently. New guidance should be provided which makes clear the responsibility of parents to ensure information about their child's education is provided to the local authority (para 103)

In conclusion, . . . the current guidance with regard to children who are educated at home – which some parents of children who attend unregistered settings will claim – needs urgent review in order to enable local authorities to fulfill their safeguarding responsibilities and ensure the wellbeing of those children. I welcome therefore the proposal in the White Paper, "Educational Excellence Everywhere" to consider the role of the local authority in ensuring the safety of children in these settings; this needs to be undertaken soon (para 105)

##### 5. White Paper, "Educational Excellence Everywhere" , March 2016, Cm 9230

'We will set high expectations for every child, ensuring that there are no forgotten groups or areas and we will focus on outcomes. 'p3

##### 6. Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland 3 June 2016

It is hard to see how the resistance to the Bill is compatible with the government's commitments under the UN CRC and the findings from the recent review.

<http://www.crae.org.uk/media/93148/UK-concluding-observations-2016.pdf>

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/childrens-rights-16-17/>: Relevant findings:

(a) Introduce a statutory obligation at national and devolved levels to systematically conduct a child rights impact assessment when developing

laws and policies affecting children, including in international development cooperation;

(d) Ensure that children are not only heard but also listened to and their views given due weight by all professionals working with children

7. House of Commons, Select Committee on Children, Schools and Families  
Final Report: The Review of Elective Home Education, 9 December 2009.

<https://publications.parliament.uk/pa/cm200910/cmselect/cmchilsch/39/39i.pdf>

This review, while ambivalent about all the recommendations by the Badman review, is a valuable source as it made clear that inaction was not acceptable.

It concluded that it was 'unacceptable that local authorities do not know accurately how many children of school age in their area are in school, are being home educated or are otherwise not at school'. The Committee heard from Sue Berelowitz, The Deputy Children's Commissioner, who argued that it was 'not acceptable that the state should not be able to vouch for the education of so many of its citizens'.

On 'un-official exclusions' it concluded that: we are not convinced that the Department's proposed response of simply strengthening existing guidance on exclusions is sufficient; the Department should investigate what is driving this practice on the part of local authorities and schools, bearing in mind some of the findings of this Committee's recent inquiry into school accountability. (Paragraph 3)  
The Bill here would strengthen initiatives to investigate the use of these exclusions.

On registration by parents: Given that existing databases could not provide an equally efficient and secure means to that end, we believe that a separate registration system for home educating families should be put in place. This would assist local authorities in knowing which children were in school, which were home educated, and which were not known to be in either category. The Government should review and, where necessary, strengthen the duties on local authorities . . . para 5)

We believe that registration would encourage local authorities and home educators to recognise that it is to their mutual advantage to have a clear record of children who are being home educated. Any registration system for home educating families should be light touch. In view of the concerns expressed by home educators about compulsory registration, we suggest that registration should be voluntary. Local authorities should publicise the benefits of registration, including the resources that will be available to registered families. The success of a system of voluntary registration (combined with improved information sharing) should be reviewed after two years. If it is found not to have met expectations—in terms of assisting local authorities in identifying and working with the families of children who are being home educated and those of children not otherwise at school—we believe that a system of compulsory registration would need to be introduced. (para 6)

A most of the Bill clarifies current law IF there was resistance to the registration by parents provision there would still be much value in it going ahead.

On safeguarding: The law relating to the duties and powers of local authorities with regard to home educated children has become very complex and difficult to interpret. This is reflected in the Department's existing guidelines on home education. The Department should take the opportunity provided by the Children, Schools and Families Bill to provide a definitive, succinct statement of the applicability of the Children Act 2004 and the Every Child Matters outcomes to home educated children. The Department should then provide guidelines that better enable local authorities to translate the law into practice, especially in relation to the safeguarding of home educated children as well as children with no record of school attendance. (para 7)

We do not believe that local authority officers responsible for liaising with home educating families should be given the right to interview a child away from the child's parents. That right should be reserved for colleagues who have primary responsibility for child safeguarding, including social care services and the police. A parent's or child's refusal for such an interview to take place should not be included as grounds for revoking registration to home educate. Any related concerns on the part of the home education team should be passed to social care services. (para 8).

This partly informed my ambivalence to the word 'interview' in the Bill. Referring to ascertaining the wishes and feelings of the child locates it more widely in general UN CRC compliant language rather than something that appears close to child protection.

For further information and more detailed analysis of the current legal framework I would be happy to provide copies of the following articles:

Monk, D (2016) "'Out of School Education' and Radicalisation: Home Education Revisited" *Education Law Journal* 1: 17-31

Monk, D (2009) 'Regulating Home Education: Negotiating Standards, Anomalies and Rights' *Child and Family Law Quarterly* 21 (2): 155-184.