Re: The Children's Wellbeing and Schools Bill

PROPOSALS RELATING TO CHILDREN NOT IN SCHOOL: TWO BIG ISSUES

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INTRODUCTION

1. As an education lawyer for over 30 years, I have advised and represented children, parents, schools and local authorities in the SENDIST, High Court and Court of Appeal. I was involved in discussions with DfE officials on the framing of what became the Children and Families Act 2014. I have served on the Education Committee of a local authority and as the chair (now called judges) of the SENDIST.
2. I write to comment on two big issues arising from the provisions of the Children's Wellbeing and Schools Bill relating to home educated children:
    a. The proposed 'best interests' requirement, which - in my view - would represent the greatest undermining of parents in the history of our education law, and would do so uniquely for parents who choose to home educate, without any sufficient explanation or justification; and
    b. The proposed register of education providers, which will require people and organisations providing structured learning to children – such as Scout/Guide groups, religious groups, relatives, friends, neighbours – to provide full details to a local authority register on pain of a fine, but only in relation to children who are being home educated.
3. I would be happy to elaborate on any aspect of what I outline below.

THE PROPOSED 'BEST INTERESTS' REQUIREMENT

4. It is not well understood that the legal duty to provide education to a child falls on their parents (and not anyone else). In England (the position is essentially the same in Wales, Scotland and Northern Ireland):

> "The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—
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> (a) to his age, ability and aptitude, and
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> (b) to any special educational needs … he may have,
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> either by regular attendance at school or otherwise."

5. Parents can discharge that duty by sending their child to a state school or a private school, or by home educating their child.
6. As I set out in Annex 1 to this document, the specifics of the statutory formulation have varied since the first major education statute, the Education Act 1870, but the principle has not: as long as parents provide suitable (i.e. good enough) education to their children one way or another, public bodies cannot

force them to do it any particular way; and cannot decide something else might be 'better'. Latterly, a strong set of statutory imperatives aimed at meeting parental preferences (such as in choice of school for those who want to send their children to school) has reinforced the central importance of parental wishes and freedoms in our education system.

7. The Bill proposes to change those fundamental principles, but only for parents who wish to home educate. Only for them, the local authority will – now, for the first time ever - be able to override the parentally-preferred way of educating their child (even though satisfied that the parental provision is suitable). This a dramatic new and significant 'state knows best' incursion into family lives in at least two distinct ways.

Parents who wish to withdraw their children from school

8. The Bill first proposes an entirely new restriction (clause 24, proposed inset section 434A [page 45 line 30] on parents removing their children from a school with a view to home educating them. For the first time, they will need local authority consent in two situations: (1) for a child at a special school who was enabled to attend by an EHC plan, (2) for any child where the local authority is conducting enquiries under section 47 of the Children Act 1989.

9. In each case, the local authority is to be required ("must") to refuse consent even if satisfied that the child will receive suitable home education, and simply because the local authority thinks it would be in the child's best interests to stay at the school [page 46 line 35]. As above, that is a highly significant and wholly incursion into parental and family life. For the first time local authorities must insist that children attend school even though parents would (as the local authority agrees) provide suitable education at home. That newly and dramatically changes the fundamentals of English education law after over 150 years.

10. Case (1) (withdrawal from a special school) arises in circumstances where there is not even any basis for concern of any kind, let alone educational: it is simply a parent doing what many do across the whole of society, namely deciding that they would like to discharge their duty to educate their child in a different (and also suitable) way. Many parents decide to change school or provision in favour of something they think is better. Uniquely, these particular parents will now have their wishes overridden by the local authority.

11. Even in case (2) (section 47 enquiries), the threshold for overriding of the parental wish to home educate (even though that has been agreed a suitable option) is remarkably low: the mere fact of an enquiry (including an inquiry having no bearing whatsoever on the child's education).

School Attendance Orders

12. At the moment (and indeed since 1876), where a child is being home educated and the local authority is not satisfied that the child is receiving suitable education it may serve what is known as a 'school attendance order' (SAO). A parent who does not comply with an SAO can be prosecuted. But, at any point in the process (including before the magistrates) the parent need only show that the education they are providing is suitable after all, to bring the process to an end; and that is so even if the local authority or magistrates might think school would be better. The point is that parents must merely meet the threshold of suitability.

13. The Bill proposes fundamentally to change that, making a parent not only show that the home education that they are providing is suitable, but also show that school attendance would not be better. For the first time, the local authority will be able to override parental preference, even while agreeing that home education would be good enough,

14. Clause 26 (inserting section 436H(1) and (5) [page 58 lines 5 and 34]) requires ("must") the local authority to serve a preliminary SAO where it thinks attendance at school would be better, even though satisfied that the home education is suitable. It does so (in the first version of 'condition B') simply because the local authority is conducting enquiries under section 47 of the Children Act 1989 (see inserted s436(5)(a)(i) and (c)) (i.e. even where the inquiries may have nothing to do with educational matters and when nothing is identified that justifies any safeguarding action). That is a remarkably low trigger for overriding the parental preference for agreed-to-suitable home education.

15. Following a preliminary SAO of that kind, the parent must then (so it is proposed) persuade the local authority that home education is best (and not merely suitable) for their child; and the local authority must serve an SAO where in its opinion 'it is expedient the child should attend school': inserted section 436I [page 59 lines 20-30].

16. Moreover, that obligation on the local authority to override what it agrees to be suitable home education (by a preliminary SAO, then SAO then potentially a prosecution) persists even where any section 47 inquiries have long since ceased; at which point there could clearly be no possible justification for the local authority (and then court) to impose its view of what is better, even though what is being provided by parents is agreed to be good enough.

The Department's ECHR Memorandum

17. I explain in Annex 2 to this note why I consider that the Department has entirely failed to provide justification for the interference with Article 8, 9, 14 and A2P1 rights it acknowledges will arise here. Nor are these measures the least intrusive (and thus proportionate) for any claimed justification, as they need to be for ECHR compatibility. The Memorandum is a notably weak document. I

consider it likely these provisions, if enacted in this form, would be declared to be incompatible with Convention rights by the court.

THE REGISTER OF PROVIDERS OF EDUCATION

18. Clause 25 proposes a register of children not registered at school. Inserted section 436C(1)(e) [page 49 lines 23-36] requires the register, where those children receive education from a person other than their parent, to specify the names and addresses of any person or organisation involved in providing that education, a description of the organisation, the postal address and the total time spent receiving that education. Parents must provide that information [page 51 line 25]. And a local authority may require a person it thinks is providing education for more than a prescribed time to provide details [page 52 lines 30ff] on pain of a financial penalty [page 53 line 30]. That applies to "any programme or course of education, or any other kind of structured education" [page 52 lines 30-34].

19. The problem is that that description (and "any other kind of structured education" in particular) will (1) potentially require to be registered a very wide range of people and organisations, including many who/which are also working with children who are attending school (outside their school hours); and will (2) potentially require parents who home educate to be constantly (and wholly impractically) changing the register entries for their child.

20. As for (1), anyone or any organisation providing "any kind of structured education" (even if not a programme or course) to a child who is being home educated will need to be on the register along with details of what they are doing, where and when. The courts have defined "education" to include any learning: it is a very wide concept.

21. This new requirement will clearly therefore catch groups such as the Scouts or Guides, church or religious groups, providers of holiday activities, trips and courses, and many others who provide structured activities which involve learning; and it would also catch, say, a grandparent, neighbour or another child's parent who regularly helped them gain any skill or knowledge at all (including reading, or anything sporty, musical or artistic). But – as I say – in each case only in relation to home educated children, even though what they are providing for the children is all the same.

22. As for (2), many of the kinds of education provision in question might not last long: something can be structured, and yet one off, or last only a few occasions. And yet it, and the person or organisation providing it will need to be on the register with full details. Parents, and others, could be having to constantly adjust the register.

23. Overall, this is a recipe for a highly bureaucratic process which will be cumbersome and intrusive not just for parents, but also potentially for other family members, neighbours and the many people and organisations, many

voluntary and charitable, which provide any kind of structured learning for children. The organisations and the people involved (including thus the people within the organisations) will be required to register, with full details, but only for the home educated children.

24. Nor is this obviously saved by the proposition that the education in question must exceed a prescribed amount of time [page 52, lines 35-40]: Many of the activities will last several hours at a time, likely to be more than any prescribed threshold; or may be only for a one off, or occasional or irregular. Regulations which seek to capture that will rapidly become unmanageable and discredited.

The Department's ECHR Memorandum

25. For a child and parent to have information recorded on the register about education providers clearly engages their Article 8 rights. Where that is information about providers who are also doing exactly the same for children attending school (as most would be) that amounts to an Article 14 + Article 8 interference which the Department has not even mentioned, let alone sought to justify. Why does a child who is home educating have to provide details of every adult involved in their church group or Guide group, where those at school do not? Again, this would appear to be something the court would declare to be incompatible with Convention rights if enacted in this form.

David Wolfe KC, Matrix, January 2025

Annex 1 – Suitable Home Education

26. The Elementary Education Act 1870 newly required parents of children between 5 and 13 to cause their children to attend school unless "the child is under efficient education in some other manner". That allowed parents to educate their children entirely out of school, including at home, provided they could, if necessary, persuade a court that they were providing 'efficient education'. And provided they met that requirement, no public official or court could require attendance at school.

27. The Elementary Education Act 1876 made the point more explicit imposing an obligation on every parent to cause their child "to receive efficient elementary education in reading writing and arithmetic". But again, provided a parent met that threshold, no public official or court could compel their child to attend school.

28. The current framing of the position emerged in the Education Act 1944, which set the fundamentals – still largely unchanged – of our modern education system. Section 36 required the parents of every child of compulsory school age to '*cause him [sic] to receive full-time education suitable to his age, ability and aptitude, either by regular attendance at school <u>or otherwise</u>*" [my underlining]. Section 76 provided that the relevant public authorities should '*have regard to the general principle that, so far as is compatible with the provision of efficient education and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents'*. Accordingly, the law maintained the key proposition that parents could electively home educate their children provided they did so to a threshold level of 'suitability'; and reinforced that with a strong presumption in favour of education in accordance with parental wishes other than where that cost more or adversely impacted on others (which has provided the bedrock for many 'parental preference/choice' provisions including around school choice.

29. Those provisions have been only slightly tweaked in the Education Act 1996, where they sill remain in force as sections 7 and 9:

> "7. The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—
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> (a)to his age, ability and aptitude, and
>
> (b)to any special educational needs ..in the case of a child who is in the area of a local authority in England ... he may have,
>
> either by regular attendance at school or otherwise."
>
> "9. In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of [F1State and [F2local authorities]] shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as

that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

Annex 2: ECHR Memorandum

30. The Department's ECHR Memorandum asserts that [paragraph 148]:

> "The Department notes that the proposals do not increase the state's control over or interference with the content of education provided by electively home-educating parents to their children, and the system of registration of children not in school is not mandatory. A parent's refusal to provide information can trigger the school attendance order process but the parent can still prevent an order being made (or, if prosecuted, secure acquittal) by demonstrating that their child is receiving suitable education. A parent's refusal to allow access to the child's home may contribute to a local authority making an adverse determination when deciding whether to issue a school attendance order, but this can be mitigated by allowing such access."

31. That covers the situation where the local authority considers the home education not to be suitable. It says nothing about the situation I consider in my note above, namely where the home provision is undoubtedly suitable, but the local authority is of the view that home education is (in the local authority's view) inferior to school education and therefore school education in the child's 'best interests'.

32. The Department correctly acknowledges that these provisions will have a differential impact (so as to engage Article 14, the prohibition on discrimination) in relation to Article 8 (respect for private and family life) [see Memorandum #146-147].

33. But in relation to all of that, it simply asserts [paragraph 149] that "any" [sic: the interference is clear and obvious] Article 8/14 interference is justified if necessary and proportionate in the interests of protection of the right of the child to an education under Article 2, Protocol 1.

34. That is no answer: insofar as A2P1 deals with the position of children (as opposed to parents) it provides that "No person shall be denied a right to an education." There is nothing in there which could conceivably justify denying a child education is agreed suitable, simply because the state thinks something else might be better.

35. Moreover, the second sentence of A2P1 says this: "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 is in conformity with their own religious and philosophical convictions." Many parents who home educate are precisely doing so out of a philosophical conviction. The Department's response is entirely misconceived here.

36. Nonetheless, it continues: "Interference can also be justified as necessary for the protection of health and morals, as the measures will help to identify

children who may be neglected or socialised in ways that are harmful to them or that will make them harmful to others and will offer certain children some protection from harm by requiring them to attend or remain at school." Those words reveal the incredibly low threshold (the mere fact that a parent wants to remove their child from a special school, or the commencement of a section 47 inquiry, even where that has nothing to do with education) being applied here: nothing close to justifying across the board that local authorities will now decide what is best even if what parents want to do is agreed good enough.

37. The Department asserts [paragraph 153], but without any explanation, that the measures do "not go beyond that which is necessary for protecting these interests". But that, in itself reveals the huge leap taking place here. At present parents need only show that their home education is good enough. No justification is offered for local officials to be able to override that because they disagree with the parent and think school is better.

38. As for restriction on withdrawal from special schools, the Department simply relies on the proposition that "this is justified because children in special schools tend to have greater needs" [paragraph 157] but that completely ignores the fact that, in order to show that the home education is suitable, parents will (see section 7 Education Act 1996, as above) need to show that it is suitable for their child's special educational needs. That does not then justify imposing an additional requirement of 'bests interests'.

39. Finally, in relation to Article 2, Protocol 1 and Article 9 (protection for religious freedoms) the Department falls back on the fact that the ECtHR has accepted the position in those countries which have compulsory schooling for all [paragraph 161]. But that, of course, entirely misses the point: we do not have (and never have had) compulsory schooling in the UK. We have a system which, as above, has fully embraced home education (provided it is suitable for the child) since 1870. For that now to be selectively withdrawn (so that the state can override the parent and insist on schooling even while agreeing the parental education is suitable, must be seen in that context, particularly when – as the Department agrees – there is a need to justify the discrimination which will now arise: the clearest discrimination against home educating parents far beyond what could be properly justified.

40. I predict that these provisions, if enacted, would be held by the courts to be incompatible with Convention rights.
