

Scottish Government
Home education guidance: consultation
31 August 2022

Introduction

1. The NASUWT welcomes the opportunity to comment on the proposed updates to the home education guidance.
2. The NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education.

General

3. The NASUWT believes that it is a fundamental duty of the Scottish Government to ensure that all children can access a broad, balanced, relevant and engaging education that meets their needs and interests. This duty extends to those children educated at home.
4. The NASUWT accepts that the purpose of this consultation is not to propose changes to policy on home education, but feels it is nevertheless appropriate to highlight the Union's position that qualified teachers are best placed to deliver the educational curriculum to children.
5. It should further be recognised that it is by no means a matter of expert consensus that the Government is required by the European Convention on Human Rights to permit home education in all circumstances. It is also the case that the European Court of Human Rights has upheld the right of states to withdraw or mediate legal entitlement to elective home

education. Other European countries, including Sweden and Germany, have considerably more constrained rights to home educate and most European jurisdictions require mandatory registration of home educators. Indeed, in New Zealand, the relevant legal framework demands that home-educated children are 'taught at least as regularly and as well as in registered school'.

6. The appropriateness of current rights for parents to home educate must be evaluated in the context of education as a human right and a public good. The NASUWT remains clear that high-quality education requires the deployment of appropriately qualified teachers and, therefore, continues to find difficulty in reconciling a general right to home education with this principle. It should be noted that the right to be taught by appropriately qualified persons is also affirmed in the United Nations Strategic Development Goals to which the UK is a signatory.
7. Therefore, the Scottish Government must recognise in its development of policy in this area that international law does not obstruct it from considering a wide range of options in regulating and restricting the rights of parents to home educate.

Question 1. The purpose of this guidance is to set out the relevant law, to provide advice on the roles and responsibilities for local authorities and families in relation to home education; and to encourage the development of trust, mutual respect and positive relationships. Is this purpose sufficiently clear in the introduction?

8. While the intended purpose is contained within the introduction, this messaging can appear lost. The reader has to first navigate an explanation of the United Nations Convention on the Rights of the Child (UNCRC) and a lengthy explanation of what will not be covered by the guidance before reaching the purpose in paragraph 1.5. It would be better to lead with the purpose of the guidance and follow up with the

legislative foundation, any supportive legislation thereafter and finally any caveats which would avoid the central purpose being lost.

Question 2. The law does not foresee flexi-schooling, or make provision for it. Flexi-schooling is not the same as home education. Is this made sufficiently clear in paragraph 1.4? Please provide any comments on flexi-schooling that you may have.

9. The guidance is clear in drawing a distinction between flexi-schooling and home education; however, in the current Scottish context this appears an artificial delineation which does not take into account the realities on the ground.
10. Any attempt to foster trust, mutual respect and positive relationships will be undermined by guidance which intentionally ignores models of schooling even more broadly utilised and developed since the last iteration of the guidance in 2007.
11. Equally, it could be construed that the Scottish Government, through the adoption of a minimalist approach to guidance, is intentionally excluding or creating additional barriers for children with Additional Support Needs or for Gypsy/Traveller families who are more likely to be utilising flexi-schooling, particularly in a context where some parents may be withdrawing their children from mainstream education because their needs are not being met.
12. There are particular issues in this context for Gypsy, Roma and Traveller (GRT) families who find themselves in circumstances where they are required to home educate their children by default, given the difficulties they may face in securing admissions to schools. The NASUWT remains profoundly concerned by ongoing reductions to local authority GRT-related services. It is, therefore, essential that policy and practice in respect of all home-educated children ensures that local authorities have

the resources and support necessary to secure the right to a suitable and effective education for all children from GRT communities.

13. Local authority services should provide direct support for the education of GRT children in a way that understands and meets their needs and circumstances. The NASUWT recommends that the guidance includes examples of good practice, including for children who are highly mobile. It would also be very helpful if the guidance could consider the degree to which local authorities should be liaising with each other.

14. It should be remembered that the Equality Act 2010 and the Public Sector Equality Duty (PSED) place significant legal responsibilities on all public bodies, including the Government, when carrying out their functions. Legislation requires such bodies to have due regard to the need to eliminate discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Independent NASUWT research shows that the majority of schools are unaware of their duties and obligations under the PSED. Where the guidance ignores the Government's legislative responsibilities or undermines the PSED, the Scottish Government's commitment to equalities appears tokenistic. The NASUWT is concerned that the current guidance will not meet the aims of the PSED.

15. The Scottish Government should also be meeting its responsibilities under the PSED by collecting and using evidence when developing policies. When undertaking national consultation processes, such as this one, the papers should explain the evidence, issues and potential adverse impact, as well as how they plan to mitigate any adverse impact. Respondents to the consultation should be invited to comment on this information, as well as any gaps in the evidence base. Unfortunately, in almost all cases, public authorities ask equality impact questions passively expecting others to identify the issues and the evidence.

16. The Union is calling on the Scottish Government to do more than just espouse equality, instead seeking out the voices of those with protected characteristics as a priority. The NASUWT strongly recommends that the Scottish Government considers in greater detail an equality impact assessment when reviewing the framing of the updated guidance.

Question 3. How can local authorities hear the individual and collective voices of home educated learners? Please give examples of good practice.

17. The guidance which precedes this question is insufficient to enable the reader to understand the breadth of the legal duty. Simply listing the available legislation and section numbers falls significantly short of providing guidance for schools, teachers and local authorities. Noting that *'thus far there is very little national or international case law to provide guidance as to the balance that must be struck between the views of the parent and child in relation to the child's education'* provides schools with no practical guidance on the application of the law. Indeed, only requesting examples of 'good practice' as part of the consultation process, instead of drafting clear guidance, appears little more than a brash attempt to avoid liability on the part of the Scottish Government.

18. Section 2 is exceedingly unhelpful as a means of supporting local authorities to act in a way consistent with their legal duties. As might be expected, a fair portion of this section is given over to the UNCRC and reference is made to Article 12 on the need to take account of the views of the child. There is also an explanation of the provision in the Education (Scotland) Act 1980 that, in essence, sets out that the decision to home educate rests with the parent: the child really is not a party to the decision. How these two requirements or expectations are to be reconciled in practice is not addressed. If a child is capable within the context of Article 12 of forming a view on whether or not they wish to be home educated, what happens if the parent's view is different to that of the child? What happens in this case if a parent wishes to home educate

their child and the child is clear that they wish to go to school? Assuming there is no reasonable grounds to refuse consent to home educate, what should the local authority do? How would agreeing with the parent's wish to home educate in such a case be consistent with the UNCRC and what tests would a local authority apply in order to decide?

19. Acknowledging there is very little national or international case law on striking a balance between the rights of parents and children in this respect falls far short of advice and simply leaves local authorities to work out what to do, with no meaningful criteria to apply in order to make a decision. It might have been useful for the consultation paper to further explore international comparators. Perhaps there is not a lot of international case law because those countries that are signed up to the CRC's determination protocol and that are often cited as examples of good practice on UNCRC implementation are also those that place significant restrictions on the right to home educate?

20. Having chosen to give such prominence to the UNCRC in policy and to take forward incorporation of it, it is incumbent on the Scottish Government to explain to local authorities how in practice they are supposed to balance the requirements of Article 12 and the 1980 Act when they come into conflict.

Question 4. Please share examples of collaboration and involvement in the delivery of support and guidance for home educating families. Please share your examples here.

21. Please see the response to question 3 above, outlining the Union's concern that responsibility is being sidestepped through a failure to identify a clear framework or even a set of prompt questions. While positive examples of collaboration and involvement will be important, these would be a poor substitute for an overarching guidance framework.

22. Notwithstanding the appropriateness or otherwise of a legal entitlement to home educate, it is clear that if it is to be retained, every effort must be made to secure the fundamental rights of children to remain safe and receive an appropriate education in all circumstances. The Union is concerned that ad hoc examples are being sought or collated when nationally:

- there is no certainty about the precise number of children and young people being educated at home;
- local authorities do not have the full range of powers or resources necessary to ensure that children and young people not in school are receiving their entitlement to a suitable education;
- in some instances, children are being home educated due to an absence of support to pupils with additional support needs and disabilities (ASN);
- there is a widespread general lack of understanding among parents, and by local authorities themselves, of the extent of existing local authority powers to monitor and, where appropriate, intervene in cases where there are genuine concerns about the way in which home education is being provided; and
- distinctions between interventions undertaken by local authorities in respect of safeguarding and those related to the general provision of education are not always clear.

23. It is right that when support is necessary to secure home-educated children's entitlements, local authorities should continue to use their best endeavours to provide it. However, it is important to establish the bounds of reasonableness in this respect. In particular, the NASUWT is concerned that local authorities can be called upon to devote disproportionate levels of scarce public resources in an attempt to compensate for inherently inadequate and inefficient home education provision. Frameworks for the monitoring and regulation of home education should be established on the basis that support should only be provided if it is clear that it would allow home educators to meet national minimum standards of provision and to facilitate better access to school-

based provision should the need arise or circumstances change. If it is not evident that the provision of support would meet these criteria, local authorities would need to use the powers proposed above to refuse or revoke registration. These considerations are particularly important in relation to children with complex, medical, educational or case needs, or those with disabilities.

Question 5. Do you have any comments on paragraphs 3.1 – 3.11?

24. While the guidance notes that *'parents do not have to give a reason for choosing home education when requesting to withdraw their child from school'* and that *'[a]ny reason given should have no bearing on whether or not consent is given'*, it is a little confusing to immediately thereafter list some of the common but not exhaustive reasons. For readability alone, it might be helpful to swap paragraphs 3.2 and 3.3 to provide context before the list of reasons is set out.

25. Paragraph 3.10 states that further to Article 12, local authorities should seek the views of the child in question as part of their consideration of a request to home educate. However, there is no guidance offered to local authorities on what they are supposed to do having gained these views. They are asked to factor the views into decision making but with no effective guidance on the ways in which this should be done or how these views should be balanced against other considerations.

26. Paragraph 3.14 confirms the position that local authorities *'may not unreasonably withhold consent'* to a request to withdraw a child from school to home educate. Paragraph 3.19 mentions that child protection concerns might be grounds for withholding consent but it is difficult to understand how in any of these circumstances it would be reasonable to give consent. In any event, there is little here to support local authorities in evaluating whether or not it would be reasonable to withhold consent.

Question 6. Is it helpful for a local authority to provide a structure for parents to use to provide information on their education plans. For instance, broad questions or a template to support parents to think through their planned provision?

27. It would be helpful to provide broad questions, both for the benefit of parents and local authorities, to ensure sufficient information is able to be gathered and considered. It might be useful if the guidance explicitly sets out the type of adjustments which might also be considered to facilitate this information gathering, such as engaging an interpreter.

28. The NASUWT agrees that a positive relationship between education authorities and home-educating parents is critical in ensuring that home-schooled children receive the best education possible outwith a formal school environment.

29. The NASUWT strongly supports the Article 28 right within the UNCRC : 'the right of the child to education'. In providing children with this right, NASUWT believe it is critical that due weight is given to the views of the child in question. Consideration needs to be given as to the mechanisms via which the child's views are taken. Being consulted while in the company of the parent/guardian making the request will not always be appropriate.

30. Fundamentally, it is important that the requirements on schools and local authorities are made much clearer.

Question 7. Does 6 weeks provide sufficient time for a local authority to issue a decision regarding consent to withdraw a child from school?

31. Six weeks may prove challenging if this bridges the school summer holiday period and further time may be needed in such circumstances.

Question 8. Do you consider in-person contact between the local authority and home educating family to be important? Please give examples of the types of contact that have worked well and in the best interests of the child.

32. Yes, further guidance should be provided on the contact with both families and individual children. Where the guidance states '*[t]he child should be given the opportunity to attend that meeting, or otherwise to express his or her views, but the child's attendance should not be seen as compulsory*' it remains unclear how that would sit with both the wording and the intention of the UNCRC and this question should be addressed directly within the guidance document.

33. It is vital that home education is overseen and monitored effectively by local authorities, given their duty to ensure that all children receive a suitable education and are kept safe. It is sensible that such monitoring arrangements are graduated according to assessments of risk, but it is clear that they should also be sufficient to ensure that the entitlements of all children in respect of quality of educational provision and safeguarding are secured. It is difficult to see how any real or considered judgement regarding the efficiency or suitability of the education can be made where there is only one visit per year, for example.

34. There is no clear legal framework within which local authorities can monitor home education effectively, and parents have no obligation to cooperate with any efforts they make to do so. While local authorities continue to have statutory responsibilities for ensuring the suitability of provision for home-educated children, as well as for securing their safety and wellbeing, they have insufficient legal powers to discharge these responsibilities. Further, those powers that local authorities do have are often not understood by parents or, in some instances, by local authorities themselves. These arrangements are in urgent need of reform.

35. The Scottish Government may wish to consider as a comparator the 2009 Review of Elective Home Education led by Graham Badman which could form the basis of further discussion on the development of home education policy.¹

36. Paragraphs 4-7 to 4.12, in particular, seem to underplay seriously legitimate concerns about the importance of ensuring that children who are home educated are safe. Schools have a critical role to play in ensuring protection of children from harm and identifying risks to their wellbeing and safety. This is because schools are places where children come into contact regularly with adults from outside their families and households who are trained to identify signs of abuse or neglect and to take appropriate action. Children who are home educated are as entitled as their peers in schools to the protection of the state from harm, and it is essential that their wellbeing is monitored effectively.

37. It is understood that local authorities do not have a statutory basis currently for accessing a child as part of the local authority's monitoring of provision. The fact that they do not gives rise to grounds for concern as it is difficult to understand how a local authority can assure itself that a child is safe and free of risk if it does not have direct contact with the child. It is also important to note that Article 3 of the UNCRC places an obligation on the state to act in the best interests of the child. It is not clear that arrangements for home education in which the local authority has no right to access a home-educated child are consistent with the Article 3 duty.

38. Nevertheless, within the current statutory framework, the guidance needs to be much clearer about the importance of local authorities making every effort to gain direct access to home-educated children. It should be clear that professional curiosity about the wellbeing of such children

¹ Badman, G. (2009). *Report to the Secretary of State on the Review of Elective Home Education in England*. London: Stationery Office

should be aroused by persistent refusals on the part of families to allow local authority officers to meet with children.

39. It is also not evident how local authorities can evaluate the suitability and effectiveness of home education without their officers meeting with home-educated children. The guidance does not place enough emphasis on how home-educated children's rights under Articles 28 and 29 of the UNCRC are being met nor set out how effective evaluation of educational provision can be undertaken.

Question 9. How can local authorities best keep general data on the numbers of home educated children and young people within their area? Please give us your views

40. Local authorities will currently have variable data collection mechanisms. Currently, it is enough that these are GDPR compliant and facilitate appropriate sharing of information as required. The updated national guidance should set out a framework of principles and identify what data is expected to be collated and how this should be used.

Question 10. What is your opinion of a national approach to information management, for example, a national register?

41. Local authorities have significant responsibilities in relation to the safeguarding of home-educated children as well as the suitability of the education they receive. It is clear that local authorities cannot fulfil these requirements effectively if they do not have accurate records of all home-educated children within their jurisdiction. Therefore, if the Scottish Government intends to continue to give parents a right to home educate, then it is entirely reasonable, as a minimum expectation, for it to establish a system of mandatory registration of all children educated in this way. The scope of any registration requirements should include those children who receive a combination of school-based and home education.

42. The implementation of such measures would require an audit of resource implications and the extent of any additional support local authorities might require. In light of ongoing constraints on local authority funding, it is by no means clear that sufficient capacity and resources are in place currently in all circumstances.
43. The NASUWT notes the view expressed by some within the home education community that mandatory registration might undermine the work that local authorities have undertaken to build up strong working relationships, support mechanisms and consensus with home educators and their organisations. However, the Union can discern no credible reason why the introduction of a mandatory registration system would hinder local relationships between parties with a commitment to acting reasonably.
44. Given that the purpose of mandatory registration would be to ensure that local authorities are aware of all locations where children are educated, the NASUWT would support any proposal to require home educators to identify any settings that provide education to their children in addition to that provided at home.
45. Local authorities must know where all children for whom they have a statutory responsibility (i.e. those living within their local authority area) are being educated if they are to satisfy themselves that these children's statutory rights and, it should be emphasised, their education and wellbeing rights under the UNCRC are being met. This includes knowledge of all children who are being home educated so that local authorities are able to discharge their responsibilities towards them and take action in cases that give rise to legitimate concerns. A local register of home-educated children, with minimum expectations across all local authorities on how such a register should be kept and maintained, is therefore essential. A national register would also help to inform policy making and recognise trends in the propensity of parents to home educate.

46. It is clear that a requirement on parents to submit to mandatory registration would need to be accompanied by arrangements to address deliberate non-compliance.
47. Finally it is important to pick up on the comment within the draft guidance, currently under review, that states '*GIRFEC [Getting it right for every child] Information Sharing Guidance is in development. This guidance will promote necessary, appropriate and proportionate information sharing, which complies with all relevant legal requirements*'.
48. It is important to highlight that the NASUWT agrees with the principles of GIRFEC, and the aspiration that we all work together to help children and young people grow up loved, safe and respected so that they realise their full potential. We share the desire for all children and young people to live in an equal society which enables them to flourish, to be treated with kindness, dignity and respect, and to have their rights upheld at all times.
49. In December 2016, the NASUWT met with Scottish Government ministers to discuss the Supreme Court's decision in the case of *The Christian Institute and others v Lord Advocate*. At this meeting, the Union suggested that in the absence of any clear proposals from the Scottish Government as to how it would address the concerns of the Supreme Court, proposals around information sharing breached the right to privacy and a family life under the European Convention on Human Rights. The NASUWT suggested it was time to reconsider this policy and look at developing an alternative approach.
50. Providing legally sound information sharing guidance has been a challenge the Scottish Government has not been able to meet as yet and the NASUWT wishes to be clear that attempting to progress this matter without legislative support, and by shifting the burden for making difficult judgements about information sharing onto schools, teachers and others who work with children and young people, is wholly unacceptable. As

well as passing the buck, this would place another intolerable workload burden on staff in schools.

Question 11. What factors can facilitate home educated learners to access qualifications? What barriers or solutions may there be to accessing qualifications? Please give details

51. There are a substantial number of variables which will impact upon the ability of home-educated learners to access qualifications, including but not limited to: knowledge of their existence, access to materials, provision of adjustments, cost, local variability, internet connectivity, access to electronic devices. The myriad of complex factors, not replicated within a school setting, reinforce the Union's view that high-quality education requires the deployment of appropriately qualified teachers.

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