

Responding to the Children not in School Consultation

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This document can be downloaded from The HE Byte - [English Consultations](#) page

Introduction

The purpose of this document is to highlight key issues in each section of the Department for Education's consultation which focuses on establishing a *register* for children "not in school." It is not intended to offer advice on how to answer questions, but to identify key issues in the Government's documentation so that respondents can give careful thought to their own submissions to some or all of the questions.

Relevant documents can be downloaded from the Government's website, but we include links here for ease of use. We recommend that those wishing to respond try if possible to find time to read the first part (p.3 to 10) of the DfE's response to the 2018 consultation, **Elective home education: call for evidence**, as this sets the scene for this year's consultation:

- [Official web page](#)
- [Elective home education: call for evidence 2018 response \[PDF\]](#)

The documents relevant to the **Children Not in School** consultation can be accessed via the following links:

- [Official web page](#)
- [Consultation document \[PDF\]](#)
- [UNCRC assessment \[PDF\]](#)
- [Family Test assessment \[PDF\]](#)
- [Equalities log \[PDF\]](#)

The Government are encouraging respondents to use the [on-line response form](#) to make submissions. There does not appear to be any word limit for individual answers, but there are some features which it is best to be aware of from the start. There are six on-line sections (ten pages) to complete, consisting of:

1. Introduction
2. Section 1 - LA duty to maintain a register of children not in school
3. Section 2 - Duty on parents
4. Section 3 - Duty on settings
5. Section 4 - Duty on local authorities to provide support for home education
6. Concluding questions

The on-line questions are numbered differently from those in the PDF document for two reasons. First, the *Introduction* contains six questions about the respondent's identity (name, email address etc.) and whether they are making their submission on their own behalf or as a representative of an organisation. That is fairly standard practice. Secondly, and more significantly, *Sections 2 to 5* all begin with a question asking "Do you agree..." Depending on how this initial question is answered, the software then loads one of two subsets of questions, one for those who *agree* and a different one for those who *disagree*. We have prepared a [Comparison between questions on published Consultation Document and On-line Response Form](#) for those who may find this useful before completing the form.

None of the thirty-five questions in the published PDF consultation documents appear to have any significant differences between the "Agree" and "Disagree" questions sets. There is one previously unlisted question in the first section which is asked differently in the two options. Inserted between Q1 and Q2 (in the PDF) are Q8 (Agree) and Q20 (Disagree). Respectively these ask "Why do you support the concept of a duty on each LA to maintain a register?" and "Why do you not support the concept of a duty to each LA to maintain a register?" Given the small amount of difference in the subsequent questions asked, respondents may wonder why this device has been employed in all four main sections. It appears that it is to facilitate the sorting of the responses by the DfE into two types - those *for* a register and those *against*. One can only speculate whether this could result in the two types of responses being treated differently. Finally, it is possible to save submissions and return to them on a later occasion.

Background and context (p. 8 to 9, Consultation Document PDF)

It is worth reading this section because it sets out the Department's thinking behind its decision to work towards introducing a register which would include home educated children.

Key points are:

- Last year's consultation, "was in recognition of the fact that local authorities need to be supported to be able to conduct their duty to ensure all children in their area are receiving a suitable education." A key factor being "the increasing numbers of children receiving their principal education outside of state or independent schools and instead deemed to be educated in the home and/or other settings - or not at all." (§1.1)
- Amongst those being educated outside mainstream schools, some "are being educated at home very well by dedicated parents, who deserve support. However, others are deemed to be 'home educated' but in reality such education as they get is mainly or entirely through attendance at unsuitable settings such as unregistered independent schools or multiple part-time settings." Additionally it is stated, "there is also likely to be a number of children for whom the education being provided is unsuitable," and "it is mainly in the interests of such vulnerable children that the proposals in this consultation paper are brought forward." However, "the government intends to ensure that any proposals do not impede those families who are successfully, and through choice, educating their children at home." (§1.2)

§1.3 to 7 outlines some relevant recent events and also the mechanics of the Government's response to Lord Soley's Bill, and "is grateful to Lord Soley for his initiative in bringing forward the bill." (§1.6)

§1.8 clarifies that in order for these proposals to move forward it depends "on gaining suitable Parliamentary time for the primary legislation which is envisaged." If such time is found, then other necessary steps will mean "that full roll-out might be two to three years away."

Section 1 - LA duty to maintain a register of children not in school

This section is covered on pages 10 to 14 of the Consultation document, and questions 1-12 (Doc) / 7-19 & 20-31 on-line. [N.B. From now on, the annotation X/Y/Z will be used to denote question numbers in the Doc/Agree/Disagree sequences.] The common format in this and the next three sections is arranged as: *Background* (§2.1), *Proposal* (§2.2-3) and *Technical detail* (§2.4-7). These are then followed by a list of the questions in that section. (N.B. a full list of *all* questions is available on p.27-30 in the Consultation document.)

Background: In responding to this consultation it is important to grasp the implications of §2.1.

The DfE are *not* asking if they should establish a register of children not in school, but *how* such a register should operate and *what* it should include.

It is important to remember this when responding to this consultation. Whilst there is an opportunity to say *why* you disagree with the proposal to establish a register (Q~/8/20), you should also remember that in all but this and the final question, the DfE is seeking comments on issues which need careful consideration when establishing a register. If you simply wish to register your objection to the proposal, Q20 and Q72 are the places to do so. If you object to a register but desire to do what you can to limit the danger a register would entail, then respond thoughtfully to those remaining questions which you feel able to address.

The foundations of the Government's reasoning are set out in the opening three sentences. They believe:

- a) LAs have a duty to identify children who may not be receiving a suitable education;
- b) LAs have safeguarding duties in respect of *all* children whether or not they are attending school; *therefore...*
- c) "The Government wishes to support local authorities in these roles, particularly in relation to those children [who] are vulnerable."

This consultation is not the place where the interpretation of the laws behind either a) or b) can be effectively challenged; if that is to be done it will have to be in another context, possibly through the courts. However, those responding to Q20 may wish to question the DfE's interpretation behind one or both of these statements. The recently published [Elective home education: guidance for local authorities](#) contains their reasoning. Q2/9/21 to 4/11/23 concern which children should be included in the register. The three groups are: those attending an educational setting (other than their own home) during school hours, children who are being educated under s.19 arrangements and flexi-schooled children.

Technical detail: §2.4 is important because it explains that whilst *primary* legislation will be used to establish a register, the details of how it will operate will be specified in *secondary* legislation. The reason given is that it will allow the arrangements to be adjusted “in the light of experience.” However, it also reduces the level of scrutiny that future changes will receive and therefore opens up the possibility of a register being abused.

The sub-sections of §2.4, a to h, raise questions about what data should be collected and how it should be processed. Q5/12/24 ask for comments on the information which should be collected, and contain check lists of possible categories. Very relevant to the collection and handling of data is the 2016 UK Supreme Court ruling on the [Scottish Named Person Scheme](#). On that occasion the Court ruled that the Scottish Government’s data handling policy [breached human rights legislation](#). To date, despite trying to circumvent the relevant criteria, the Scottish Government has been unable to find a way of implementing the scheme. There are therefore good reasons for stating that only the minimal data should be collected, and strict limits placed on which bodies it can be shared with.

Q6/13/25 to 10/17/29 are all concerned with what should be done with the data collected, whilst Q11/18/30 is about funding and is only for LAs to answer. The final question in this section, Q12/19/31, is an open one, “Do you have any other comments on either the principle of registration or practical issues related to registration on the basis proposed?” It may be worth noting here that whilst the opening sentence of §2.5 is to be welcomed, “The inclusion of a child on the register *would not form in any way some kind of licence* to educate a child outside the school system” [emphasis added], the DfE needs to be made aware of the potential for LAs not to appreciate what this means. The probability of such misunderstanding is increased by the scheme being called a “register”. If, as the DfE state, “The register *would mainly function as a list of children* about whose education the authority must satisfy itself as to suitability in terms of s.7, or consider a school attendance order,” [emphasis added] then it would be far more helpful if a different description were used. One possibility is a requirement to *notify* the LA, as this would emphasise that the list is not a licence, but simply the provision of information by the person(s) responsible for education of a child.

Section 2 - Duty on parents

This section is covered on pages 15 to 17 of the Consultation document, and questions 32 to 37/42 on-line.

Background: In a rather surprising comment it is suggested that the proposed register could be operated “*without any duty on parents to supply details of their child.*” (§3.1) [emphasis added] It is noted that to do this would be similar to the current voluntary schemes operated by some LAs.

Proposal: §3.2 makes clear however that the DfE intends for there to be a statutory duty on parents to register children educated “not in school”. It is recognised that “there is no guarantee that parents would comply with such a duty.” It is also suggested that unless their circumstances change, parents may “have to inform the local authority only once in many years,” though given the anxiety levels in LAs, one has to ask if they would be happy hearing from parents only once in, say, five years. The final point in this paragraph which seeks to placate parental fears states that “local authorities would not be allowed to legally require more information than that specified in regulations.”

Technical detail: §3.3 reiterates the different roles that primary and secondary legislation will play in establishing and amending the register. Sub-paragraph a) concerns information from parents, whilst b) identifies the circumstances under which parents would be required to register children. Action to be taken should a parent fail to register a child is considered in §3.4, under three sub-sections. Essentially, the question concerns when a LA should be authorised to start “the process which may lead to the serving of a school attendance order.”

Q13/32 differentiates between those who support a parental responsibility to register and those who don’t. As in the previous Section, Q14/33/38 provides a check list of information about a child which should be required, and in both instances we suggest this mandatory information needs to be as little as is necessary to identify the child. (It may however be helpful to provide opportunity for extra information to be supplied voluntarily. For instance, the option “Reasons for child not being in school” could offer parents the opportunity to flag up failure to provide suitable SEND education, failure to tackle bullying or instances of off-rolling.) Q15/34/39, 16/35/40 & 17/36/41 all ask what the “consequence for non-compliance” by parents should be. Q18/37/42 is the “do you have any other comments” question.

Section 3 - Duty on settings

This section is covered on pages 18 to 20 of the Consultation document, and questions 43 to 48/53 on-line.

Background: Though not named in §4.1, this section is essentially about unregistered settings and creating a new duty for them not to register as a “school” but to provide details of children who are attending their “setting”. In fact the DfE stresses, “this would *not* amount to a scheme for regulating these settings, only imposing requirements as to the provision of information about specific children.” [Emphasis added] This is therefore essentially a proposal for the state to *track* children, and consequently raises significant concerns. Politicians, it appears, have been coerced by fears of “radicalisation” (an imprecise term) into seeking powers to track all children, whether or not they are educated in state-controlled settings. The reference to “specific children” is clarified by the final sentence which exempts children who are on the roll of a state-funded or registered independent school. It has to be asked if such an arrangement, which treats children differently on the basis of how they are educated, contravenes Human Rights legislation. The Government must give very careful thought to this area.

Proposal: §4.2 states that the purpose behind this duty is to collect data for the proposed register, but the list of settings which could be included in Q20/44/49, suggests that this is also concerned with identifying unregistered legal and illegal educational settings. The wording demonstrates a high level of mistrust of HE parents as it would make it mandatory for “proprietors” to pass on details of the “not in school” children, but not of those on a school roll. This inequality is emphasised in §4.3 which explains that parents of EHE children who attend such settings could be “called upon to demonstrate to the local authority that the education a child is receiving is suitable overall,” whilst it appears that no similar response would be required of parents of schooled children attending the same sessions.

Overall it seems that by allowing the conflation of EHE with illegal schools and unregistered settings, brought together by fears of “radicalisation”, the DfE is proposing confused legislation in this section. Particularly important is the lack of a definition of “normal school hours” and the threshold which a setting would have to meet before “the proprietor” would be required to “respond to enquiries from local authorities.” **This lack of clarity is a concern to the HE community, because it could mean that some HE groups may fall within the scope of this proposed requirement.** Even if one uses the open question (Q24/48/53) to make this point, it would be prudent for HE families to contact their MPs as well about the need for clarity in this particular matter. Questions need to be asked such as, would someone from a group of say ten families which hire a village hall once or twice a month, be required to fulfil the role of “proprietor” and file details of all EHE children attending? What about groups where families come together to share sessions from one or more private tutors? Would a LA consider two families sharing time together in their own homes as being covered by this requirement? Whether they are arranged formally or informally, some LAs would no doubt consider such instances as “unregistered settings”, so it would be best to argue that this should not be the case *before* the legislation goes before parliament.

Technical detail: The above need for clarity is in part recognised in §4.4 but, given the lack of understanding of truly *elective* HE amongst public employees and because the Government is determined to bring in a registration scheme, even if one disagrees with them there is good reason to make the point that if this duty is to be included in primary legislation, it should be discussed in depth with the HE community *before* the draft bill is presented to parliament. §4.4a suggests that the Government is seeking to state which settings will *not* be included in this duty, but that will not be precise enough unless some way is found of specifically excluding parent-led groups which are a vital part of the varied landscape of EHE.

§4.5 suggests that some form of sanction will be required for non-compliance. §4.6 introduces the possibility that this requirement may not come into force at the same time as the rest of the legislation.

The questions follow the structure of the previous two sections. Q19/43 is the watershed one, whilst Q20/44/49 & Q21/45/50 provide check box lists: the first concerning the types of settings to be included, the second the information to be passed on by proprietors. Q22/46/51 & Q23/47/52 are concerned with sanctions for non-compliance. The final question, Q24/48/53, is the usual open comments one.

Section 4 - Duty on local authorities to provide support for home education

This section is covered on pages 21 to 25 of the Consultation document, and questions 54 to 62/70 on-line.

Background: The Department recognises in §5.1 & 2, that requiring LAs to provide support for EHE families (on request) is a contentious issue in the HE community. However, they intend to do this, whilst recognising that the details will need careful consideration. The Government also indicates that by specifying that support would only be available “on request”, this mitigates against “increased interference by local authorities with the process of home education.” This belief may prove to be false, given the track record of many LAs in over-stepping what they are already legally permitted to do.

Access to public examinations for HE children is mentioned in §5.3, with the DfE indicating that making changes may not be straightforward. The next three paragraphs, §5.4-6 are about funding for support, the first being about additional cost to LAs, the second excluding from this consultation penalties for schools, and the third ruling out the allocation to their families of the money “saved” by children not attending school. Funding through LAs for SEND children who are HE is referred to in §5.7, but only in so far as stating that it is covered in the new guidance.

Proposal: This repeats the previously stated information about the duty being drafted in wide terms in primary legislation, and then focussed through regulations (secondary legislation). (§5.8)

Technical detail: Here it is made clear that eligibility for support would almost certainly be linked to registration. (§5.9a) Given that the DfE has clearly signalled its intention to bring about registration for EHE children, such a link seems unavoidable. It is however very difficult not to see this as a carrot to distract from a very oversized stick. This concern is reinforced by §5.9c which raises the question of “conditions which could (or could not) be attached to the provision of support given and had to be met for that support to continue.” Between these two clauses is a list of seven possible ways in which support could be made available, and we leave it to individual respondents to indicate which they would or would not favour.

Those concerned about support being used as a means of gaining access for monitoring will find §5.10 alarming. The second part reads, “However, the main incentive for local authorities to operate such a duty seriously **would be to ensure that the education provided at home for a child was suitable**, and thereby reduce future expenditure incurred on children where this was not the case.” [Emphasis added] Other forms of assistance such as with public examinations are under consideration, according to §5.11.

Q25/54 sorts respondents according to their agreement or disagreement with the overall proposal. Suggestions for types of support are sought in Q26/55/63, potential difficulties for LAs are asked for in Q27/56/64, restricting support to registered children is covered by Q28/57/65, whilst access to public exams is the theme of Q29/58/66. (The next question is for LAs only and asks about their expected expenditure.) Q31/60/68 is the open question which normally ends each section, but in this section, two further questions (Q32/61/69 & Q33/62/70) ask whether support for HE parents should be provided by the Department of Education and if so, what form this might take.

Concluding questions

This section is covered on pages 26 of the Consultation document, and questions 71 & 72 on-line.

There is no Background, Proposal or Technical detail for these questions. It seems that there are “required questions” of this nature for most consultations. It would therefore be very easy to overlook them as they seem technical and boring, but we encourage all respondents to answer them if at all possible.

Q34/71 asks for comments on the conclusions set out in the published equalities log, UNCRC analysis and family test. These can be downloaded individually from the bottom of the [official web page](#).

[Equalities Log](#) - Just four pages long - with lots of blank space due to being laid out as a table. **At first glance this seems to be about families from faith backgrounds, but on close inspection it reveals a worrying aspect of the Government’s attitude to parental responsibility in general.** Part 1, identifies the proposed register as having a “particular impact” on “Children in families with varying faith or belief (or none).” The rest of the log gives the impression that the author included the phrase “or none” simply because it is the done thing.

It has also to be noted that one set of communities which often educate their children out of school are conspicuously absent from this document. These are the Gypsy, Roma and Traveller communities which are legally recognised as ethnic groups, and protected from discrimination by Race Relations and Human Rights legislation. It therefore needs to be asked why no consideration is given to the impact of this proposal on them.

Part 2 has five columns headed:

- Will there be a positive impact on people with the protected characteristics identified above?
- Will there be a negative impact on people with the protected characteristics identified above?
- Justification of conclusion of analysis
- Conclusion
- Date when equality conclusion will be reviewed

Each page of Part 2 concerns separate clauses of [s.149 of the Equality Act 2010](#), which reads:

149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to -
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The first point to note in response to this, is that s149 refers to how a local authority *exercises its functions*. This returns to a core issue in the debate over EHE (in regard to safeguarding), i.e. is *elective* home education a function of a LA or is it an expression of family life? By citing this section of the Equality Act, the author of this log has indicated that they believe HE to be a function of a local authority. This is an important point, as demonstrated by the text in the first three columns on each page.

The first point to note is that the phrase “Although there is no quantitative evidence available...” appears in each of three answers in the first column, which asks for details of the positive impact on the people affected by the new policy. This results in the speculative “it is likely that...” This alone highlights an absence of evidence in this document, the supposed benefits of the proposed policy being only in the minds of the authors (and those who think in the same way).

Further, the Government responses to the question in the first column all begin with the same phrase, which indicates an institutional bias against EHE, especially when carried out by families from faith communities. This states:

“Yes, because registration of persons with the specified characteristics in Part 1 who are not in school for reasons related to those characteristics (because mainstream schools do not cater properly for their faith, as their parents see it) is likely to increase the likelihood that they will receive a suitable education...”

This seems to be evidence of prejudice against parents with faith, in that it suggests that they will provide an unsuitable education by virtue of being who they are. For a Government department to be going against the spirit of the very equalities legislation which it is trying to promote within LAs is clearly contradictory. Given that [Human Rights legislation](#) calls on states to “respect the right of the parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions,” this is a serious concern. **If the state does not respect the rights of families from faith communities, yet claims not to be prejudiced against them, one has to conclude that it does not respect the rights and responsibilities of any parent.**

This is in some part admitted by the answer to the second question given on the fourth page. After a brief “Not to any measurable extent,” to both the previous subsections, the final response is much fuller:

“Yes, in the sense that persons with the specified characteristics in Part 1 may believe that the register and action stemming from it impacts disproportionately on their presumed right to educate their children in accordance with their wishes, compared with the general population of England.”

The answers in the third column also express the belief that parents from faith groups are more likely to provide a unsuitable education. All three answers are very similar, but a phrase from the second page further emphasises the lack of respect for parents and an intention to impose the state’s values on children against their parents’ wishes. It reads:

“The outcome of registration is expected to be a greater likelihood of a suitable education being provided (whether in accord with the parents’ wishes or not).”

The Equalities Log therefore fails to practise what it preaches. Rather than treating parents from a religious or faith background with equal respect, it assumes them to be a particular danger to their children's well-being. In so doing, it also demonstrates ambivalence towards parental responsibilities in general. This should be of concern to parents who are of no particular religion or faith just as much as to those who are. If any group of parents are disenfranchised by the state because they do not subscribe to the prevailing philosophical zeitgeist, then *all* parents who refuse to go along with the crowd stand in danger of being similarly relieved of their parental responsibilities.

[UNCRC Analysis](#) - This three page document is much easier to read than the Equalities Log, being set out in a more conventional manner. It answers what appear to be six standard questions in connection with the [United Nations Convention on the Rights of the Child](#). The answer to the first confirms that registration implicitly has to do with tracking and also monitoring in some way. This is taken from the first paragraph:

“There would be no direct impact on the children concerned from the registration process, but since the proposals are designed to make it easier for local authorities to track the children concerned in order to ensure that they do not fall into the category of those who are not receiving a suitable education, the eventual result of registration for some children could be that their parents are obliged to send them to a state school rather than continue the existing education arrangements.”

The answer to question 2 lists a number of Articles from the Convention, then states that proposals “should be to help meet the requirements of these articles.” This is a rather sweeping assumption given that Article 29/1 requires “States Parties agree that the education of the child shall be directed to:” with clause c) requiring, “The development of respect for the child's parents, his or her own cultural identity, language and values,” as well as a respect for national values of the country in which they are living. As previously discussed, the Equalities Log evidences a significant amount of disrespect for parents from certain cultural backgrounds, and implies that children will be better separated as much as possible from their parents' influence.

Question 4 asks, “Do you need to engage with children and young people and/or their advocates and other stakeholders to seek their views?” Acknowledging that they do need to do this, the Government then claims, “The department will be attempting to encourage home educating families to involve children in the consultation process.” It would be interesting to discover how the DfE has gone about fulfilling this commitment since the launch of the consultation. Perhaps it hasn't had much motivation given the conviction expressed in the next sentence, “However, some home educators believe that the views of children on home education are not significant compared with parental rights to determine the mode of education.” Again, the Equalities Log suggests that the Department believes that the views of parents are insignificant when compared to the state's rights to determine the type of education children should receive.

In answering the final question the DfE states that a full Child Rights Impact Assessment is not required because “the number of children involved is small.” In fact it estimates that it does not exceed “1% of the ages 5-15 cohort.” In calculating this insignificant figure it uses the same figures for children known to be EHE in England which others have been employing to sound the alarm that HE numbers have reached almost epidemic proportions!

[Family Test Assessment](#) - This two page document, laid out in a similar style to the previous one, provides answers to five questions about the impact of the proposal on family life. These are concerned with family formation, families going through key transitions, family members' ability to play a full role in family life, families before, during and after couple separation, and families most at risk of deterioration of relationship quality and breakdown.

What is striking about the brief answers, besides their naivety, is that in every case but the last the author can only see the *benefits* of making it “harder for some parents to educate children at home,” therefore leading “to fewer children being educated at home.” What is completely missing from their assessment are those areas where family relationships fail to develop because parents and children do not spend as much time together, or where children lose a love of learning by being squeezed into a model of education which is not suitable for them, and so on. Only in answer to the final question do they recognise “there is no reliable data to underpin analysis.” This is therefore another example of the narrow, unresearched and prejudiced thinking found in many public servants.

The final consultation question (Q35/72) is an open one. If you have any energy and emotion left, please share your thoughts with the Government firmly but politely.