

The Children's Commissioner for Wales is wrong to recommend that the home education model should be more heavily restricted

(a) Introduction

1. *Families First in Education* represents the voices of home educators throughout Wales. We are a network of home educators and interested parties from a variety of backgrounds across Wales who are united by a desire to protect the rights and freedoms of parents to educate with autonomy and in a child's best interests.

2. We urge the Minister for Education to recognize that the UK has historically given home educators a large degree of freedom in choosing the method and manner of their child's education.

3. In February, the [Children's Commissioner for Wales called](#) for the Welsh government to reform home education policy and enact the [Dylan Seabridge Child Practice Review recommendations](#)¹; namely, that children's voices should be heard and recorded by local authorities (LAs) on an annual basis. As a 'critical friend' to the Welsh government, the Commissioner urged greater consideration of child rights in the review and updating of policy and legislation. She suggested that the United Nations Convention on the Rights of the Child (CRC) required the government to introduce a stronger public authority-led child focus on home educated children. In short, she urged policy makers to increase LA supervision of home educated children.

4. We consider it likely that home education will be an agenda item for the Senedd in the forthcoming parliamentary season and the recommendations of the Children's Commissioner will guide discussions.

5. We urge the Minister for Education to carefully review the Commissioner's recommendations to see that they have not been sufficiently substantiated. The Commissioner's legal arguments were not persuasive, and her safeguarding arguments were weak. The Commissioner also did not prove that CRC's 'the right to be heard' would have prevented Dylan Seabridge's death, since he was not an 'invisible' child to the Authorities. In short, these unsubstantiated concerns are misdirected at the expense of parents who are turned into the objects of suspicion when in reality they have often made significant sacrifices to raise children according to what they believe best for them as is their right in international and domestic law.

6. Therefore, there is no justifiable need for the Senedd to reform the current home education model in Wales.

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Children's Commissioner for Wales, A review of the Welsh Government's exercise of its functions (February 2021)

(b) The Welsh Commissioner’s legal arguments are not persuasive

7. Although neither a lawyer nor legal professional by background, Ms Holland made several legal claims and demands. Her main claim was that the UK’s ratification of the CRC required the Welsh government to reform the long-standing tradition of parents taking the primary decisions for their children in private arrangements for home education.

8. This claim should not be accepted by the Welsh government without thorough legal analysis and scrutiny, for the following reasons:

i. **International law affirms that parents, not the State, have the primary responsibility for deciding the manner and method of their child’s education**

9. International law strongly protects the rights of children to receive an education. Article 28 of the CRC says that State parties should ensure that primary education is compulsory and available free to all, and that secondary education should be promoted and accessible to all.

10. However, neither the CRC, nor any other international legal text that the UK has ratified, demands that a child’s education must be primarily provided for by the State under the assumption that it can provide a ‘better’ education than parents. Instead, parents are recognised as responsible for the ‘upbringing and development’ of their children, and the family stands as *“the fundamental group unit of society and the natural environment for the well-being of all its members, particularly children”*². The family is entitled to *“protection and assistance”* if they require it; yet, public authorities must respect parents’ ‘rights and duties’ without undue interference or intrusion (Articles 5 and 14). A child’s right to be cared for (primarily and predominantly) falls within the scope of parental oversight in the CRC.

11. Indeed, the [United Nations Committee](#) on the Rights of the Child (made up of independent experts who monitor the implementation of the CRC) has confirmed via General Comments that the CRC’s right to education does not specify that education should be provided centrally or that this is a better model³. Moreover, Article 29 of the CRC provides that State parties agree that a child’s education shall be directed to the development of respect for the child’s parents; a textual reading of the Convention text shows that the drafters were keen to affirm that parental views in education are *de facto* good for children. The right to education should not be construed in a way which limits the liberties of individuals to establish and direct educational institutions. Namely, the rights of individuals to design and manage the methods of educational provision should not be limited.

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Preamble to the United Nations Convention on the Rights of the Child (1989)

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See United Nations Human Rights Office of the High Commissioner, Committee on the Rights of the Child, General Comment No. 12 on the ‘right of the child to be heard’ CRC/C/GC/12 (1 July 2009)

12. Other international legal texts also have a high regard for the natural family in decision making about children. Various texts affirm the primacy of parents in directing the personal and educational development of their children. The role of the State is secondary – intervening when parental primacy is inadequate or harmful. The Universal Declaration of Human Rights, the cornerstone document of the human rights movement, provides, “[parents] have a prior right to choose the kind of education that shall be given to their children”⁴ because they “have the primary responsibility for the upbringing and development of the child”⁵. States also need to respect the “liberty of parents...to ensure the religious and moral education of their children”⁶; and respect the rights and duties of the parents to direct the child “in a manner consistent with their evolving capacities”⁷.

13. The European Convention on Human Rights (ECHR) also protects parental rights and primacy. It protects the rights of men and women to found a family (Article 12) and the integrity of family and private life against arbitrary State interference (Article 8).

14. Standing as perhaps the strongest international legal text for parental rights, Article 2 of Protocol 1 to the ECHR provides:

“In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.

15. This Article gives parents the right to choose not just the religious education of their children, but also the broad education of their children in general terms. In reviewing this Article, the European Court of Human Rights has held that “respect” means more than simply “acknowledge” or “take into account”⁸ – it has a deeper meaning and application. Moreover, it has affirmed the principle of ‘pluralism’ in education, considering that multiple forms and methods of education are valuable to children and wider society. This includes a parents’ choice to home educate.

16. From caselaw, the Court has held that *how* individual States organise their education systems in respect to the method and suitability of education sits under their ‘margin of appreciation’. In other words, the European Court has left the details about *what* education looks like to each individual country.

17. Even in the rare instances when individual European countries have imposed outright bans on home education, there has been UN pressure to reinstate the model. For example, the

4 Article 26 of the Universal Declaration of Human Rights (1948)

5 Article 18 of the United Nations Convention on the Rights of the Child (1989)

6 Article 18 of the International Covenant on Civil and Political Rights (1966)

7 Article 14 of the United Nations Convention on the Rights of the Child (1989)

8 European Court of Human Rights, *Campbell v The United Kingdom*, Application no. 13590/88 (25 March 1992)

UN Special Rapporteur on the Right to Education has [directly advised Germany](#) (which has banned home education since 1919) to reverse the ban and allow parents to formally teach their children within the home⁹. Moreover, even where the European Court of Human Rights has refused to strike down country prohibitions against home education, it has never said that is right for the country in question to retain the prohibition.

ii. **Interference in the home education model could be incompatible with other human rights**

18. The Children’s Commissioner for Wales used Article 4 of the CRC (“*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*”) as her linchpin for reform of the home education model. She argued that this Article placed a duty on the government to more fully realise child rights, and specifically to do so by upholding the child’s ‘right to be heard’ under Article 12 of the CRC¹⁰.

19. However, this claim ignores at least two fundamental and enshrined human rights: the right to a private and family life, and the right to privacy.

20. Both Article 12 of the Universal Declaration on Human Rights and Article 8 of the ECHR protect the right to private and family life. Article 8 of the ECHR provides:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society”

21. Any interference with this fundamental right legally needs to be narrow and strictly defined.

22. [Caselaw](#) of the European Court of Human Rights on the topic of safeguarding has affirmed that national laws cannot presume, absent clear and compelling evidence of harm to a child, that the interests of the child are different to those of their parents¹¹. If a State is to withdraw an aspect of parental authority, it must do so only in limited circumstances: a high threshold should be reached. Yet, the Welsh Commissioner’s calls for LAs to interview home educated children annually outside their parents’ consent, and absent of any threat of risk to the child, introduces a “preventative” measure; it tries to introduce interference in legitimate private activities without justification. This could infringe Article 8 of the ECHR as well as the presumption that parents act in their child’s best interests. Absent any compelling evidence of serious harm, this presumption should not be legally open to LAs.

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United Nations Human Rights Council, Fourth Session, Report of the Special Rapporteur on the right to education, Vernor Munoz Mission to Germany 13-21 February 2006, A/HRC/4/29/Add.3 (9 March 2007)

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Article 12 of the United Nations Convention on the Rights of the Child (1989):

(1) *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

(2) *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

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For example, Fifth Section Wunderlich v Germany (Application no. 18925/15, 10 January 2019)

23. The right to privacy is also found in the CRC and other texts such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In the CRC, the right is mentioned twice; once in relation to privacy in criminal proceedings, and once as “*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation*” (Article 16). This Article was drafted because “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*” (as provided in the Preamble). The CRC calls for parents to protect their child’s evolving capacities in both Article 5 and Article 14. While children have the right to form religious beliefs, the CRC upholds the rights of parents to inform, guide and nurture development as the child matures.

24. Any intrusion on a child’s privacy as overseen by parents, such as by LA interviews in the absence of compelling evidence of serious harm, could disproportionately interfere with important aspects of parental rights.

iii. **The CRC ‘right to be heard’ does not require home educated children to be annually interviewed by Local Authorities**

25. By reiterating the core Seabridge Child Protection Review Panel’s recommendation that home educated children need to have their voices heard and wishes recorded annually (allegedly derived from Article 12 CRC), the Children’s Commissioner indicated that children would be better protected from harm if LAs could listen to their views, annually. Implicitly, she argued that within a new, formal child-public authority relationship, children should be able to “*express a view about their educational experiences*” (outside their parents’ earshot), which would avoid the safeguarding risks associated with home education and provide greater oversight to the “*well-being and education of children*”.

26. But, in pushing this recommendation for reform, she urged the Welsh government to reverse the presumption that parents look after the best interests of their children and provide a suitable education when they home educate, unless evidence is shown to the contrary. In doing so, she implicitly argued that LAs should look after the best interests of children in education, unless parents can demonstrate suitability and children can affirm a preference to remain educated in the home.

27. Yet, this recommendation goes against the legal and social presumption that parents *do* act in the best interests of their children when home educating. Under section 7 of the Education Act 1996, it is parents’ sole responsibility to ensure that children receive efficient full-time education suitable to their age, ability, aptitude, and specific educational needs – “*by regular attendance at school or otherwise*”¹². This judgement call lies within the sole hands of parents, and permission from a government employee does not need to be sought if a child is home educated from the outset. The assumption underwriting the law here is that parents have the primary

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Section 7 of the Education Act 1996

responsibility to determine whether formal schooling or home education is most suitable to their child.

28. Without risk of harm or poor education, LAs should not intervene. The Education Act 1996 gives LAs [powers to address these issues](#) if they arise¹³. This is also written into the [Welsh government's statutory guidance](#)¹⁴.

29. In other words, and since safeguarding risks to 'hidden' or 'isolated' home educated children are so incredibly rare, the proposal will achieve a far more wide-reaching consequence than just looking out for children like Dylan Seabridge. The proposal elevates child views about home education *above* the legitimate decision of parents to home educate, and it places the LA as the arbiter of such views (even though the CRC is silent on this). The 'right to be heard' in the home education context tries to give children the right to opt-out of the model if they dislike it, in turn alienating them from their natural family.

30. However, this is contrary to the [Department for Education's \(DfE\) home education guidance \(2019\)](#). The DfE advises that while Article 12 of the CRC requires countries to give *due weight* to the views of children (according to the age and maturity of the child), it does not override the decision-making authority of parents to decide whether home education is preferred to school education. A child's negative attitude to home education as a method of educational provision, for example, "*should not bear on the Authority's conclusions as to suitability*"¹⁵; it should – at most – be a reason to discuss the child's feelings with the parent. [DfE guidance for parents](#) also affirms that on the topic of child views, "*This does not give children authority over parents, and a decision to educate a child at home is a matter for you as parents*"¹⁶. Therefore, the DfE does not place the voice of the child, nor the intervention of public authorities, above parental primacy to decide that home education is most suitable for the child.

31. The DfE has further advised that [s.17\(4\) of the Children Act](#), which puts a duty on public authorities to take a child's wishes and feelings into account as far as is reasonably practicable, does not "*place an obligation on Local Authorities to ascertain the child's wishes about elective home education, as that is not a service provided by the Local Authority*"¹⁷. Since home education is a service provided by parents, the LA does not have an obligation vis-à-vis the CRC to listen to child views about home education when legitimate and independent safeguarding risks are not material.

13 Section 437 of the Education Act 1996

14 Welsh Government, Statutory guidance to help prevent children and young people from missing education, circular no: 002/2017 (March 2017)

15 Department for Education, Elective home education: Departmental guidance for local authorities (April 2019), at 10.1

16 Department for Education, Elective home education: Departmental guidance for parents (April 2019), at 2.13

17 Section 17(4) of the Children Act 1989

32. Adding international weight to this interpretation of Article 12 of the CRC, the [UN Committee on the Rights of the Child General Comment on the ‘right of the child to be heard’ \(2009\)](#) affirms that the a State’s duty under Article 12 is to allow children to, in particular, be “*given the right to be heard in any judicial or administrative proceedings affecting him or her*”. The Comment has quoted the legal analysis of the Commission on Human Rights on Article 12, which assessed that the child’s right to be heard “in all matters affecting the child” applies to “*matters under consideration...includ[ing] children in the social processes of their community and society*”¹⁸. The primary contextual application of Article 12 is for the State to acknowledge and encourage the voice of the child in *court or judicial proceedings* on matters impacting them – including relating to health, living conditions, education, or protection.

33. Whilst the General Comment goes on to acknowledge that there are other settings in which the ‘right to be heard’ should be implemented domestically, including in relation to education and school, it does not include views about the type or method of education provided to the children. Instead, the non-binding guidance highlights situations of “*authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms*”, where a child’s voice should be heard and listened to. It encourages States to build opportunities for children to speak about their negative experiences for the “*elimination of discrimination, prevention of bullying and disciplinary measures*”¹⁹ and also to participate in decision-making processes such as class councils, student councils and student representation boards to discuss school policies and codes of behaviour.

34. It is therefore inappropriate for the Children’s Commissioner to quote the ‘right to be heard’ in the context of home education without a thorough legal analysis of Article 12 of the CRC and supporting comments by human rights bodies, and consideration of the “prior right” of parents.

iv. **Domestic law remains directly effective in Wales; the CRC is not**

35. The UK ratified the CRC in 1991 with it coming into force in 1992. The Welsh Senedd additionally passed the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) which outlines that Welsh Ministers must have *due regard* to the CRC and its Protocols when exercising any of their functions. This law goes farther than England in outlining a Children’s Scheme and Child Rights Impact Assessments for legislation and policy proposals. However, this legislation does not enable children to seek redress from the courts if a public authority has breached the Agreement’s principles; the CRC has no direct legal effect. The CRC in Wales is therefore a policy intention but does not make the CRC domestically legally binding.

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[United Nations Committee on the Rights of the Child, General Comment No. 12 on the ‘right of the child to be heard’ CRC/C/GC/12 \(1 July 2009\)](#), at 27

19

Ibid. at 109

36. This is different to the ECHR which does have direct legal effect via the [Human Rights Act 1998](#). As explained above, Convention rights do not limit home education or require LA checks upon home educated children. Indeed, the ECHR strongly protects parental rights and responsibility, and the European Court of Human Rights has generally left the matter of home education to each individual State to decide upon.

37. Moreover, UK domestic law cannot be overridden without repeal of statute. [Section 436\(a\) of the Education Act 1996](#) places the duty on LAs to make arrangements to identify children out of school not receiving suitable education, but not to seek out and interview any home educated children. [DfE non-statutory guidance](#) for LAs explains this by advising them to have arrangements for finding out whether education in the home is suitable which “*are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully [home educating]. Often, having in place a system which is based on a presumption that it will be parents who initiate contact with the authority if necessary will yield good results when the parents are known to be providing good education*”²⁰. Regarding ‘suitability’ of education, the law provides no specifics, and [DfE non-statutory guidance for parents](#) affirms that parents have discretion in how they direct education to the age and aptitudes of children.

38. Therefore, the Senedd should be careful not to use provisions of the CRC to overrule domestic legislation without first repealing primary legislation and undertaking a thorough analysis of whether the human rights regime requires reform. Without doing so, the Senedd could run the risk of infringing their devolved powers with Westminster. The [current legal challenge](#) about some Holyrood bills, including the Scottish parliament’s domestic adoption of the CRC, should create caution to the Senedd. Moreover, the Scottish lessons learned through the [‘Named Person Scheme’ litigation](#), which led to the abolition of a scheme that tried to wedge a State-shaped gap between children and parents when there was no wrongdoing or harm, should be remembered. As poignantly noted by the Supreme Court Justices:

“The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world.”

and

*“Within limits, families must be left to bring up their children in their own way.”*²¹

(c) The Welsh Commissioner’s safeguarding claims are unsubstantiated

39. Apart from the legal arguments being misguided, Ms Holland’s assertions that home educated children face greater safeguarding risks than in full time school is simply inaccurate. With sole reference to the tragic [Seabridge](#) case of parental neglect, she assumed that home educated children are naturally at risk. Her implicit argument was that children are safer within

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Department for Education, Elective Home Education: Departmental guidance for local authorities (2019), at 5.2

21

The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, at 73

the hands of the LA or schools than the hands of parents. This is unsubstantiated, and the Senedd should be cautious to legislate for increased LA powers to interfere with private and family life.

i. There is little evidence that children are ‘hidden’ from Local Authorities

40. As awful as the Dylan Seabridge case was, and despite being so frequently cited as the classic example of abuse, it was a rare case of parental neglect. The family lived in a remote and secluded community, and they remained isolated from mainstream universal services such as healthcare appointments. This is not to say the LA did not know of the children – they did, since the mother was identified by her employer as a potentially vulnerable adult. Discussions with the Authority were not recorded here – and the [Concise Child Practice Review](#) cites this as an error²². There were potential opportunities to intervene before Dylan tragically died. He was not ‘invisible’.

ii. There is little evidence to show that children face safeguarding risks when home educated

41. The Commissioner has failed to provide evidence that home educated children needed greater surveillance to protect them from abuse and harm. Independent research actually shows that home educated children are even half as likely to be subject to Child Protection Plans as children referred in school-based education. Indeed, FOI research from Wales has revealed that *“home educated children, although more likely to be scrutinised by social services than their schooled peers, are less likely to be at risk than all children in Wales”*²³.

42. Moreover, research that has emerged in mainstream media over the past few months has testified to the sex abuse scandals prevalent in many independent and state schools where abuse happens *in school*– reported by the [Guardian](#), [Times](#) and [Telegraph](#). The majority of perpetrators have been male teachers or other educational staff who have groomed and manipulated pupils. It is simply untrue to claim that children at home face greater risk than under the supervision of school employees.

43. There is also a lack of evidence that LA processes are inadequate to protect children who are home educated. The DfE has maintained that *“there is no proven correlation between home education and safeguarding risk”*²⁴.

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See the Child Practice Review Report, CYSUR Mid and West Wales Safeguarding Children Board, Concise Child Practice Review Re. CYSUR 2/2015

23

See the research of Wendy Charles-Warner, Home Education and the Safeguarding Myth: Analysing the Facts Behind the Rhetoric (February 2015)

24

Department for Education, Elective home education: Departmental guidance for local authorities (April 2019) at 7.3

(d) Summary

44. Any proposals to drastically alter the parental primacy over children in education and increase public body interference in the home must be seriously weighed against domestic and international legal obligations. While the CRC places the child at the forefront of political decision-making, it does not invent new obligations for LAs to act in the 'best interests of children' when there are no justifiable reasons to intervene in parental primacy and responsibility. This extends to home education. There is no *de facto* 'right to be heard' by public authority employees absent evidence of serious harm.

45. Moreover, in both domestic and ECHR law, the UK is required to respect the right of parents to home educate their children in accordance with their values and beliefs.

46. While parents have a right to home educate their children as they see fit and in accordance with their values and education philosophy, LAs have a statutory duty to oversee the safeguarding of children in cases of perceived harm or inadequate educational provision when this has become evident.

47. While children are not *de facto* safer being home educated than being in school, the evidence suggests that placing a child in school is not a protective factor for their safety. Moreover, since home educated children are already twice as likely to be monitored by Social Services, they are already receiving a greater degree of oversight than school educated children

48. It is feared that if more intrusive powers were given to LAs to enter into family home life by questioning children at least annually about their education preferences and methods of education in the home, then these powers would be used to a greater extent than intended, in order to be risk adverse. There is no justified and legal reason to increase the power of LAs and to make them the arbiter of the 'right to be heard' or a child's 'best interests'.

49. If the Senedd wishes to reform the home education landscape to expand LA powers to interview children who are not at risk, it would need to produce substantiated evidence that such reforms would be economically viable; beneficial to the deployment of LA statutory duties; compatible with the prior right of parents to direct the education of their children, and fully accountable to Parliament. A full Public Sector Equality Duty impact assessment would also need to be done under the Equality Act to analyse and evaluate the implications for intervening into private and family life.

Internet links embedded in above text:

Para. Embedded Links:

- 3 https://www.childcomwales.org.uk/wp-content/uploads/2021/02/ReviewofWG_FINAL_ENG.pdf
<http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf>
- 10 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- 11 <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>
- 12 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23977&LangID=E>
<https://archive.crin.org/en/home/rights/convention/articles/article-18-parental-responsibilities.html>
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- 15 <https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>
- 17 <https://www.refworld.org/docid/4623826d2.html>
- 22 <https://laweuro.com/?p=188>
- 28 <https://www.legislation.gov.uk/ukpga/1996/56/section/437>
<https://gov.wales/sites/default/files/publications/2020-09/statutory-guidance-help-prevent-children-young-people-missing-education.pdf>
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- 31 <https://www.legislation.gov.uk/ukpga/1989/41/section/17>
- 32 <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>
- 35 <https://www.legislation.gov.uk/mwa/2011/2>
- 36 <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- 37 <https://www.legislation.gov.uk/ukpga/2006/40/section/4>
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<https://www.supremecourt.uk/cases/uksc-2015-0216.html>
- 39 <https://www.bbc.co.uk/news/uk-wales-31039895>
- 40 <http://safeguardingboard.wales/wp-content/uploads/sites/8/2018/06/20160708-CYSUR-2-2015-CPR-Report.pdf>
- 41 <http://www.home-education.org.uk/articles/article-safeguarding-myth.pdf>
- 42 <https://www.theguardian.com/uk-news/2020/dec/17/child-sexual-abuse-in-schools-often-an-open-secret-says-inquiry>
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- 43 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791527/Elective_home_education_guidance_for_LAV2.0.pdf