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Book

The legal framework on education in England : complexities and shortcomings

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Working Paper

The Legal Framework on Education in England: Complexities and Shortcomings

Javier GARCÍA OLIVA & Helen HALL

CIRIEC No. 2018/10

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The Legal Framework on Education in England: Complexities and Shortcomings

Javier García Oliva and Helen Hall*

Working paper CIRIEC No. 2018/10

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Abstract

The article addresses legal framework in relation to education in England, with particular emphasis on the treatment of children and young persons within the compulsory full-time education bracket. It considers how the plethora of overlapping and parallel legislation in some areas raises challenges for all parties, whilst ironically other aspects of the system, particularly home-schooling, are under regulated.

Keywords: education; home-schooling; public-sector; faith-schools; parents; children

Introduction

The legal landscape governing education in the United Kingdom is a curiously mixed terrain. In some areas there is a jungle of legislative provisions, with applicable regulations scattered across various statutes and statutory instruments, and in these cases, discerning the nature and content of relevant requirements can be a complex and time-consuming exercise. Yet in other places, a robustly individualistic and laissez-faire approach dominates, where rules are few and far between, and also frequently fluid. In these arena, the spirit of the Common Law tradition prevails.

Our study must necessarily encompass these twin realities, as we explore the education law framework. We shall begin with a discussion of the regime governing children and young-persons legally required to be in full-time education, and then move on to consider at the position of adults in tertiary education. One important preliminary point to note is that education is a matter for devolved administrations in Wales¹, Scotland² and Northern Ireland.³ For this reason, our study is confined exclusively to the English context, and readers should be mindful that the position may be different in the other nations of the United Kingdom.

Children and Young People-Compulsory Full-time education

English law places a duty upon parents⁴ to ensure that children of compulsory school age⁵ receive '*efficient fulltime education*'. There is no expansion of the meaning of 'efficient', save that the education must be suitable to the child's age, ability and aptitude and must take into account any special educational

¹ Government of Wales Act 2006, Schedule 7.

² Scotland Act 1998, Schedule 5 (which sets out the matters which are reserved to the UK Parliament). All other matters, including education are deemed to be devolved. See further: UK Government, 'Devolution Settlement in Scotland'
<https://www.gov.uk/guidance/devolution-settlement-scotland>

³ Northern Ireland Act 1998, Schedules 2 and 3 (which set out matters not transferred to the Northern Ireland Assembly Government).

⁴ Education Act 1996, s 7.

⁵ Education Act 1996, s 8: from the age of five until the end of the academic year during which the student turns sixteen. There are now further statutory provisions relating to the educational and training choices which young people aged sixteen to eighteen may make. See further: Education and Skills Act 2008. In summary, the law provides that if young people choose to leave school at 16, they must do one of the following: stay in full-time education elsewhere; start an apprenticeship or traineeship; or spend 20 hours or more a week working or volunteering, while in part-time education or training.

needs which the individual might have. As Dowti and Collishaw⁶ state, courts have discussed the requirements imposed by this provision, and the current consensus is that the education must be sufficient to equip the child to live in modern civilised society, or a particular community within it. Furthermore, it must enable the child to transition into a different community or lifestyle upon reaching adulthood, should the individual so desire.

Consequently, to adopt an extreme example, there would be no scope for parents to argue that a female child did not need to learn mathematics beyond the basic level of arithmetic needed to manage a household. Such an education which failed to equip a child for further study or the job-market should they wish to enter into it as a young adult would fail to meet the test of efficiency. However, there are no specific regulations setting out the subjects which must be taught or the material which must be covered during these years of compulsory full-time education.

Furthermore, the statute also explicitly states that the full-time education may be provided ‘otherwise’ than in school,⁷ and therefore, parents have a considerable degree of freedom in determining the type and context of education which their children receive. We shall explore the law relating to the various categories of education open to parents in England: State Maintained Schools, Privately Funded Schools, Faith Schools (which may be either state maintained or privately funded), Home Education and “Illegal” Schools.

State Maintained Schools

For the period between the end of the Second World War and the late 1980s, **state schools** were under the control of local regional government, known as local authorities, but this position began to change with the Education Act 1988,⁸ and in the last thirty years successive governmental policies have opened up a variety of different governance and funding structures for **State Maintained Schools**. The result is that a number of different models of maintained schools now exist in England: academies and free schools,

⁶ I. Dowty, ‘An outline of law and practice in home-based education’, in T. Dowty and K. Colishaw, *Home Educating Our Autistic Spectrum Children* (Jessica Kingsley: London) 2002, 242-281, p. 255.

⁷ Education Act 1996, s 7.

⁸ M. Garrett and P. Lynch, *Exploring British Politics* (Routledge: Abingdon) 2016, 299.

voluntary aided and voluntary controlled schools, foundation schools, and community (special) schools.⁹

The respective models operate through different legal entities and vehicles (e.g. charitable trusts), they have different groups and interests contributing to decision-making and funding, and varying degrees of autonomy from the local authority. It is important to appreciate that these matters have an impact on their capacity to determine the content and delivery of educational curriculum, and as a result, it cannot be asserted that English law guarantees (or even seeks to guarantee) any sort of uniformity in the state maintained sector. There is a national curriculum, but not all schools in receipt of public funding are obliged to follow it.¹⁰

Academies are funded directly by the Government, act independently from the local authority, are run by charitable trusts, and may be supported by corporate or other sponsors, including religious denominations. Academies need not follow the national curriculum, but are bound by the same regulatory framework on admissions, special educational needs and exclusions which apply to other maintained schools.¹¹ **Free schools** function in much the same way as academies, but tend to be newly founded schools rather than institutions which have converted from another model.¹²

Voluntary aided, voluntary controlled **and foundation schools** all have less autonomy than academies and free schools, although considerably more than community schools,¹³ also in contrast to academies, they follow the national curriculum. Voluntary aided schools are supported by a charitable foundation, very often a religious organisation, which contributes to operational and building costs and has a significant input into governance. Governors appointed by the foundation will outnumber other governors by a majority of two.¹⁴ Voluntary controlled schools have a similar structure, but enjoy less freedom and do not receive any building costs from the foundation. In addition, foundation governors will be in the minority on the governing body.¹⁵

⁹ UK Government, Types of Schools, <https://www.gov.uk/types-of-school>

¹⁰ HM Government, National Curriculum, <https://www.gov.uk/government/collections/national-curriculum>

¹¹ HM Government, Types of Schools, Academies: www.gov.uk/types-of-school/academies

¹² Academies Act 2010.

¹³ HM Government, Types of Schools: www.gov.uk/types-of-school/overview. Community schools still are controlled directly by the Local Authority.

¹⁴ The Church of England, Diocese of Derby, 'Aided and Controlled Schools: What's the Difference?', September 2005 at 4.

¹⁵ Ibid.

Foundation schools are funded wholly by the local authority, but the governing body employs the staff and has responsibility for admissions to the school.

Community and community special schools still operate under the model of local authority control, in much the same way as was the general norm before the statutory reforms of recent decades. They are obliged to teach the national curriculum and as institutions have limited capacity for autonomous decision-making.

Privately Funded Schools

Privately funded schools are often termed **independent schools**, or more confusingly ‘**public schools**’ in British English.¹⁶ They do not receive any direct financial support from the state, although do benefit from some significant fiscal advantages provided by charity and tax law.¹⁷ As might be anticipated, independent schools are subject to less state direction and control than is the case in the publically maintained sector. For instance, all of the schools discussed above are subject to the state school inspectorate “Ofsted”, whereas this is optional for independent schools.¹⁸ These must be subject to inspection and monitoring, but can choose to be evaluated by an alternative inspectorate approved by the Secretary of State in lieu of Ofsted.¹⁹

Faith Schools and Religion in Education

In truth, as commentators like Sandberg have noted, faith schools are not really a separate category of school from those already discussed.²⁰ They may be either state maintained or independent, and consequently will fit into one of the models set out above (unless of course, they operate outside of the lawful system entirely and are within the ‘illegal’ bracket considered below). The School Standards and Framework Act 1998 established the concept of **schools with a ‘religious character’**.²¹ As we shall see, qualifying for this designation

¹⁶ See for example C. Griggs, ‘The Trades Union Congress and Public Schools’, in G. Walford (ed), *British Private Schools: Research on Policy and Practice* (Woburn: London) 2003, 31-56.

¹⁷ Charities Act 2011, s3(1)(b).

¹⁸ HM Government, ‘Ofsted: About us’

<https://www.gov.uk/government/organisations/ofsted/about#our-responsibilities>

¹⁹ Independent Schools Inspectorate: <http://www.isi.net/>;
<https://www.gov.uk/education/inspection-of-independent-schools>

²⁰ R. Sandberg, *Law and Religion* (CUP: Cambridge) 2012, 152.

²¹ School Standards and Framework Act 1998, ss 58-69.

exempts the school from certain provisions of equality law, and in some circumstances, general statutory obligations which would otherwise apply in relation to Christianity. Although the term '**faith schools**' is not a legal one, this label is frequently used in both popular and academic discourse, to describe schools with a religious character.²²

In practical terms, maintained faith schools tend to be academies, free schools, voluntary controlled and voluntary aided schools, but some foundation schools do have a religious character.²³ Community and community special schools are the only types of maintained schools which *cannot* have a religious character, but, significantly, the Government itself describes them not as "secular", but as '*not influenced by ... religious groups*'.²⁴ Such schools are subject to various legislative demands regarding religion, particularly in relation to collective worship and the teaching of religious studies. Rivers argues with considerable justification that almost all state maintained schools in England are in some sense faith schools, given the requirements which are imposed.²⁵

One area which illustrates this is the **teaching of Religious Education**. When the National Curriculum was introduced in England,²⁶ legislation affirmed that Religious Education was compulsory, but placed it outside the National Curriculum. For community schools, the syllabus for this subject is determined by the Local Standing Advisory Council on Religious Education ("SACRE").²⁷ Every local education authority has a duty to set up a SACRE, which must reflect the main religious groups in the relevant area, but must always include representation of the Church of England,²⁸ which reflects the special link between the established Church and the State. The teaching of this subject must be academic, rather than devotional in nature, and it should reflect that the main traditions in Great Britain are Christian, whilst integrating the other major faith communities which are present in contemporary British society.²⁹

²² See for example J. Cairns, *Faith Schools and Society: Civilising the Debate* (Continuum: London) 2009.

²³ L. Vickers, 'Religious Discrimination in Schools: The Employment of Teachers and the Public Sector Duty', in M. Hunter-Henin (ed), *Law, Religion and Freedoms in Europe: Education in Europe* (Ashgate: Oxford) 2011, 87-106.

²⁴ HM Government, Types of Schools: <https://www.gov.uk/types-of-school/overview>

²⁵ J. Rivers, *The Law of Organized Religions* (OUP: Oxford) 2010, at 234. This comment encompasses Wales as well.

²⁶ Education Reform Act 1988, c 40.

²⁷ Ibid at s 69.

²⁸ Education Act 1996, c 56, s 390.

²⁹ Ibid at s 375(3).

In the case of voluntary controlled and foundation schools, the non-denominational syllabus agreed by the SACRE must be used, unless parents request denominational teaching in harmony with the faith of the trust deed establishing the school.³⁰ The position for academies is similar, with non-denominational teaching in accordance with local education authorities' policies being the norm in the absence of parental requests for an alternative reflecting the foundational values of the school.³¹ Where voluntary aided schools are concerned, the syllabus for Religious Education is set by the school: some institutions devise their own, whilst others choose to follow that set by the SACRE.³²

Academies, with or without a religious character, are entirely free to determine their own curriculum, in respect of religious education as elsewhere.³³ Unsurprisingly, however, the vast majority of faith academies focus their religious studies on material which reflects the religious character of the school.

All schools except for academies and free schools are required to by law to provide a right of *parental* withdrawal from Religious Education courses.³⁴ Academies and free schools are encouraged, but not compelled, to provide a right of withdrawal which mirrors the statutory one.³⁵ The fact that the students themselves do not have an independent right of withdrawal is troubling, and arguably where older children and teenagers are concerned, fails to comply with their Article 9 right to freedom of religion and belief under the European Convention on Human Rights,³⁶ or the parallel right contained in the

³⁰ The Church of England, Diocese of Derby 'Aided and Controlled Schools: What's the Difference?', September 2005 at 4.

³¹ R. Long and P. Bolton, 'Faith Schools: Frequently Asked Questions', House of Commons Library Briefing Paper, 14 October 2015 at 7.

³² See above, note 118.

³³ HM Government, Types of School: Faith Schools, <https://www.gov.uk/types-of-school/faith-schools>

³⁴ The UK Government, The National Curriculum, <https://www.gov.uk/national-curriculum/other-compulsory-subjects>

³⁵ R. Long, 'Religious Education in Schools (England)', House of Commons Briefing Paper, 7 July 2016.

³⁶ ECHR Art 9: 1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.* 2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

United Nation Convention on the Rights of the Child.³⁷ Nevertheless, at the time of writing there appear to be no plans to amend this provision.

Another striking area which illustrates the significance of religion within all state maintained schools is that of collective worship. All maintained schools with no defined religious ethos are required by statute to hold a daily act of worship,³⁸ which is '*wholly or mainly of a broadly Christian character*',³⁹ clearly demonstrating once again that 'non-faith schools' in Britain cannot be construed as secular. It is true that this provision is socially controversial, and voices from campaign groups questioning the appropriateness of the practice.⁴⁰ Equally, there are those who would resist this change, and argue that reforms might be seen as an attack on English culture, and cause a backlash against minority faith groups and secularists.⁴¹

Again, parents may choose to withdraw their children from the daily act of worship,⁴² and in this context sixth form students (ordinarily aged sixteen to eighteen) themselves have an individual right to opt out.⁴³ In maintained schools with a religious character, collective worship must be in accordance with the tenets and practices of the religious denomination which characterizes the school.⁴⁴ Given the right of withdrawal, the current law probably does not violate human rights,⁴⁵ although the autonomy of younger pupils is less well protected.

Another complex area in relation to schools with a defined religious character relates to the admission of pupils and the employment of staff, and exemptions from equality law, which in general terms forbids discrimination on grounds of religion or belief.⁴⁶ As might be expected, maintained schools in England *without* a defined religious ethos may not discriminate on faith grounds when it

³⁷ UNCRC -Art 14.

³⁸ Education Act 1996, c 56, s 390.

³⁹ Ibid at Sch 20.

⁴⁰ Humanists UK, 'Collective Worship', <https://humanism.org.uk/campaigns/schools-and-education/collective-worship/>

⁴¹ The Telegraph, 'School Nativity Plays Under Threat', 2 Dec 2007, <http://www.telegraph.co.uk/news/uknews/1571187/School-nativity-plays-under-threat.html>

⁴² Ibid at s 71(1).

⁴³ Ibid at s 71(1B).

⁴⁴ Ibid at s 69(4).

⁴⁵ See Article 9 ECHR and Protocol 1 Article 2.

⁴⁶ Equality Act 2010; Human Rights Act 1998.

comes to admissions.⁴⁷ In contrast, maintained schools with a religious ethos are granted special dispensation when it comes to the selection of pupils.⁴⁸ Nevertheless, the school must be over-subscribed before faith related criteria can be legitimately applied.⁴⁹

This supposed safeguard of oversubscription is controversial in its practical application, given the difficulty of defining whether an individual is a member of a faith community. As Barber observes, the courts are in general reluctant to interfere with the determination of religious authorities on this point, but there remains scope for wrangling and in the worst case scenarios either litigation or deliberate exclusion of some groups.⁵⁰ The system strives for a balance between, on the one hand, interests of schools with a religious character in fostering their defining ethos, and on the other, access for the wider community to the local school funded by the tax-payer. Independent faith schools are also able to apply religiously selective criteria in their admissions policy and are shielded from discrimination law repercussions for this.⁵¹

Similar statutory favour applies in relation to the recruitment of teaching staff for Faith Schools Voluntary controlled and Foundation Schools may take faith into account during the appointment process for a head-teacher.⁵² Such schools can also designate up to one fifth of appointments of '*reserved teachers*' and select them on the basis of their '*fitness and competence*' to deliver religious education in accordance with the doctrines of the faith of the school.⁵³ Furthermore, failure to abide by these doctrines could potentially provide legitimate ground for disciplinary action, and even dismissal of head-teachers and reserved teachers, if their actions were such as to undermine their '*fitness and competence*' to perform the role they have been appointed for.

⁴⁷ Equality Act 2010, c 15, s 4.

⁴⁸ Ibid at Schedule 11. Beyond the admissions policy itself, other manifestations of the school's religious ethos, such as dress codes [Schools Admission Code for 2007, paras 2.41–3] may also affect the make-up of the school by (consciously or unconsciously) discouraging some families from applying. [P. Barber, 'State schools and religious authority-where to draw the line?' (2010) *Ecclesiastical Law Journal* 224.] A requirement that women not wear mini-skirts, leggings or trousers on the school site, may make families from outside the faith community less likely to seek admission.

⁴⁹ Schools Admission Code for 2007, paras 2.41–3.

⁵⁰ P. Barber, 'State schools and religious authority-where to draw the line?' (2010) *ELJ* 224.

⁵¹ School Standards and Framework Act 1998, ss 58-69.

⁵² School Standards and Framework Act 1998, c 31, s 60 (as amended).

⁵³ Ibid at s 58.

Voluntary Aided and Privately Funded Schools have even greater discretion. In fact, faith related considerations may be taken into account when appointing *all* teaching staff and as a legitimate ground for disciplinary action and dismissal.⁵⁴ This latitude has serious implications for the personal freedoms of individual employees, particularly since warnings and sanctions could relate to personal life-choices outside of the school sphere (for example, engaging in extra-marital, homosexual or inter-faith relationships). Vickers perceptively observes that, in contrast with the provisions of the Equality Act 2010, the School Standards and Framework Act 1998 does not apply any test of proportionality, nor require a demonstration that the religious criteria are '*genuine occupational requirements*', that is, that the religious criterion is of practical relevance to fulfilling a legitimate aim of the school.⁵⁵ Vickers questions whether this framework is compatible with human rights law in a European context, given that it enables discrimination against individuals on religious grounds, and other commentators⁵⁶ express similar concerns about the apparent dissonance between the current framework and equality law.

Academies and Free Schools designated as religious are able to apply religious criteria to teacher-recruitment and discipline.⁵⁷ However, because they are not within the special provisions of the School Standards and Framework Act 1998, the provisions of the Equality Act 2010 apply unless the school can demonstrate that the religious criteria form a '*genuine occupational requirement*'.⁵⁸

In summary, a number of very important special legal provisions apply to designated Faith Schools. Given that according to official statistics, around one third of all publically maintained schools are faith schools, plus a large number of private schools, this part of the education law landscape should not be overlooked.⁵⁹ Furthermore, whilst discussing religion, it must be noted that even maintained schools without a designated faith character, are still subject to a variety of legal duties in respect of religion. Both Anglican religion, and

⁵⁴ Ibid at s 60.

⁵⁵ L. Vickers, 'Religious Discrimination in Schools: The Employment of Teachers and the Public Sector Duty', in M. Hunter-Henin (ed), *Law, Religion and Freedoms in Europe: Education in Europe*, (Ashgate) 2011, at 87-106.

⁵⁶ R. Thompson, 'Religion, Belief, Education and Discrimination' (2015) 14 *Equal Rights Review*, at 71-106.

⁵⁷ Ibid at 76.

⁵⁸ N. Shribman, 'A Victory for Common Sense' (2011) 161 *New Law Journal*, at 1248-1250.

⁵⁹ House of Commons Briefing Paper, *Faith Schools in England: FAQ*, Number 06972 (13 March 2017).

Christianity more widely, still have a particular prominence within the English educational system.

Home Education

Despite the variety of school-based provision on offer in England, there are still a very significant number of parents who opt to educate their children away from a school based setting. In 2016/17 there were 30,000 home-schooled children in England, and the tide continues to rise rather than ebb.⁶⁰ A broad spectrum of motivations underlie this trend. Some families are driven by ideological concerns, they might not have a faith school close by which matches their worldview, or might be driven by non-religious convictions about society, child-development, politics or the environment. Some parents conclude that none of the available options for school-based education are sufficiently in harmony with their values.

It should be noted at this point that there is considerable flexibility and accommodation of parental choice within the English school system. In addition to the concessions to parental belief in relation to religious education and worship set out above, there are provisions allowing for pupils to be withdrawn by parents from the teaching on sex and relationships which is part of the National Curriculum,⁶¹ although the right does not extend to lessons in biology, on the scientific aspects of reproduction in humans and other mammals.⁶²

Commentators like Harris have justly questioned whether vesting this unilateral power in parents is compatible with the independent human rights of the children and young people involved.⁶³ Pupils of an age who wish to explore their own identity and sexuality may well have differing ideological priorities from their parents, and it is difficult to reconcile the law facilitating parents denying them information with the provisions of the United Nations

⁶⁰ 'Number of children home taught doubles in six years amid increased competition for school places', *The Telegraph* (7 July 2017),

<http://www.telegraph.co.uk/education/2017/07/07/number-children-home-taught-doubles-six-years-amid-increased/>

⁶¹ HM Government, The National Curriculum, <https://www.gov.uk/national-curriculum/other-compulsory-subjects>

⁶² Education Act 1996, s 405.

⁶³ N. Harris, 'Playing catch-up in the schoolyard? Children and young people's 'voice' and education rights in the UK,' (2009) Vol 23:3 *International Journal of Law Policy and the Family*, at 331-58.

Convention on the Rights of the Child (UNCRC)⁶⁴ and the European Court of Human Rights (ECHR).⁶⁵ To humanise the debate with a concrete example, parents might have a genuinely held belief that masturbation or sexual activity between two men is physically, as well as spiritually, damaging. Does their right to present this belief to their child really outweigh the right of their young son to learn of other (empirically evidenced and widely supported) perspectives, especially should they happen to be gay or bisexual?

Furthermore, the current position does not make sense in light of an established and universally accepted judicial precedent to the effect that children who have sufficient maturity and understanding to make informed decisions about their health, sexual and otherwise, have the legal competence to do so.⁶⁶ It is not surprising that the Government is currently reviewing the law in this regard, and reform looks highly likely,⁶⁷ and all things considered, commentators like Bainham are justified in asserting that the present balance of the law is tipped too far in the direction of parental rights.⁶⁸

Of course, there are limitations, at least within the state maintained sector. As we have seen, parents cannot withdraw their children from science lessons, even if they object to them learning about sexual reproduction or Darwinian evolution. Neither can they veto literature for study in English lessons which they might consider religiously offensive, for example, because characters practice witchcraft or magic.⁶⁹ Interestingly, local schools may voluntarily choose to respect parental feelings, and for example, in some places Muslim parents have been informally permitted to withdraw their children from music lessons.⁷⁰

⁶⁴ UNCRC, inter alia: Article 6 (Life, survival and development) Articles 12 (Respect for views); Article 12 (Freedom of expression); Article 13 (Freedom of thought, belief and religion); Article 19 (Protection from violence, abuse or neglect) and Article 42 (Knowledge of rights).

⁶⁵ ECHR Article 8.

⁶⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

⁶⁷ R. Long, 'Sex and Relationships Briefing Paper', House of Commons Library, 02 March 2017: researchbriefings.files.parliament.uk/documents/SN06103/SN06103.pdf.

⁶⁸ A. Bainham 'Sex Education: A Family Lawyer's Perspective', in N. Harris, *Children, Sex Education and the Law* (London: National Children's Bureau) 1996, 24-44, p30.

⁶⁹ 'Religious parents want Harry Potter banned from the classroom because it glorifies witchcraft', *The Telegraph*, 16/12/15

<http://www.telegraph.co.uk/education/educationnews/12052212/Religious-parents-want-Harry-Potter-banned-from-the-classroom-because-it-glorifies-witchcraft.html>

⁷⁰ Muslim Pupils Taken Out of Music Lessons, *Teaching Times*, <https://www.teachingtimes.com/news/muslim-pupils-music-lessons.htm>

Nevertheless, within the public system, there cannot be infinite flexibility, and schools simply could not function if every family demanded to be allowed to select their child's classes à la carte. Added to which, there are questions of how far children should be deprived of educational opportunities afforded to their peers on the basis of parental preference. Moreover, of course, there is always the option of selecting a faith school which does not follow the national curriculum or a privately funded faith school which offers a schedule in keeping with the relevant parental values.

All of these considerations are profoundly relevant in relation to our discussion below, about parents who assert that a school-based education would be ideologically unsuitable and who also resist greater state monitoring of home education.⁷¹ It goes without saying, religious and ethical convictions are not the only reasons behind a choice to home-school, and some parents assert that a school environment is not suitable for their particular child, sometimes after negative experiences of bullying.⁷² They may feel that their child's special educational needs or behavioural challenges were not adequately met or understood, or that their exceptional academic abilities were not catered for by the material provided. In some cases, parents regard formal, structured education as a harmful or at suboptimal approach to nurturing learning and development, and regard an alternative educational philosophy like 'unschooling' as a preferable path.⁷³

A thorough discussion of the politics and policy debate around home-schooling is beyond the scope of this article. As stated, families opt for home education for a plethora of very different reasons and the legal regime has to recognise and be geared towards all circumstances. Child A might have autistic spectrum disorder and have found the noise and sensory stimulation of a classroom simply unbearable (even though his or her neuro-typical siblings are happily in school and home education had not previously been on the parental radar); Child B might be a member of a very strict religious group and there may be no school within the geographical or economic reach of B's parents which would satisfy them; and Child C might come from a family with a philosophical commitment to non-school based education. Also, we cannot ignore Child D, whose abusive parents or carers do not wish their maltreatment to come to light via concerned teachers or parents at the school-gate. Thankfully, children

⁷¹ A. Thomas, *Educating Children At Home* (Bloomsbury: London) 1998, Ch 4, 28-40.

⁷² C. Badman, *Report to the Secretary of State on Elective Home Education in England*, House of Commons 11/06/09, para 4.4.

⁷³ D. Martin, *Radical Unschooling: A Revolution Has Begun* (Tasora Books: Minneapolis) 2011.

in this position are rare, but they do exist and in recent years there have been a number of harrowing and high-profile cases with tragic outcomes.⁷⁴

The current legal framework must be seen against this backdrop. At present, parents can withdraw their children from school simply by giving notice and if the withdrawal is complete public authorities have no power to object (although parents have no right to demand a partial withdrawal or part-time school attendance).⁷⁵ If the child has never been in school, then no notice need be given, and parents do not have to demonstrate that they have any qualifications or minimum level of academic knowledge before embarking on home education. Furthermore, local authorities have no statutory duty to monitor home education on a routine basis.⁷⁶

As Swann observes, where it appears to the local education authority that a child is not receiving a fulltime and efficient education at home, there it is a duty to serve notice on the child's parents,⁷⁷ requiring them to satisfactorily demonstrate that an adequate education is being delivered,⁷⁸ and if the authority is not satisfied by the parental response, they may issue a School Attendance Order.⁷⁹

Government guidance has been issued on the duties which local education authorities have in relation to children who are in receipt of home education.⁸⁰ These make it clear that the state should not intervene unless and until there is some evidence of a problem, and that home educating a child should not be construed as failing to provide an efficient education.⁸¹ There is, nevertheless, gathering disquiet around the lack of robust regulation of this area, from local

⁷⁴ Calls for home-schooling register after a boy, 8, dies from scurvy after becoming invisible to the authorities, *The Independent* 9/7/16; Starved Girl Khyra Ishqa's death was preventable *BBC News* 27/07/10, <http://www.bbc.co.uk/news/uk-england-birmingham-10770907>; <http://www.independent.co.uk/news/education/education-news/calls-for-home-schooling-register-as-boy-8-dies-from-scurvy-a7128381.html>; Lord Laming, *The Victoria Climbié Inquiry* (Presented to Parliament-January 2003) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273183/5730.pdf

⁷⁵ HM Government, Home Education, <https://www.gov.uk/home-education>

⁷⁶ T. Tabori, 'Tackling Illegal Schools', *Local Government Lawyer* (06/09/16).

⁷⁷ Education Act 1996, s 436(A).

⁷⁸ S. Swann, *Pupil Disaffection in Schools: Bad Boys and Hard Girls* (Routledge: Abingdon) 2013, 56.

⁷⁹ Education Act 1996, s 437(1).

⁸⁰ Department for Children, Schools and Families, *Elective Home Education: Guidelines for Local Authorities* (2007, updated 2013).

⁸¹ *Ibid*, para 3.

councils⁸² and also from Ofsted.⁸³ There are calls for greater powers to be given to local authorities to monitor children receiving home education and duties to be imposed on parents to facilitate this (e.g. admitting inspectors to the home when required and handing over teaching materials being used for review).

The whole subject is, at present, a political hot-potato in the UK: the home-schooling lobby is forceful, articulate and essentially opposed to increasing regulation (although of course, opinion amongst home educators does, as would be expected amongst any diverse community).⁸⁴ There is, undoubtedly, a link between growing calls to regulate home education, and the issue of illegal schools, which we shall discuss below, and there are also concerns about child-welfare and the rights of all children to an adequate education. An investigation by the education journal 'Schools Week' revealed that with the rising number of children being educated at home, there has been a commensurate increase in home-educated children returning to the school system, sometimes when the time out of it has had a detrimental impact upon their educational development.⁸⁵

Even more disturbing is the possibility for children who are home-educated to become invisible to the world, and for neglect and abuse (intentional or otherwise) to go undetected, sometimes with tragic consequences. Recent events in Wales give some insight as to possible developments in England, given the similarity of legal provisions and cultural pressures in place in the respective contexts. A review into the death of Dylan Seabridge, an eight year old boy who was allowed by his parents to suffer from scurvy, a painful, distressing and entirely preventable condition to which he eventually

⁸² Councils seek new powers to check on home-schooled children, *The Guardian* (16/08/16) <https://www.theguardian.com/education/2016/sep/16/councils-seek-new-powers-to-check-on-home-schooled-children>

⁸³ Ofsted calls for home-schooling regulation to tackle illegal religious schools, *Humanism UK* (06/11/17) <https://humanism.org.uk/2017/11/06/ofsted-calls-for-home-schooling-regulation-to-tackle-illegal-religious-schools/>

⁸⁴ N. Taylor, 'Why home-schooling should not be regulated: A British home-educator's reply to a hostile global agenda', *Home Education UK*, <http://www.home-education.org.uk/articles/article-why%20he-should-not-be-regulated.pdf>

⁸⁵ J. Schaufenberg, 'Home education doubles, with schools left to pick up the pieces when it fails', *Schools Week*, 07/07/17, <https://schoolsweek.co.uk/home-education-doubles-with-schools-left-to-pick-up-pieces-when-it-fails/>

succumbed, provoked calls in Wales for the introduction a register of children who were home educated.⁸⁶

Despite pressure from the Children's Commissioner for Wales, a register was not forthcoming and new statutory guidance for both parents and public authorities has been issued instead.⁸⁷ The Children's Commissioner expressed her disappointment at this decision and the wider debate continues.⁸⁸ It is hard to imagine that more disturbing cases than those already seen could emerge, yet the present Government seems reluctant to introduce new legal power to facilitate public authorities in, at the very least, monitoring the physical and mental welfare of children being educated at home. Arguably, because such a framework was not in place, the Article 2 and Article 3 rights of little Dylan not to be deprived of his life, or to be subjected to inhuman treatment, were breached, but of course, Dylan was and is in no position to assert such rights. It is regrettable that the collective dialogue on home schooling is not more child-centred, a theme which follows through into our discussion on illegal schools.

Illegal Schools

The link between the permissive regime applicable to home-schooling and the problem of "illegal schools" is accepted by Ofsted, as well as stressed by campaign groups like Humanism UK.⁸⁹ In fairness, the majority of parents do not wish their children to grow up without any form of education, but either in defiance or ignorance of the law, send their children to schools which operate outside of the regulatory framework (e.g. not arranging for inspections as discussed above).

⁸⁶ Boy's scurvy death prompts home-schooling register call, *BBC News* 08/07/16, <http://www.bbc.co.uk/news/uk-wales-36746094>

⁸⁷ Welsh Government, *Elective Home Education Guidance* 12/01/17, <http://gov.wales/topics/educationandskills/schoolshome/pupilsupport/elective-home-education-guidance/?lang=en>

⁸⁸ Home education guidance disappointing, says commissioner, *BBC News* 13/01/17, <http://www.bbc.co.uk/news/uk-wales-politics-38603771>

⁸⁹ Ofsted calls for home-schooling regulation to tackle illegal religious schools, *Humanism UK* (06/11/17) <https://humanism.org.uk/2017/11/06/ofsted-calls-for-home-schooling-regulation-to-tackle-illegal-religious-schools/>

A scandal broke in the popular press early in 2017, about the number of children being educated in illegal schools,⁹⁰ but more than a year later, the problem remains ongoing.⁹¹ Concerns encompass the health and safety of the pupils, as some of the illegal schools are housed in unsuitable premises, as well as the quality and content of the education. The illegal schools which have come to light have all been run by faith groups, wanting to provide a closely controlled environment in line with their interpretation of Christianity, Islam or Judaism.

As well as the impact which this may have on the future of the individual pupils, there are fears that these institutions could be breeding-ground for extremist hatred and potentially even terrorism, expressed by senior police figures.⁹² Public authorities continue to voice concerns that the legal framework does not provide them with adequate powers to tackle this issue. The chief operating officer of Ofsted, Matthew Coffey, would like greater legal capacity to forcibly enter suspected illegal schools and seize materials, as well as more specific definition of terms like 'school',⁹³ and he has expressed frustration that the governing law is simply too vague to serve its purpose.⁹⁴

An association of regional authorities, the Local Government Association, has asked for two concrete legal changes to assist them in dealing with illegal schools: 1) power to enter homes and other premises and see children to check the suitability of education being delivered if necessary; and 2) power to compel parents to register home educated children.⁹⁵ Tabori expresses sympathy with this position, and furthermore suggests that the reforms in education discussed above, and the fragmentation of responsibility previously vested in a single local body, has exacerbated the problem with illegal schools.⁹⁶ In his view, the multiplicity of governing arrangements under which schools may operate, and the freedom granted by some models to answer

⁹⁰ The full extent of unregistered schools in England revealed, *The Independent* (18/02/17) <http://www.independent.co.uk/news/uk/home-news/the-full-extent-of-unregistered-schools-in-england-revealed-a7586101.html>

⁹¹ Illegal schools: Ofsted reveals up to 20 across the north, *BBC News* (13/12/17) <http://www.bbc.co.uk/news/uk-england-42339680>

⁹² 'Segregated communities' fuelling rise in terror threat, warns counter-terror chief, *The Telegraph* (05/09/17).

⁹³ Give us the power to break into illegal schools, Ofsted chief says, *The Telegraph* (22/09/17).

⁹⁴ Education and Skills Act 2008.

⁹⁵ T. Tabori, 'Tackling Illegal Schools', *Local Government Lawyer* (06/09/16).

⁹⁶ Ibid.

directly to central rather than regional government has had a negative impact upon the regulatory framework at a systemic level.

We would concur with Tabori's hypothesis, but would also suggest that there are wider issues at play. The seemingly intractable problems with illegal schools relate to the convergence of the two streams highlighted at the outset of our discussion. On the one hand, there is the forest of primary and secondary legislation, as well as non-statutory governmental guidance, which regulates the provision of school-based education, and on the other hand, there is the individualistic, free and largely unregulated sphere of home-schooling. We would suggest that both sides of this divide need to be moved away from the extreme territory they currently occupy, to more central ground.

In one respect, public sector actors in relation to schools (Ofsted and local authorities) are beset by problems in combatting illegal institutions, because they are hampered by the inadequate tools supplied to them by copious, but inefficient legislation. And yet at the same time, parents who enjoy expansive freedoms of home-education wish to retain this, and it seems that politicians are reluctant to face the backlash of their disappointment if they are thwarted. Government in England has showed no signs of heeding calls for registers from the Local Government Association (mirroring the unwillingness of the Welsh Assembly Government to accept the pleas of the Children's Commissioner).

However, we would argue that a simplification of the legal framework governing schools and an increase in regulation of home education, would both be of benefit to children and young people in England. In the latter case, can the desire of families to enjoy the maximum assurance of privacy really justify disregarding the rights of vulnerable children, whose very life may be at stake? As both of us have argued previously, it is the non-negotiable responsibility to a liberal democracy to safeguard the rights of those least able to assert them.⁹⁷

⁹⁷ J. García Oliva and H. Hall, 'Responding to Non-Liberal Minorities within a Liberal State: the challenge posed by children and vulnerable adults', *Public Law* (2018).

University Education in England

We now turn to the very different position of adults in tertiary education. Due to the constraints of space, we shall confine ourselves to the university context and not enter into discussions about vocational and technical training for the over sixteens. Our interest in the university context relates directly back to the analysis which we have just undertaken, and the link is a very simple one. Essentially, the provision of university education and basis upon which it can be accessed are surprisingly uniform throughout England, and whichever of the multiple forms of primary and secondary education a young person has enjoyed or endured, they must be able to cope with the same, universal system if they are to progress academically after the age of eighteen.

There are a small number of private universities operating in England, but the overwhelming majority are public. In contrast with some continental jurisdictions, this does not mean that their assets are owned by the Government, nor that those employed within them are civil servants. However, they are regulated and funded by a common body, the Higher Education Funding Council for England (HEFCE),⁹⁸ and maximum tuition fees are fixed annually, for example, £9,250 for the academic year 2017/18.⁹⁹ In practice, almost all universities in fact charge this maximum amount, so economic factors are not relevant in terms of accessing the top performing universities in academic terms.¹⁰⁰ Governmental loans are universally available to cover tuition fees, and maintenance loans are offered subject to household income.¹⁰¹ Given that the maximum loan available for 2017/18 is £7097, it is insufficient to support even the most frugal of student lifestyles with some supplementation. Therefore, students from affluent backgrounds are able to devote more time to their studies, as those receiving financial help from family members are not required to work long hours in part time jobs, or may at least restrict their paid employment to the vacation period.

In light of the above, it cannot be asserted the system is entirely meritocratic. Whatever political judgement is made about the framework now in operation,

⁹⁸ Higher Education Funding Council for England, 'What we do',

<http://www.hefce.ac.uk/workprovide/unicoll/#index>

⁹⁹ HM Government, Student Finance, <https://www.gov.uk/student-finance/new-fulltime-students>

¹⁰⁰ Almost all universities confirm £9,250 tuition fees for 2017/18, *The Times Higher Education* 06/09/16, <https://www.timeshighereducation.com/news/almost-all-universities-confirm-ps9250-tuition-fees-2017-18>

¹⁰¹ HM Government, Student Finance, <https://www.gov.uk/student-finance/new-fulltime-students>

students receive far less help from the state than was the case in previous generations, when tuition fees were paid by local authorities and maintenance grants were on offer as well as loans, a far cry from the current situation where the cost of teaching as well as living is a direct burden.¹⁰²

Nevertheless, accepting the economic inequalities which prevail, it remains the case that university admission is dependent in England upon the demonstration of academic ability. If an individual is willing and able to enter into tertiary education, they will not be barred from the most successful and prestigious institutions by the fees levied. Nevertheless, their capacity to demonstrate the necessary academic ability, and also to cope with their course upon arrival, will be determined by the educational opportunities which they have enjoyed up until this point.

There are, of course, conversations to be had about ways in which universities can and should provide an efficient tertiary education to learners from a wide variety of backgrounds, but the fact remains that in contrast to the many forms of pre-university education on offer, there is really only one system in which to participate. Therefore, if individuals receive an inadequate education which hampers their ability to demonstrate the necessary academic capacity, or an education which is only adequate for a very particular religious or cultural context, then accessing an university education in England is going to be extremely challenging.

Current Trends and Data

Drawing all of the above together, a number of trends can be observed at the present time, in relation to both the legal framework and available statistics. One is that there are economic, cultural and ideological inequalities in relation to educational provision at all levels. Privately funded education has always been an important part of English context, and shows no sign of diminishing. Statistics from the Independent Schools Council, the body responsible for inspecting the overwhelming majority of private schools, indicate that there are around 2600 such institutions operating at present.¹⁰³

Whilst it would be inaccurate to portray all private schools as providing a superior quality of education to their publicly financed counterparts (standards

¹⁰² H. Carraso, 'Reassuringly Expensive: The Impact of Market Forces on England's Undergraduate Provision' in H. Ert and C. Dupuny (eds), *Students, Markets and Social Justice* (Symposium Books: Oxford) 2013, 8-21.

¹⁰³ Independent Schools Council, <https://www.isc.co.uk/research/>

of provision vary widely across both sectors), it is nevertheless the case that parents who are able to do so ordinarily opt to pay for their child's schooling because they believe that this will provide their children with some advantage. Furthermore, there is a strong tradition of regarding private education as something aspirational. The English enthusiasm for private schools, including boarding schools, shows no sign of diminishing, as the ongoing success of the Harry Potter franchise attests.

But as our survey of the educational system has demonstrated, families are not simply confronted with a division between independent and state schooling. Amongst the publicly funded sector, there is a bewildering array of legal entities running educational establishments. It is undeniable that parents with greater educational and social capital are better equipped to navigate the complexities of the system and make strategic choices accordingly.¹⁰⁴ As the trajectory of legal change over the past four decades, and in particular since the 1990s, has been to add new forms of governance structure and render the position ever more impenetrable to those unwilling or unable to carry out extensive research, this dimension of inequality has increased with legislative change borne of political ideology.

Another trend is the ongoing firm support for faith schools across the political spectrum; at the time of writing forty-four percent of English schools are faith schools.¹⁰⁵ Twenty two percent of all schools are Church of England, nine percent Roman Catholic, and the remaining thirteen percent are drawn from a variety of other faiths. In practical terms, the ability of parents to access publically funded education in a religious environment of their choosing is also related to economic and social opportunity, as we explained above. The tendency for religious and cultural minorities to want to organise schooling for their children in a setting intended to preserve their distinctiveness and values, and pass these to the next generation is not a new one. It is not a coincidence that after the Established Anglican grouping, the next most significant provider of faith based education is the Roman Catholic church, which represented not only one of the largest and most visible minorities in historical times, but also one which was regarded negatively by much of the population, as the specific legal disabilities imposed upon Catholics demonstrate.

In the modern era, with the sadly rising tide of Islamophobia, it is perhaps unsurprising that some Muslim parents feel a desire to have their children educated in a context they feel confident will be affirming of their world view.

¹⁰⁴ J. Allan and R. Catts (eds), *Social Capital, Children and Young People* (2012).

¹⁰⁵ Government Paper-R. Long and P. Bolton, *Faith Schools in England: FAQs*, House of Commons Library No 06972, 6/6/18.

The political desirability of faith schools in terms of social integration is beyond our expertise as lawyers, but the trend is one which the legal framework at present supports.

It also allows for the option of having children educated at home, which may or may not be for ideological reasons. The uptake on this pathway is growing rapidly. There are now 48,000 children being home-educated, this equates to approximately 0.6% or one in every two hundred pupils of compulsory school age.¹⁰⁶ More sociological research is undoubtedly needed to explore the reasons behind this shift, and it is highly probable that a number of factors are at play. However, as more and more children are experiencing this form of education, there are strong reasons to question whether this area needs more rigid regulation. The current laissez-faire approach is essentially the result of historical accident, and nineteenth century debates about parental rights which have less relevance in a modern, child-centred legal setting.

Not only is there the issue of regulating genuine home-schooling, in the interests of ensuring that the present welfare of young people is adequately being addressed, there are also serious questions about whether the current permissive regime is feeding into the recognised problem of illegal schools. The lack of any legal duty on parents to account to public authorities as to where and how the day to day education of children is taking place, is undoubtedly making it easier for unregulated educational collectives to operate. Evidence shows that progress in bringing about a decline in this area is not as rapid as would be desired. Early in 2018, at least 350 such unregulated institutions were in operation.¹⁰⁷ Children in British society not only morally deserve to have their rights to safety and adequate education more robustly defended, the State is failing to comply with its obligations under the UNCRC if such illegal¹⁰⁸ schools are not effectively eradicated.

¹⁰⁶ Department for Education, *Schools Pupils and their Characteristics* (January 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719226/Schools_Pupils_and_their_Characteristics_2018_Main_Text.pdf

¹⁰⁷ Is there a problem with unregistered schools, *BBC News* 26/2/18, <https://www.bbc.co.uk/news/education-43170447>

¹⁰⁸ See in particular UNCRC Article 28.

Conclusion

As we observed at the outset, the law in relation to education can be described in terms of contrasting phenomena: firstly, there is a plethora of provisions in relation to school based education, to such an extent as to generate uncertainty which hampers, rather than facilitate, effective regulation; and secondly, there is a huge amount of parental freedom afforded in relation to home education. The interests of children would be more effectively promoted if both sides of the coin were less extreme.

Possible Ways Forward

The legislation which governs school-based education could be far more streamlined and specific in defining terms and addressing needs, and pruning it would actively promote its efficiency. Equally, as public bodies and officials tasked with promoting the welfare of children, particularly within the education remit have suggested, the introduction of more robust monitoring of home education is long overdue. There are many reasons why families might opt to for non-school based learning, but those motivated by ideological factors are rejecting a school-system which, if anything, is too weighed towards respecting parental beliefs, rather than in the opposite direction. Consequently, extra accommodation of home educators on ideological grounds should not be necessary. All schools, state maintained or privately funded, must satisfy independent inspectorates, and therefore, we wonder why home education should be a separate domain. When this consideration is combined with the risks of leaving vulnerable children at risk of undetected abuse, the case for oversight is compelling.

A closely related issue arises in respect of illegal schools, which continue to operate. A system which provides so much diversity within the school sector, particularly when it comes to facilitating the delivery of education within a religious ethos, furnishes those responsible for illegal schools with little excuse for their conduct, and when this is combined with the immense latitude granted to parents in home education, the position is even more striking. Bearing in mind that the law is so generous, there are no legitimate grounds for either parents or educational providers to elect to flout it. A functional system for keeping track of children not in registered schools, or in other words children who are officially home educated, would be a decisive factor in stamping out this persistent problem. One possible development to address this problem could be the introduction of punitive criminal sanctions for parents or those with parental responsibility who send children to illegal, unregulated schools. Furthermore, the introduction of legal requirements in

respect of those educating children at home, would help to ensure that this growing sector was not expanding in a way which was detrimental to the interests of young people.

In addition, more consistent and efficacious regulation of primary and secondary education would be beneficial for young people embarking upon university study, and being required to function in the comparatively uniform paradigm of public tertiary education. As private, religious universities are not an option within the English system, whatever experience of education learners have prior to this stage, it must be sufficient to equip them for this possibility.

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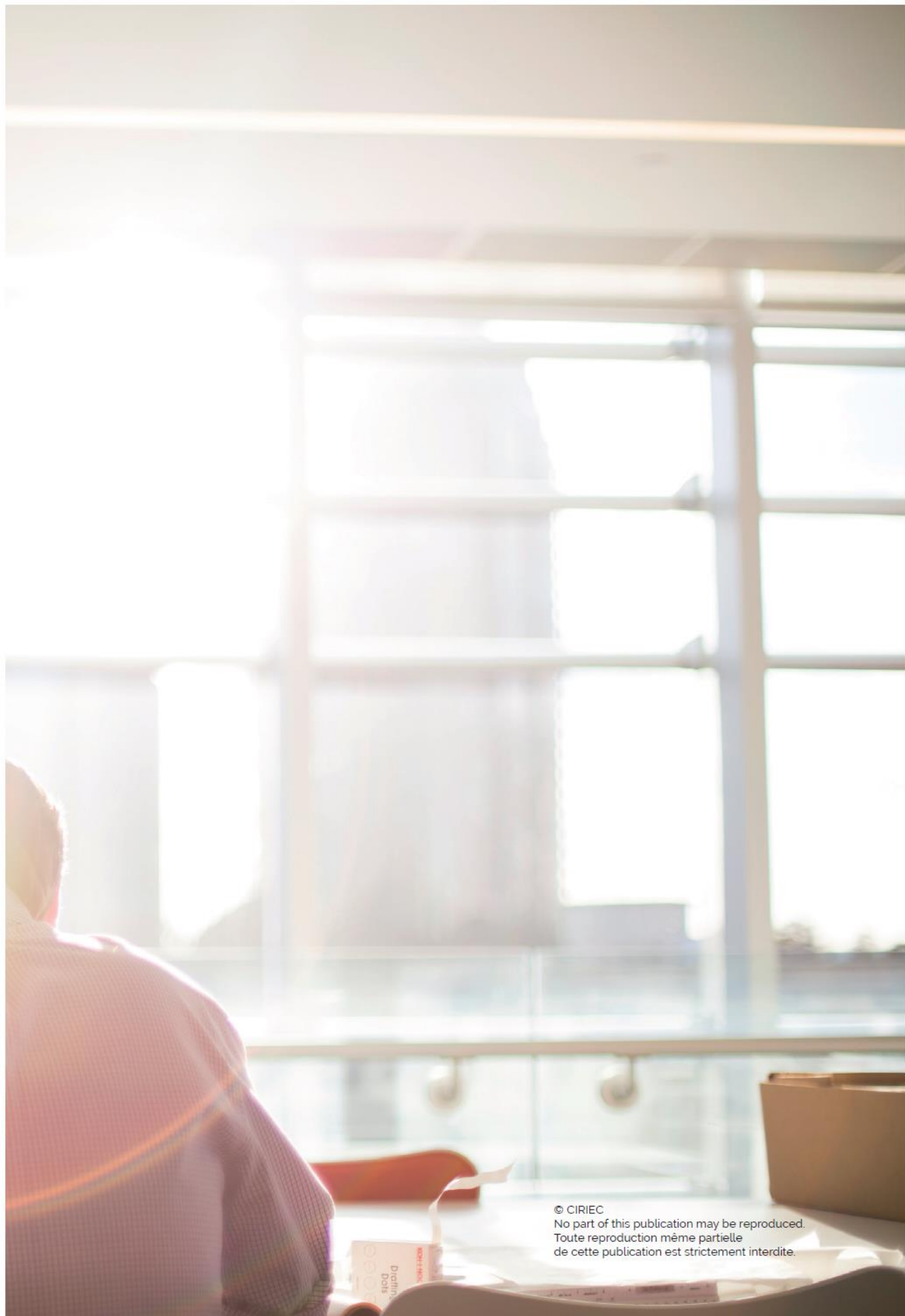
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