Annex B: Respondent Information Form

Introduction

1. In order to help collate and analyse responses to the Home Education Discussion Paper we would be grateful if respondents provide their responses in the form below.

Respondent Information

Name: Alison Preuss

Contact information (email/postal address): xxxxxxxx@xxxxxxxx

Are you responding as an individual or an organisation? Scottish Home Education Forum

Questions

Section 1- Introduction

Question 1: What aspects of policy and legislation need to be reflected in to the introduction section of the guidance?

[NOTE: We have pointed out several minor but important errors in the discussion document, which we will not labour in this response, having already had an opportunity to share them directly, but in the interests of ensuring accuracy of the formal consultation it will be vital to allow home educators with suitable expertise advance sight of the proposed text.]

The legislative framework remains unchanged, with the duty to provide education during the compulsory years being discharged by the parent, either by sending the child to a *council* school (where that duty is presumed to be met through attendance alone) *or* by other means (which includes home-based education and independent schooling).The word 'or' in the 1980 Act denotes the equal status in law of these options, which needs to be emphasised in order to combat anti-home education bias.

Despite there being no plans to amend primary legislation, it would be helpful for the guidance to reference the protections afforded by the GDPR (given effect in the UK by the Data Protection Act 2019), the ECHR (via the Human Rights Act 1999) and the UNCRC (expected to be incorporated). All Scots policy must comply with overarching human rights and data protection legislation and the home education guidance has the potential to be incompatible with aspects of both unless the appropriate balance is struck.

Question 2: Should this guidance, which is primarily directed at local authorities, be accompanied by a version specifically aimed at parents who may wish to home educate their children?

No, because section 14 of the 2000 Act (which was inserted as a late-stage amendment due to parliament's recognition of local authorities' over-reach, as can be seen from the Official Record) provides for the issue of statutory guidance for local authorities. It is up to parents to determine how their children are educated (according to their age, aptitude and ability) and they cannot be prevented from doing so without justification. Guidance is only required for local authorities to ensure they carry out their responsibilities in respect of noting children who are known to be home educated, recording withdrawals from council schools and intervening in the event of parental failure to provide appropriate education, the criteria for which are set out in the 1980 Act. The 2000 Act does not in any way interfere with parental choice to educate outwith schools, nor can any other legislation or policy do so, including GIRFEC. Given that compliance with the ECHR is non-negotiable and the Scottish Government has no intention of amending primary legislation, the focus should be on ensuring that local

authorities understand their responsibilities and the limitations of their powers in relation to parental provision of home education.

Section 2 - Legislative Position

Question 3: Does the guidance set out the legal position, both in Scotland and internationally, as it applies to home education clearly enough?

Overview

One error that should have been picked up in 2007 concerns the local authority's alleged "responsibility to satisfy itself that suitable and efficient education is being provided". The LA duty is in fact 'negative' in that it must act where it is *not satisfied* that appropriate education is being provided, for which evidence and justification are required. The duty is akin to that of social work and the police who do not have a proactive duty to investigate all families for possible neglectful parenting 'just in case', which would be in breach the Human Rights Act. Case law (which we detail below) supports this assertion

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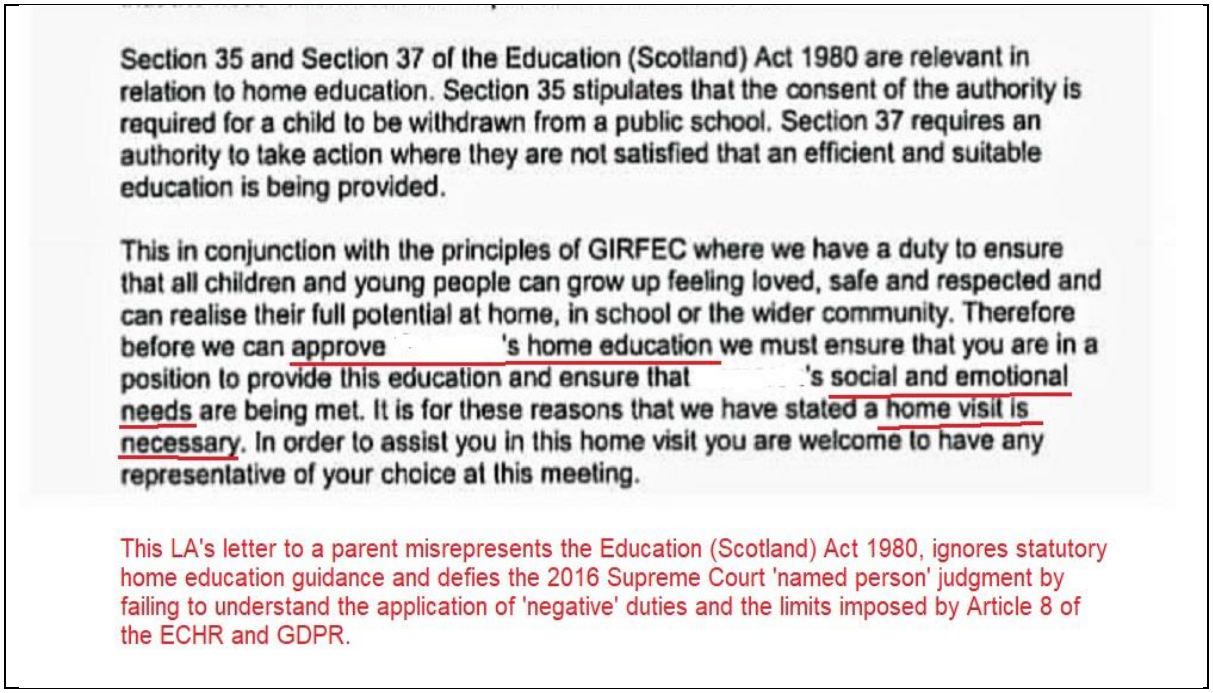
That the 2007 guidance has aged so remarkably well illustrates how a co-operative approach and joint research (by home educators and the then SCC) informed the final document and ensured it reflected both human rights and education legislation. There is clearly a need for clarification with regard to councils' data processing post-GDPR and the 2018 Data Protection Act, as well as disavowal of unlawful home education policies established by some LAs that failed to adhere to the previous DPA 1998 and still fail to recognise relevant case law (in particular, the 2015 CJEU Bara judgment and the 2016 Supreme Court 'named person' ruling).

The assessment (if any) of home educated children is a matter for their parents, not the LA, and 'recording' of home educated children is limited to noting their status, details of any withdrawal from a council school and any actions under section 37 of the 1980 Act or Children's Hearings Act 2011. The legal principles are clear, that it is parents who have the duty to provide education and who determine their children's best interests unless the relevant threshold test is met. This is often misunderstood or misrepresented, but again case law supports our assertion; indeed the Scottish courts were found to have erred by the Supreme Court in applying a test of 'best interests' before establishing whether the test of 'significant detriment' had first been met. This example of a letter from a LA to a parent withdrawing her child from school illustrates the extent of the problem:



Section 35 and Section 37 of the Education (Scotland) Act 1980 are relevant in relation to home education. Section 35 stipulates that the consent of the authority is required for a child to be withdrawn from a public school. Section 37 requires an authority to take action where they are not satisfied that an efficient and suitable education is being provided.

This in conjunction with the principles of GIRFEC where we have a duty to ensure that all children and young people can grow up feeling loved, safe and respected and can realise their full potential at home, in school or the wider community. Therefore before we can approve 's home education we must ensure that you are in a position to provide this education and ensure that 's social and emotional needs are being met. It is for these reasons that we have stated a home visit is necessary. In order to assist you in this home visit you are welcome to have any representative of your choice at this meeting.

This LA's letter to a parent misrepresents the Education (Scotland) Act 1980, ignores statutory home education guidance and defies the 2016 Supreme Court 'named person' judgment by failing to understand the application of 'negative' duties and the limits imposed by Article 8 of the ECHR and GDPR.

Right to an education

The Standards in Scotland's Schools etc Act 2000 has limited, if any, relevance to home education (which is not provided by the LA or by virtue of arrangements etc). The Act rightly obliges LAs to have regard to the child's views of their school education, but this does not apply to home educated children who are not 'pupils', and Article 12 UNCRC (from which the statutory duty derives) should not be misrepresented to compel a child to offer a view if they decline to do so.

Rather than cite irrelevant sections, it would be more helpful to stick to the pertinent text from Schedule 2 (Minor & Consequential Amendments) in relation to the 1980 Act, namely: "Section 1 of the Standards in Scotland's Schools etc. Act 2000 (right of child to be provided with school education by, or by virtue of arrangements made by, an education authority) is without prejudice to the choice afforded a parent by subsection (1) above." *[ref. Section 30 of the 1980 Act].* Although the "without prejudice" to Section 30 appears in the following section of the guidance, the 2000 Act is accorded relevance that it does not have, since the right to education derives from ECHR and UNCRC, which also links Article 28 (right to education) with Article 29 (quality and content of education).

Compulsory education age

The legal parameters of compulsory education age are described in the guidance as complex, but the most common misunderstanding we encounter is the relevant commencement date, which can easily be clarified as "if he or she has attained the age of 5 years by the beginning of the school session (usually mid-August)". It is also relevant to clarify in the guidance that children who attend school prior to attaining compulsory education age (even those who become five after the session commencement date) may be withdrawn by parental notification, as is also the case with nursery education. We have previously published an explanatory article on this

subject following reports of parents being wrongly advised in relation to compulsory education age by health visitors, LAs and third sector organisations.

Efficient and suitable education
International Law

The Harrison and 'R' cases remain benchmark rulings in respect of interpretation of suitable and efficient education, but Article 29 of the UNCRC (whose direct incorporation is proposed by the Scottish Government) focuses in similar terms on the aims of education, which it states should be directed to:

- The development of the child's personality, talents and mental and physical abilities to their fullest potential.
- The development of respect for human rights and fundamental freedoms and the principles enshrined in the Charter of the United Nations.
- The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate and for civilisations different from his or her own.
- The preparation of the child for responsible life in a free society in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.
- The development of respect for the natural environment.

The guidance could be improved by replacing references to the 2000 Act (which only applies to school education) and replacing them with sections setting out UNCRC rights, in particular the closely linked Articles 28 & 29 (on rights to education of suitable quality), with an emphasis placed on Article 16 (privacy) and an explanation of Article 12 (which is often misconstrued as a LA right to compel home educated children to provide their views - an interpretation directly contradictory to that published by the CYPCS - while failing apply the same condition to individual school pupils). Home education is of equal status to council schooling, and pro-school prejudice and home-eduphobia should be expressly recognised and asserted as unacceptable, given the imbalance of power that exists between parents and the LA.

Question 4: Are there any helpful areas of case law that would be helpful or instructive to include in a revised guidance document?

The 2016 Supreme Court 'named person' judgment prohibited actions by public bodies which may interfere with Article 8 of the ECHR and reaffirmed the threshold, already upheld by the 2013 Haringey ruling , which precluded data processing without consent in the absence of the legal test being met. That English judgment has relevance to Scotland as it referenced UK reserved legislation (data protection and human rights) and underlined "serious departures from permissible practice [that] were unlawful".

All Scottish legislation and policy, including the home education guidance and local policies must of course accord with (and/or be 'read down' to comply with) the Supreme Court's (now definitive) interpretation of the law in relation to non-consensual data processing below the significant harm threshold. If there are no *existing* child protection concerns, it is unlawful to trawl records, most especially special category data such as heath or police records, without the knowledge or consent of data subjects. We have evidence of LAs and other agencies conducting such illegal fishing expeditions in order to seek to prevent parents from making lawful decisions and exercising equally lawful educational choices. The 2016 ruling has far-reaching implications and is not confined to the named person scheme, but to all non-consensual data processing below the legal necessity threshold of risk, i.e. 'significant harm', not a subjectively interpreted. nebulous notion of 'wellbeing'. As Allan Norman, the instructing solicitor for Haringey, noted in relation to Article 3 UNCRC:

> "The Supreme Court held that nothing in Article 3 could extend the State's powers to interfere with the negative rights in Article 8.[23] The court also pointed out that in order to properly understand the child's best interests, Article 18 of the CRC comes into play[24]: 'Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern.'" [emphasis in judgment].

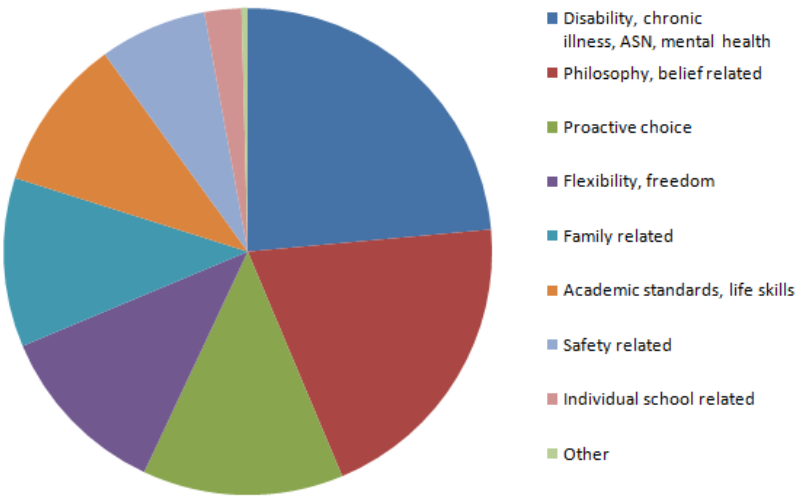
Another important CJEU judgment (Bara) applies to notification being required before data is processed between administrative bodies in order to ensure foreseeability and accessibility on the part of data subjects. The Irish data protection supervisor has just (August 2019) ordered the deletion of 3.2m illegally obtained records processed as part of the controversial Public Service Card scheme, which, like the named person, was described somewhat bizarrely as "mandatory but not compulsory". CJEU rulings are still expected to apply to the UK post-Brexit.

Question 5: Are there other reasons for parents choosing to home educate their children that it would be helpful to include in this guidance?

The fact that home education has entirely equal status to schooling (denoted by the use of 'or' in the 1980 Act) means that reasons for the choice are irrelevant, especially when they are not requested of parents who 'choose' schools. Indeed our experience suggests that LAs are likely to discriminate against home educating parents whose lifestyles, postcodes or socio-economic status do not meet with their approval, which potentially risks breaching the Equality Act 2010 and public sector equality duty.

Outlining some of the reasons for parents choosing non-school education is helpful only insofar as it allows LAs insight into the diversity of home educating families they may come into contact with, and how to ensure they do not unintentionally discriminate or exhibit pro-school prejudice. The reasons outlined in the current guidance still apply, but there are as many reasons as there are home educated children, and families may make different educational choices for their individual children.

Owing to the increase in the number of parents home educating their children and making contact with our network, the Scottish Home Education Forum undertook research in 2018 to determine reasons for school-age children being in home education in Scotland, from which it became clear that the increase was being driven by parents whose children's ASNs (most especially autism, but also disabilities and chronic illnesses) were not being met, or could not be met, by schools. Lack of respect for children's rights in schools (especially in relation to personal dignity, privacy and protection from abuse, including isolation and restraint) and targeted harassment of home educating families continue to figure significantly among members seeking support from our network with sometimes complex issues. This points to an urgent need for mandatory training for all practitioners (not just education professionals) who come into contact with home educators or those considering the option.



Question 6: Is the explanation of the process local authorities follow when considering a request from a parent to withdraw their child(ren) from school sufficiently clear and could it be improved?

In order to avoid misunderstandings by LAs, clarification is required that consent to withdraw a child can only apply where a child of school age has attended a council school *as a pupil* on one occasion or more. Reserving a school place or attending a 'transition' day do not count. A child who has not yet attained compulsory education age (which commences in the August following the fifth birthday) can also be removed from nursery or school education without the need for consent, and this could usefully be included.

There is a grey area in need of clarification in relation to children who attend school in a different LA area (e.g. by placing request or due to proximity to the council boundary). Our interpretation of the legislation is that consent relates to withdrawal of a pupil from a school in the area where they ordinarily reside, since 'reasonable excuse' would apply in circumstances where travelling distance was deemed excessive, as in circumstances where families relocate to a different council area or country and children are removed from the roll of their former school.

It is also noteworthy that parents are under no legal obligation to provide a forwarding address or destination educational setting to a child's previous school, and that CME policy does not apply to children who are (or are about to become) home educated, since they are, by definition, not 'missing' from education simply because they are not on the roll of a council school.

The checklist and flow chart in the guidance need significant improvement, as does the narrative, to fully reflect the legal position. "Sufficient time must be allowed for local authorities to take an informed decision on an important matter which will have an effect on the child's future learning" is a problematic statement which lacks accessibility and foreseeability for parents and may be wrongly interpreted, resulting in LAs unreasonably withholding consent through delay,

conditionality or unreasonable demands. This remains a serious problem for home educating families, especially in some LA areas and for those lower down the perceived socio-economic pecking order – a stratification that is lacking within the diverse home education community which is largely accepting of differences.

We have already covered the main problem areas in our most recent direct engagement with the Scottish Government, but would stress the importance of achieving consistency of approach across LA areas to processing requests for consent to withdraw children from school. Our current research into LAs' current policies and practice, and home educators' experiences of them, due to be published in autumn 2019, highlights significant discrepancies that have resulted in a postcode lottery and some serious breaches of the law. On the one hand, North Lanarkshire Council is held up as an example of consistently good practice and Dumfries & Galloway Council has recently responded positively to criticisms (by engaging with local home educators to redraft its policy in the wake of formal complaints), while on the other hand, Highland and Midlothian Councils have alienated home educating families by acting beyond their statutory *vires*. As already mentioned, others are seen to be demonstrating socio-economic bias and targeted harassment of families who are simply seeking to defend themselves from arbitrary interference and are subject to a postcode lottery.

Is there anything in the child's record to cause concern?
Is there evidence of the intention to provide efficient and suitable education?

Consent to withdraw a child from a council school cannot be, and has never been, conditional upon the excessive processing of families' personal data, since the duty to educate belongs to the parent and not the state and no lawful basis exists to permit what are effectively 'background checks' on parents who decide to fulfil their direct legal duty by other (equal) means than council schooling.

Unfortunately, many LAs have misconstrued, deliberately or otherwise, their negative duty in respect of home education as a (non-existent) power that would infringe families' rights by reading "existing evidence, either in an authority's own records or from other services or agencies, indicating that there may be good reason to refuse consent" as a licence to proactively conduct data fishing expeditions, thereby contravening the ECHR/HRA, several UNCRC Articles, the GDPR/DPA, the CJEU Bara judgment and the Supreme Court named person ruling that affirmed the primacy of parents as arbiters of children's best interests below the established non-consensual intervention threshold.

The revised guidance must ensure that LAs are aware they have no powers to solicit information from, or share it with, other services in the absence of either GDPR-compliant consent (which is invalid if coerced) or evidence of a child protection concern that will already be known to them via child protection registration, the existence of compulsory orders and/or live child protection or criminal investigations. It is important to stress that the relevant threshold is not 'wellbeing' and information may not be processed on that basis in order to fulfil parental requests for children to be withdrawn from school.

Actioning removal from the roll should centre on the proposed educational provision submitted by the parent and the absence of any known and substantiated grounds for refusal or delay. “Exceptional circumstances” cannot lawfully be construed to include parental refusal to cede privacy or human rights protections and this must be made explicit in the guidance if we are to avoid unjustified delays and refusal by some LAs to act reasonably and in good faith.

As noted in the current guidance “irregular attendance is not of itself a sufficient reason for refusing consent”. A reference to the Children’s Hearings training manual might usefully be added, which notes that the provision of home education is a reasonable excuse for non-attendance at school while parents are awaiting formal consent for withdrawal. Indeed we would recommend that the guidance explicitly state that ‘reasonable excuse’ applies in circumstances where the LA has delayed or refused to confirm consent within the recommended timescale *and* the parent is providing education. It is not onerous to consider and respond promptly to a parent’s proposals, and the data trawling (which appears to have been adopted uncritically by some LAs) is already prohibited by law.

Parents are expected to include an outline of their proposed educational provision along with their request for consent to withdraw their child. It should be emphasised that this need not be submitted on a council proforma and could take the form of an individualised philosophy of education. Parental provision is not required to parallel the school curriculum or create an artificial division between learning and everyday life, which is why it is important for LA officers who consider proposals are familiar with a variety of educational philosophies and approaches that are practised by home educators, including autonomous, child-led learning that rejects testing, assessment and outcomes in favour of facilitating the process of learning.

The timescale for confirming consent should in our view be reduced to one week where no compulsory measures are in place or live child protection investigations are in progress *and* where cogent parental proposals have been submitted. This has proved sufficient time for well-organised LAs who comply with the law and do not seek to deter parents and children from choosing home education or place unreasonable conditions as regards curriculum content or philosophy.

We would further recommend that, in the event that LAs delay the process beyond two weeks, consent should be *presumed* in the absence of LA justification for refusal, and/or that parents should be able to rely on ‘reasonable excuse’ as set out in the 1980 Act for any failure to ensure their child continues to attend school in sometimes challenging circumstances. While illness, including anxiety-related illness, constitutes good reason for absence, GPs generally do not provide medical certification for school-age children, but parental notification has been deemed sufficient by the courts. Our suggestion, if accepted, would have the effect of redressing the current power imbalance and encouraging consistent practice.

Although no statutory right of appeal exists in respect of refusal of consent to withdraw a child from school, parents may consider making a Section 70 complaint where LAs have failed to discharge a statutory duty and/or a complaint

of discriminatory treatment due to holding protected characteristics under the Equality Act 2010

Parents have successfully defended themselves against vexatious SAOs and *ultra vires* activities that amount to breaching the HRA and/or DPA, which all public bodies are obliged to comply with. There are also lawful circumventions of the consent anomaly, which is discriminatory in itself as it does not apply to independent schools or those who have the economic means to relocate out of the area.

Flexi schooling

This is an option that has become increasingly popular since 2007. We would recommend a presumption in favour of accommodating parents' (and children's) wishes as far as is practicable without compromising the child's right to education, as has been seen in some cases of part-time or reduced timetabling due to ASNs that have amounted to unlawful exclusion. There are many examples of successful flexi-schooling at both primary and secondary levels which have been agreed between parents and schools. Now that many more adults work on a flexible basis to enjoy more time with their children, the benefits to children of flexible schooling should surely also be given greater consideration as opposed to the current practice of it being a temporary measure prior to entering or resuming full-time schooling.

Flowchart

This needs to be completely re-worked and the cartoon characters dropped!

Section 4 - Contact between home educating families and local authorities

Question 7: The current guidance advises that the local authority should meet with home educating parents at least once a year. Is this an appropriate recommended frequency of contact or should it be increased?

The guidance does not actually advise meeting with the LA, and parents are under no obligation to agree to this. Rather, it suggests that annual 'contact' is reasonable for LAs to request an update of education provision, which may be responded to by parents in writing or otherwise. This remains a reasonable frequency for contact in almost all circumstances, although parents should be able to request support at any time and agree the optimal frequency and means of contact with the LA.

The fact that some LAs persist in misrepresenting the law and guidance has led, particularly in some areas, to home educators declining all face-to-face meetings and maintaining all contact in writing. Where LAs have sought to impose unreasonable conditions, we strongly advise parents to record all interactions and submit statutory subject access requests to scrutinise the personal data held by education and other agencies in order to prevent 'misunderstandings'. It should also be noted that child's plans require parental participation and consent, and may not be created or imposed by 'services' in their absence.

Question 8: Is the explanation of the process local authorities follow if they have concerns about the suitability of education being provided sufficiently clear and could it be improved?

There is considerable room for improvement of this section. As noted, there is no statutory duty to routinely monitor parental home education because parents are responsible in law for its provision and must be presumed to be acting in their children's best interests in the absence of evidence to the contrary (unlike schools, which are inspected on behalf parents). Evidence of reasonable grounds to believe that suitable education is *not* being provided is a pre-requisite for intervention. but the guidance is not sufficiently clear in this regard, with a significant risk of pro-school prejudice and home-eduphobia clouding professional judgement.

It is unhelpful to imply, albeit indirectly, that "exceptional circumstances" might exist to trigger an investigation of suspected parental educational neglect that might in turn permit enforced entry by an unknown LA employee to a family home and/or direct access to a child without the relevant threshold test having been met. This is at odds with the 1980 Act, which affords parents the right to provide evidence of suitable provision by appearing in person, with or without the child, before the LA or court if a SAO is issued.

There are established procedures to be followed in the event of child protection concerns being raised, all of which require skilled assessment and evidence to justify non-consensual intervention. Where a child is deemed to be at risk of significant harm, the relevant threshold test (which is not 'wellbeing') requires to be met in order to comply with the HRA and DPA, as upheld by the Supreme Court in the 2016 named person judgment and the case of EV (A Child) (Scotland) in 2017. It is also of concern that the 2014 national child protection guidance does not reflect the law as authoritatively interpreted by the highest UK court, and wrongly cites ICO 'advice' that had to be withdrawn in 2016, evidence for which we have already submitted to the parliamentary petitions committee:

> Under present Data Protection law it is perfectly acceptable and lawful for services to share information, where there is an indication that a child"s wellbeing is at risk. Under such circumstances consent is not required and should not be sought as the holder of the information can rely on alternative and more appropriate conditions from schedules 2 and 3 of the Data Protection Act 1998. This has been reaffirmed through the publication of advice by the Information Commissioner. (para 81); and
>
> ... where there is a risk to a child's wellbeing, consent should not be sought and relevant information should be shared with other individuals or agencies as appropriate. (para 91)
>
> Current Scottish child protection guidance not in accordance with the law
> http://www.gov.scot/Resource/0045/00450733.pdf

Malicious reports and referrals, often anonymously made, are becoming increasingly common as more children are home educated and visibly going about their lawful business in the community, with and sometimes without their parents. In order to avoid unnecessary distress to families, concerns raised solely on the basis of children not being in school, whether by individuals or other 'services', should not be pursued unless they are accompanied by credible evidence of parental neglect. Reported concerns that fall short of the significant harm threshold (which would almost always be the case in relation to allegations of educational neglect alone) cannot lawfully trigger data gathering and sharing without the consent of the parents and/or child, and contact with the family should first be made in writing to seek to establish whether or not education-related concerns may be justified. If so, the correct procedure would be to issue a SAO and/or make a referral to the reporter.

Section 5 - Good Practice for Local Authorities

Question 9: Are there examples of best practice from local authorities in Scotland (or elsewhere) that it would be helpful to reflect in this section?

The 2004 home education guidance included 'boxed' examples of good practice which we believe would be a useful addition to the revised version. There are a few examples of good practice by LAs in Scotland that are worth commenting on. North Lanarkshire has been consistent in adhering to the law and guidance thanks to having well-informed personnel who consult with local home educators and resolve any issues that have arisen in a timely manner. Dumfries & Galloway has recently engaged intensively with our local contact on a new draft policy to replace a non-compliant version that had been the subject of several serious complaints and had caused a breakdown in relationships. Several councils have veered from good to bad and back again, due largely to staff turnover and a lack of mandatory training for home education contacts who cannot even get the terminology right (e.g. the erroneous use of 'homeschooling'). We would recommend that LAs consult with home educators and conduct rights impact assessments prior to making policy changes.

Breaches of data protection due to misunderstanding of roles and responsibilities need to be expressly prohibited in the revised guidance in order to ensure compliance with the DPA and HRA, and 'fishing expeditions' ruled out in relation to processing withdrawal requests, since there is no lawful basis or statutory gateway to permit background checks on parents who are simply assuming or resuming their legal responsibility to educate, just as there is no lawful basis for applying conditions to other comparable parenting choices. Any welfare concerns that might result in delay or refusal will already be known to the local authority from whose school the child is being withdrawn. As previously pointed out by lawyer Allan Norman:

> "The Supreme Court held that nothing in Article 3 could extend the State's powers to interfere with the negative rights in Article 8.[23] The court also pointed out that in order to properly understand the child's best interests, Article 18 of the CRC comes into play[24]: 'Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern.'" [emphasis in judgment].

Clear and accurate information is almost universally lacking on LA websites and enquiries are on the whole poorly handled, some to the point of misinformation, so the guidance should more strongly assert the need for LAs to publish information for parents that is easily accessible via search, with a minimum requirement of a link to national guidance. It should further emphasise the right of parents to engage with the LA without the expectation of a visit or meeting, which must be recognised as being especially stressful for children on the autistic spectrum or suffering anxiety-related illness.

Failure to respect parental and children's rights has led to a culture of mistrust and it is vital that barriers are dismantled so that mutually respectful relationships

can be built. That home educators have had to submit FOI requests for the name of a 'point of contact', and to then have that information redacted, makes a mockery of the mutual respect the guidance is said to be promoting.

Accuracy and accessibility of information should not be the exception but the rule, and there is an urgent need for consistent policy and practice across LAs, with mandatory training for all personnel dealing with home education matters.

There is no "system of assessment and recording" for home educated children by LAs since it is parents who are responsible for the provision and assessment (if any) of education. Care therefore needs to be taken to ensure compliance with data protection legislation, including the right to access records held and seek amendment or deletion.

Cases we have been involved in include one where a parent's health records were unlawfully shared with the education service and used to imply mental illness, although the records were found to relate to a different patient with a similar name. Another parent had to obtain a court order and deploy sheriff officers to a council's headquarters to collect her records, which had been withheld, and found a catalogue of home-eduphobic comments and cavalier data sharing, contrary to her expressed wishes, by random unknown practitioners (with the notable exception of an educational psychologist who had complied with the law and is now the only professional the parent will engage with).

Too often, home education is seen as an inferior option and our recent report on our community's dealings with health visitors presents a bleak picture of discriminatory treatment based on ignorance and lack of respect for legitimate parenting choices.

Question 10: Are there additional resources that local authorities could make available to provide support to home educating parents and their children?

Having canvassed our members' views and invited suggestions for improved support, the vast majority wanted better and fairer access to exam centres as only a few independent schools currently accommodate external candidates.

In the past, some councils have allowed home educators to use teachers' resource centres, but this has been curtailed in recent years and families have largely made their own arrangements, with peer support, skill-sharing and activity groups springing up across the country. It would be a welcome goodwill gesture, with minimal cost implications, to offer home educators access to these publicly funded facilities and resources.

Given the number of children and young people with disabilities, chronic illnesses and severe school anxiety, who may be home educated on a

temporary or permanent basis, consideration should be given to the possibility of LAs funding virtual schooling for those who struggle with attendance. This would in our view represent a reasonable adjustment for children with ASNs and help avoid tribunal cases. We are aware of one child with ME who has been out of school for three years (still on the roll with no alternative education offered by the LA), but the parent's request for virtual schooling has been rejected, despite the failure of all 'multi-agency plans' to force the chronically sick pupil into school. Access to online schooling would be a cost-effective option in such circumstances, which might usefully be endorsed in the guidance as a reasonable adjustment for children who become home educated by default.

There is no good reason to discriminate against home educated children, who should be able to access council-run facilities and events on an equal basis to school pupils. They are too often an after-thought, if considered at all, as is the case with most policies which are essentially home education blind or directly discriminatory. Home educating families should not be patronised and relegated to the 'seldom heard' category when their children have been systematically excluded from services allegedly available to all. For example, despite being publicly funded, the National Parent Forum for Scotland has rejected engagement with home educators and has even blocked our Twitter account.

Section 6 - Efficient and Suitable Education

Question 11: Are there any further characteristics of a "efficient and suitable" education that should be included in this guidance?

Home educators were initially sceptical when a list of 'suggested characteristics' was first included in the 2004 guidance, but this has on the whole proved useful for parents in framing their proposals and has encouraged them to think carefully about their philosophy of education, available resources and how to tailor provision to their children's needs.

Although the CfE is said to have been based around the autonomous child-led learning favoured by many home educators, its outcomes-focused model (as with its 'big brother' GIRFEC) is anathema to those who prefer to take a children's rights-respecting approach, which a compulsion-based schooling system cannot realistically deliver.

As Katarina Tomasevski pointed out:

> The objective of getting all school-aged children to school and keeping them there till they attain the minimum defined in compulsory education is routinely used in the sector of education, but this objective does not necessarily conform to human rights requirements. In a country where all school-aged children are in school, free of charge, for the full duration of compulsory education, the right to education may be denied or violated. The core human rights standards for education include respect of freedom. The respect of parents' freedom to educate their children according to their vision of what education should be has been part of international human rights standards since their very emergence.
>
> *~ Katarina Tomasevski, first UN Special Rapporteur on Education*
>
> *https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2185*

We would reject the addition of vague, subjectively-applied CfE experiences and outcomes to the revised guidance and favour retaining the current list of suggested characteristics that have served both parents and LAs well since 2004.

Question 12: Do you find the table with examples of case law provided within this section helpful?

Given that “suitable and efficient education”, like “wellbeing”, is subjectively experienced and lacks a precise definition (rendering it inaccessible and unforeseeable in terms of the law for parents as education providers), established case law (i.e. Harrison and R) still offers the most useful interpretation, while the 2016 named person judgment and UNCRC make clear the limits of state interference with parental responsibilities and children’s rights. The 2015 CJEU Bara judgment is an additional reminder of the limitations on information sharing and should be highlighted along with the DPA 2018 to discourage blanket data trawling by LAs who persist in misconstruing negative duties as proactive powers that are likely to interfere with Article 8 rights.

References might usefully include books and academic studies of many different educational approaches. By way of example, Jan Fortune-Wood has written extensively on non-coercive, autonomous education and Terri Dowty’s book on home educating autistic children remains a go-to resource, while Dr Paula Rothermel’s research on academic attainment of home educated children from diverse backgrounds is regularly referenced. Influential authors, speakers and alternative learning proponents include John Taylor Gatto, John Holt, Sandra Dodd, Grace Llewellyn, Alfie Kohn and AS Neill, whose Summerhill ‘free’ school continues to flourish, demonstrating the success of education based on voluntary engagement.

Section 7 - Information for Parents

Question 13: Are there any other programmes (government or voluntary sector funded) that it would be helpful to reference in this guidance?

Access to the EMA has been a success story for home educated young people, but some LAs still wrongly claim they are ineligible which is disappointing. Similarly, home educated young people over 16 and are sometimes wrongly denied access to free dental and optical services, despite the government having helpfully issued new guidelines confirming eligibility after the anomaly was pointed out.

Equal access should be afforded to home educated children if they are not to suffer discrimination as compared with their schooled peers, no matter what services they wish to use via self- or parental referral, e.g. CAMHS, OT, SaLT. Access to diagnosis for specific conditions can particularly frustrating and parents have sometimes been obliged to pay for private assessments which are all too often not accepted by public sector service providers.

Issues have been raised with us about data collected and shared via the Young Scot card, and some disabled children and young people are not accessing discounted travel and other services to avoid the risk of their personal information being inappropriately shared. In the wake of the Irish PSC scandal, the government could usefully address this issue to increase participation and inclusion, although that may well be beyond the scope of this guidance.

Question 14: Given the development and accessibility of the internet is there scope to reflect the broader range of distance learning options available for home educated children?

Home educators are past masters in researching educational options and resources for their children. Thanks to now near universal broadband and advances in mobile technology, there has been an explosion in accessible learning opportunities since 2007. Much is free, and recommendations are regularly shared by home educators in national and local support networks, and sometimes through dedicated groups such as the exams and qualifications forum (which covers a range of routes for children, including IGCSE, A Level, OU modules, US based courses and distance learning, as well as full or part time attendance at FE colleges and university access courses). In short, the options are almost unlimited and our well-networked, self-reliant home educating communities have detailed knowledge of available learning options and opportunities and how to access them.

Section 8 – Children with additional support needs

Question 15: In what ways could this section be improved and reflect developments in support of children with additional support needs?

Children with ASNs are highly represented in the home educating community, and there has been a significant increase in their number and the complexity of reported needs and conditions that have been unmet (or cannot be met) in schools. There has also been a noticeable increase in parental dissatisfaction with ASN provision and schools failing to make reasonable adjustments. Moreover, some LAs are discriminating against ASN children who are home educated by denying access to diagnoses and services that would be available to schooled children, and there is evidence of home-eduphobic harassment of families with ASN children, especially those on the autistic spectrum, by certain councils. Some parents have even resorted to public protests and Section 70 complaints in order to draw attention to the problems facing children who are home educated and/or who are forced to accept reduced timetables (effectively illegal exclusion), which is often due to challenging behaviour that is inadequately managed and has sometimes resulted in injury or other harm. Our forum membership overlaps with that of other support groups, including those campaigning against the use of isolation and restraint in schools, and a range of peer support networks that deal with specific conditions such as ME.

Complaints to schools and LAs frequently go unrecorded and there is no adequate or affordable means of redress for parents who are often also full-time carers and cannot easily navigate the two-stage council complaints system prior to referral to the SPSO (whose findings may well be ignored). ASN tribunal applications are likely to increase among those who wish to secure reasonable adjustments for their children in schools, but support and advocacy is lacking, especially for those who live in remote areas. It is not coincidental that many more parents are now abandoning the system in order to provide for their children through home education, often citing safety fears, highly anxious and distressed children and discriminatory treatment. We do of course recognise the resource constraints on schools and LAs, but reasonable adjustments to support ASN children must surely be more pressing priority than universal,unlawful data gathering, which many parents and young people strongly object to when their children are unable to access suitable school education as is their right.

The guidance should make no reference to assessing a home educated child's environment simply because she has a disability when there is no evidence to suggest the parent does not have her best interests at heart when choosing a non-schooling option. It is the proposed provision that should be considered, taking account of any ASNs, not the learning environment which will in any case include a mixture of community and home-based settings. Unless it is requested or agreed by the parent, LAs cannot enforce assessment by an educational psychologist or other professional without a court order (a draconian tactic we have recently witnessed, which has left an autistic home educated child traumatised).

Refusal of consent to withdraw a child due to ASNs would require robust justification for interference with parental choice and might also constitute disability discrimination. Many of our members, including one of our administrators, home educate children with profound and complex disabilities, rare diseases and a range of additional support needs, and some have dispensed with educational psychology services and CAMHS when they see their children making progress in line with their ability - and crucially being safe and happy - out of the school environment. We have, however, encountered one exceptional senior educational psychologist

in East Dunbartonshire who has taken the time to gain an in-depth understanding of home education and should in our view be recognised as a specialist point of contact for her peers. This is one example of best practice that might be helpful to include in the guidance.

Although it is accepted that LAs have no statutory obligation to provide financial or other support for the home education of children with additional support needs, reference might usefully be made in the new guidance to the availability of self-directed support (SDS) via direct payments or funding allocations.

The revised guidance will need to include the most recent ASL legislation, in particular clarifying that it applies to 'pupils' and those children for whose education the authority is responsible. The Supreme Court has held that parents have the right to refuse offers of assistance from services and that there should be no risk adverse consequences for doing so.

> 95. Nevertheless, there must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered, especially in pursuance of a child's plan for targeted intervention under Part 5; and further, that their failure to co-operate with such a plan will be taken to be evidence of a risk of harm. An assertion of such compulsion, whether express or implied, and an assessment of non-cooperation as evidence of such a risk could well amount to an interference with the right to respect for family life which would require justification under article 8(2). Given the very wide scope of the concept of "wellbeing" and the SHANARRI factors, this might be difficult. Care should therefore be taken to emphasise the voluntary nature of the advice, information, support and help which are offered under section 19(5)(a)(i) and (ii) and the Guidance should make this clear.

However, parents do have the right to proactively seek support and assessment of their child's ASNs and it would be a welcome development if authorities and public services did not unjustifiably exclude home educated children from publicly funded services, as has been the experience of some of our members to date when seeking to self-refer.

Useful Contacts

Question 16: Are there any additional sources of help and support that should be reflected in this section?

All the home education support organisations listed in this section have moved addresses or are in some cases no longer operating. Social and peer support networks have largely replaced traditional organisations since 2007, and there are now too many to list comprehensively.

Membership of our independent Scottish Home Education Forum, which was established in 1999 and has an independent website and related social media presence, fluctuates around 3000, with direct links to numerous local and specialist support networks across Scotland. It is volunteer-run and takes a children's human rights-based approach.

As well as providing volunteer advocacy services for parents, we are sometimes invited to undertake informal sessions by agencies wishing to know more about home education. We also respond regularly to questions from professionals (including MSPs and lawyers, as well as education and health practitioners) who approach us but are ineligible to access our family support forum).

It is crucial that home educators are signposted to accurate sources of information and support, and we have had to complain about terminology and inaccuracies on the mygov.scot website which has yet to respond or amend its information. It is likely that our current research, which we aim to publish this autumn, will identify further gaps in reliable help and support for home educators.

Other Issues

Question 17: Are there any other issues which have not been addressed which you think would be useful to include during the review of the guidance?

To reiterate some of the points we made at a recent face-to-face meeting, we have continuing concerns about the *ultra vires* activities of some LAs. We met with both the Learning Directorate and GIRFEC team last year and provided specific examples of poor practice, requesting that the government issue a formal reminder to all 32 LAs of the statutory nature of the guidance and the non-negotiability of adherence to both the HRA and DPA.

We also asked for, and were assured of, a commitment to making training on home education mandatory for all family-facing professionals. Our subsequent report on home educators' experiences of the health visiting service, to which we have invited (but not yet received) formal responses from the government, the children's commissioner, the NMC and RCN, has revealed an underlying culture of home-eduphobia that extends across public services and has highlighted the need for urgent action to combat it.

A specific issue we would wish the guidance to address relates to non-resident former partners who seek to use their children's home educated status to undermine the role of the parent who has day-to-day care of the children following separation. Such individuals have been known to complain repeatedly to the LA, make malicious referrals to the children's reporter and/or make representations to MSPs and others in an effort to coerce their former partner into sending the children to school, causing enormous stress and anxiety in the process. In one such case, we were made aware of LA collusion with a former partner to administer tests to the children during an access visit, contrary to their own and their mother's express wishes. This is not an isolated case but one of the most underhand, unprofessional and long-running examples we have encountered of an attempt to exert coercive control over a home educating parent, whose children have twice been referred to the reporter with no further action taken, and who are under constant threat of school attendance orders agitated for by their non-resident parent. Our contention is that, since home education has equal legal status to council schooling, the parent with whom children ordinarily reside should be presumed, in the absence of evidence to the contrary, to be making educational decisions in their best interests, and that the children themselves should have the right to have their views fully respected rather than becoming victims of drawn-out parental disputes. LAs should avoid taking sides in such situations, which can only be resolved by the courts, in order to avoid any perception of discriminatory treatment.

Having previously been involved in the joint research with the then SCC that informed the 2007 guidance, we will be happy to contribute similarly to the upcoming review and believe our current research into LA policies and practices and home educators' direct experiences of them will be of particular assistance in the process. We firmly believe that this exercise represents an opportunity to ensure that the guidance complies with the overarching human rights and data protection legal framework, as well as fully recognising the rights of children (and

their parents as advocates of these rights) in advance of UNCRC incorporation into Scots law.