Taking Local Authorities to Task

An investigation and critique of Local Authorities' data protection policies and practices in relation to the withdrawal of children from school for elective home education in Scotland

Scottish Home Education Forum

https://scothomeed.co.uk

in collaboration with

Home Education Scotland

https://homeeducationscotland.org.uk

October 2020

Introduction

This piece of research stems from home educating parents' specific concerns about personal and special category (sensitive) data processing by Scottish Local Authorities (LAs) in relation to the formal withdrawal of children from state schools for elective home education.

These concerns were highlighted in our *Home Truths* report (published March 2020) and formed the basis of one of our 16 recommendations to the Scottish Government, which we believe would help redress power imbalances and improve relationships between LAs and home educators.

> *Since the provision of education is a parental function and parents are the legally recognised arbiters of their children's best interests, the guidance must expressly prohibit councils from routinely gathering and sharing families' personal data for the purpose of processing withdrawal requests. It should similarly prohibit councils from making withdrawal consent conditional upon parents and young people ceding their Article 8 and data protection rights, and the legal intervention threshold should be re-stated as 'risk of significant harm'.*

Due to the increasing volume of serious data-related complaints being reported by our forum members, it was felt that closer scrutiny of LAs' data protection policies and practices was warranted to further inform the upcoming review of statutory guidance.

Background

In Scotland, when parents choose to assume or take back direct responsibility for educating their children during the compulsory years, there should be no unreasonable barriers to their choice since 'education by other means' has equal status to council schooling under Section 30 of the Education (Scotland) Act 1980.

The same legislation specifies that, for those children of school age who have attended a public (council) school as pupils on one occasion or more, parents are ordinarily required to obtain the consent of the Local Authority for their formal withdrawal, but such consent may not be unreasonably withheld.

There are also several exceptions set out in statutory guidance which derives from the Standards in Scotland's Schools etc. Act 2000, including where families move out of the area, children have not attained compulsory age, where the child has completed primary schooling but not yet attended secondary school, where the child attends an independent school, or where the school has closed. It should be noted that no consent is required by parents to home educate *per se*, only to remove their child from a council school their child has attended as a pupil.

The consent anomaly, which does not apply in England and Wales where children may be 'deregistered' from mainstream schools upon written notification, is a discriminatory provision since it applies only to children who have attended a council school and who do not fall within one of the exceptions. It can also be easily circumvented by parents with the means to move areas or enrol children temporarily at an independent school.

A further concern for parents withdrawing their children is that some LAs and schools are openly hostile to home education and seek to substitute their own determination of children's 'best interests' (and their own subjective notions of 'wellbeing') for those of parents in order to justify withholding consent. Others have routinely contacted former partners for 'permission' without exercising due diligence or obtaining prior agreement, which has triggered incidences of renewed abusive behaviour and coercive control towards the parent with whom the child ordinarily resides. By contrast, no such 'permission' is sought from absent former partners for enrolling children in school.

Forum members have for some time expressed concerns about inappropriate and unnecessary data processing and the lack of prior notification of the relevant lawful bases for such processing, especially in relation to information gathering from, and sharing parental intentions with, schools and other services as part of the withdrawal process.

Given the seriousness of these concerns, and the ambiguity of current home education guidance, which is subject to the limiting provisions of overarching human rights and data protection legislation, we included the following recommendation to the Scottish Government in our *Home Truths* report:

> *Since the provision of education is a parental function and parents are the legally recognised arbiters of their children's best interests, the guidance must expressly prohibit councils from routinely gathering and sharing families' personal data for the purpose of processing withdrawal requests. It should similarly prohibit councils from making withdrawal consent conditional upon parents and young people ceding their Article 8 and data protection rights, and the legal intervention threshold should be re- stated as 'risk of significant harm'.*

Data processing by Local Authorities

When it comes to the processing of personal and special category data on children and their family members, the General Data Protection Regulation (GDPR), given effect by the Data Protection Act 2018, applies to all information that is gathered, stored, shared, deleted and otherwise handled by Local Authorities, schools and other services involved with the child (e.g. education psychology, speech and language, occupational therapy and/or health) who must have a lawful basis for such processing.

In this paper, we analyse the responses received from LAs to our freedom of information requests for the lawful bases being relied on by their data controllers with specific reference to the formal withdrawal from school of pupils whose parents have requested council consent.

Given that they should all be applying the same data protection and human rights principles to their activities under pertinent legislation and guidance, the inconsistencies were troubling, but some of the consistencies were even more so. Accountability is largely absent and one council even stated that the activities we were asking about constituted 'information gathering, not data processing'.

To be clear, the home education guidance, which is now 12 years old and scheduled for revision in 2020, does not (and cannot lawfully) provide justification for LAs to conduct data 'fishing expeditions' on home educating parents and home educated children unless

exceptional circumstances apply, e.g. compulsory measures are in place or evidence already exists of risk of significant detriment to a child when the parent initiates a withdrawal request.

Yet we have found that LAs, without exception, routinely share details of parents' requests and their proposed educational provision with schools, despite the processing of consent for withdrawal being an administrative task for the LA in which the school has no locus. Since few head teachers are conversant with the legislative framework around home education and lack knowledge and experience of education outwith the schooling system, incidences of misinformation, misrepresentation and obstruction by schools are regularly reported by our members, including distress caused to children by classroom interrogations without parental consent and unwarranted referrals to the children's reporter or social work.

Furthermore, the majority of LAs cite 'the guidance' as their allegedly lawful basis to carry out intrusive background checks with myriad 'services' on families who have simply exercised a valid and lawful choice to remove their children from school, relying in particular on ambiguous wording in Section 3.3 which still needs to be read in such a way as to comply with the Data Protection Act 2018 and the Human Rights Act 1998.

> *On receipt of a request from a parent, you should consider quickly whether there is any 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.*

Most LAs wrongly believe they have a statutory duty to ensure the suitable education of all children when that duty is in fact parental, even where it is delegated to schools. The LA duty is to intervene in the event of parental failure, for which evidence is required, and to ensure school places are made available for the children whose parents request them. Home education is in fact the default model, while schooling is an opt-in entitlement, much like the named person 'service' after the original scheme's evisceration by the Supreme Court and repeal of Parts 4 and 5 of the 2014 Children and Young People (Scotland) Act, all of which seems to have escaped the notice of a significant number of public-facing professionals.

As previously noted, some LAs also wrongly believe that their own determination of a child's 'best interests' (or 'wellbeing') takes precedence over that of parents and have unreasonably withheld consent for a child's withdrawal from school on the basis of that erroneous interpretation. Another worrying trend reported by our members is the covert contacting of separated former partners by LAs or schools to obtain their agreement as a condition of consent for withdrawal. This has triggered incidences of coercive and abusive behaviour towards the parent with whom the child ordinarily resides and will be the subject of a new piece of research.

In the light of our findings and numerous complaints raised by parents about unnecessary and excessive data processing for the performance of a simple and specific administrative task, we have asked the Scottish Government to provide urgent clarification for home educators and LAs that Section 3.3 of the guidance cannot be used to justify the routine gathering and sharing of personal and special category data on children and their parents.

The 'public task' basis that most LAs seek to rely upon needs to be sufficiently specific under the Data Protection Act 2018 (in this case, removal of a child's name from the school roll, which is the task provided for in the 1980 Act) and is further limited by Article 8 of the ECHR which mandates suitable safeguards to prevent arbitrary interference in family life.

Lawful bases for data processing

Under the GDPR, the processing of personal information is permitted if one of the six bases in Article 6 is satisfied. If the data is deemed 'special category' or sensitive - for example, if it reveals religious belief or political opinions, health conditions or sexual orientation - a basis in Article 9 must also be demonstrated.

In either of these cases, the fully informed, freely given **consent of the data subject** is a lawful basis for processing, which the data controller must be able to evidence.

Data may also be processed where it is **necessary to protect the vital interests of the data subject**, for example in an emergency medical situation or where a child is at imminent risk of significant harm.

Neither **contract** nor **legitimate interests** would be applicable bases for LAs' data processing activities in relation to home education and withdrawal from school.

A **legal obligation** or **public task** that is precise, foreseeable and limited in scope could allow for the 'necessary' processing of specific information. However, the processing must be a targeted and proportionate way of achieving a purpose that cannot reasonably be achieved by less intrusive means.

For accountability purposes, data controllers are expected to be able to **specify the relevant task, function or power, and identify its basis in common law or statute.** They must also be able to demonstrate that there is **no other reasonable and less intrusive means to achieve their purpose**. Mere assertion of a legal obligation or public task is not enough - 'working' must be shown!

As the instructing solicitor in the landmark 'named person' case has explained:

> *The limited nature of the function clearly identifies a pressing social need that justifies limiting the rights of the data subject in the narrow area concerned. The limited nature of the duty imposes its own safeguards and allows the proportionality of any interference to be challenged and assessed.*

In the performance of their duties and exercise of powers in the public interest, LAs and schools mostly rely on the public task basis for data processing, which may, where shown to be necessary or a proportionate means of achieving a specific purpose, involve gathering and sharing personal data with other public sector organisations. Maintaining attendance, attainment and pastoral records, details of EMA applications and awards, as well as contact details and communications to and from parents, could all reasonably be deemed necessary to fulfil a function in the public interest, as long as the processing is not excessive.

The purpose must still be sufficiently specific to satisfy GDPR requirements and comply with recent authoritative court judgments, including the Bara and 'named person' cases. GDPR Recital 58 also demands transparency where there may be several agencies processing data, e.g. Local Authorities, schools and allied support services, which might hinder data subjects' understanding of how their information is being used, from collection all the way through to deletion.

To summarise the key GDPR principles, all processing must:

- be lawful and fall under one of the six lawful bases;
- be for a clear purpose;
- minimise the use of data;
- maintain the accuracy of data;
- occur for no longer than necessary;
- be secure.

Applicability to home education

A more detailed overview of the legislative and policy framework that relates to home education in Scotland, along with commentary informed by counsel's opinion, is set out in our *Home Truths* report, but here we focus on the statutory bases for data processing claimed by LAs in the performance of their public functions, in particular their role in handling withdrawal from school requests by parents.

Education (Scotland) Act 1980

Under Section 30 of the Education (Scotland) Act 1980 parents have the legal duty to provide education for children during the compulsory years, either by delegating to a school or 'by other means', which includes elective home education.

Although no permission is required for home education *per se* since it has equal status to schooling, Section 35(1) provides that education authority consent is ordinarily (but not always) required for the withdrawal of a child from a council school, which may not be unreasonably withheld.

This constitutes a legitimate public function, which is rightly limited to the processing of withdrawal consent by the LA and instructing the school to remove the child's name from the roll. While it may be reasonable and proportionate to ask parents to provide information about their proposed provision of education, there are no circumstances in which it would be reasonable to expect them to cede their rights under the ECHR or GDPR, or to have to justify the exercise of an equal choice in law.

Section 37(1) of the 1980 Act sets out the powers of an education authority where it is *not* satisfied with the parental provision, namely to

> *serve a notice on the parent requiring him […] either (a) to appear (with or without the child) before the authority and give such information as the authority may require regarding the means, if any, he has adopted for providing education, or (b) in the option of the parent, to give such information to the authority in writing*.

Section 37(2) provides that if the parent

> *fails to satisfy the authority that he is providing efficient education for the child suitable to his age, ability and aptitude or that there is reasonable excuse for his failure to do so, the authority shall make an attendance order in respect of the child.*

Again, these are legitimate LA functions provided for in statute, which include suitable safeguards to prevent arbitrary interference with parental rights and responsibilities. It should be noted that children do not have the right to refuse school or to choose the means of their own compulsory education, which may or may not be in accordance with their wishes.

Standards in Scotland's Schools etc. Act 2000

Exploitation by LAs of the consent anomaly in the 1980 Act was identified as problematic in academic research prior to the passage of the Standards in Scotland's Schools Act 2000. After narrowly failing to secure its removal at Stage 2, a provision for statutory guidance on home education was included at stage 3, with the express aim of preventing councils from making unreasonable demands of parents and holding children 'hostage' in schools.

While LAs are required to have regard to this statutory guidance, it is not law and is therefore challengeable in the courts, as are local council policies that are incompatible with overarching legislation.

The 2000 Act affirmed the right of every child of school age 'to be provided with school education by, or by virtue of arrangements made, or entered into, by, an education authority', but this was 'without prejudice to the choice afforded a parent' by the 1980 Act.

It also placed a duty on education authorities (in respect of school education)

> *to secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential', as well as obliging them 'to have due regard, so far as is reasonably practicable, to the views (if there is a wish to express them) of the child or young person in decisions that significantly affect that child or young person, taking account of the child or young person's age and maturity.*

Home Education Guidance

Statutory guidance on home education aims to assist LAs in interpreting primary legislation and to protect parents and children from over-reach. Scheduled for its third review in 2020, the current version includes 'suggested characteristics' of suitable education and a recommended maximum timescale of six weeks for processing consent to withdraw a child from school.

As previously noted, some of the wording in the guidance, in particular Section 3.3, has created considerable ambiguity. This has led to LAs conducting 'background checks' on home educating families on a routine, not limited, basis as part of the withdrawal process, despite such checks being prohibited by law in the absence of strict necessity.

Recent landmark court rulings have upheld the threshold for interference with Article 8 of the ECHR as 'risk of significant harm', including the 'named person' (2016) and EV (2017) judgments, which re-affirmed parents as arbiters of their children's best interests unless the test of significant detriment is met.

The home education guidance essentially limits the grounds for refusing or delaying consent to (a) lack of an outline of suitable parental educational provision, and/or (b) child protection (not 'wellbeing') concerns, i.e. live cases already known to the LA. Only in exceptional

circumstances, commonly understood to be 'risk of significant harm' to the child, may the LA collect and share information incidental to the withdrawal process with other services without prior parental knowledge or agreement. Home education is no more of a risk to children than school attendance, and council consent cannot be contingent upon data processing that is not strictly necessary to fulfil that task.

Similarly, there is no provision in law for the 'monitoring' of home education, but councils are empowered to take action in the event of parental failure, for which evidence is required. Thus, the guidance sets out reasonable steps LAs might take to maintain contact with home educating families, such as annual requests for updates of provision. Access to family homes and interrogation of children cannot be insisted upon or coerced, and less intrusive means must be employed unless exceptional circumstances, such as a live child protection investigation, can be shown to apply.

It is worth repeating here that it is up to parents, not schools or LAs, to determine their children's best interests and that professional opinions are irrelevant in the absence of evidence of risk. It has been disappointing to see reports by our members of knee-jerk referrals by schools to social work or the children's reporter due to head teachers' disapproval of parental decisions, personal prejudices and ignorance of the law.

Children & Young People (Scotland) Act 2014

In terms of information processing as part of the GIRFEC policy (which is not supported by those home educators who prioritise children's self-determined rights over state-imposed outcomes), both the 2014 Children & Young People (Scotland) Act and 2013 'advice' from the Assistant Information Commissioner for Scotland (ICO) were responsible for introducing an unlawful threshold for non-consensual state intervention in family life (based on a 'notably vague' and subjective notion of 'wellbeing') in what proved to be an unsuccessful attempt to replace the established 'risk of significant harm' test that has been consistently upheld in key court rulings.

Parts 4 and 5 of the 2014 Act (providing for named persons and child's plans) never came into force and are now scheduled for repeal, while the 2013 ICO advice had to be withdrawn in the wake of the 2016 'named person' judgment. Nevertheless, we still receive regular reports of public services seeking to rely on the redundant and unenforceable sections of the legislation and/or the outdated ICO advice, which is inexplicably still referenced in the 2014 national child protection guidance and myriad public policy documents.

An Information Sharing Bill introduced by the government in an attempt to satisfy the Supreme Court ruling also had to be withdrawn in 2019 as it proved impossible to draft a compliant code of practice. Disappointingly, there remains a legacy of unlawful and abusive practice that has pervaded public services and left a trail of victims who have been denied access to justice.

Children Missing from Education

Another public function that is sometimes misinterpreted by LAs concerns 'children missing from education', who are defined in guidance as;

> *children and young people of compulsory school age who are not on a school roll* ***and are not being educated otherwise*** *(at home, privately or in an alternative provision). They have usually not attended school for a period of time.'* [our bold]

There is no obligation on families to 'register' or notify their home educating status to the LA (any more than there is to register as a vegetarian with the butchers' federation), given that parents are responsible for the provision of their children's compulsory education and are afforded choice as to the means they employ.

Children who have always been home educated or are withdrawn from school for home education are, by definition, not missing from education, so data processing as part of the CME 'tracing' function needs to be limited to those falling within that narrow definition and can only be lawful in relation to home educated children where there is evidence of significant detriment to a child's *welfare*.

UNCRC and ECHR

Although not yet incorporated into Scots law, LAs and schools have cited the UNCRC as providing a lawful basis to gather and share data on children, in particular Article 12, which, it is erroneously claimed, *requires* children to give their views on whether they wish to be home educated (yet curiously does not extend to canvassing individual pupils' opinions on their school education).

LAs are also routinely contravening children's right to privacy as enshrined in Article 16 of the UNCRC by claiming a 'public task' basis from soon-to-be-repealed, unenforceable legislation and discredited ICO advice in order to justify gathering and sharing their personal information without GDPR-compliant consent or legal necessity.

Having been gutted by the Supreme Court in 2016, the GIRFEC policy (which was intended to collect and share the personal data of all children, family members and associated adults without their consent) has had to be reset to a voluntary model with no statutory basis and, crucially, no adverse consequences for 'non-engagement'.

> *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 […] and the Guidance should make this clear*. ('Named Person' judgment, Para 95)

And as Para 89 of the same judgment affirmed in relation to actions by public bodies, nothing in Article 3 of the UNCRC (acting in the best interests of children and young people when making choices that affect them) extends the state's powers to interfere with the negative rights in Article 8 of the ECHR.

FOI responses from Local Authorities

The following FOI request was submitted to each of the 32 LAs in order to ascertain how they are processing parents' and children's personal and/or special category data when children are being withdrawn from school for home education.

Upon a request being received by the Council to remove a child's name from the school roll in order to be home educated, does the council process personal data to contact (a) the school and/or (b) other agencies as part of the process?

If so, what is the legal basis for (a) and/or (b)?

If so, how and when is advance notification provided to data subjects?

Please also provide your current Data Protection Impact Assessment for your Home Education policy.

Responses within deadline were received from 30 councils. East Lothian and Midlothian did not respond, but there may have been a delay in the delivery of our request to East Lothian.

Contact with the school

We first asked w*hether councils shared personal data with, or obtained it from, the child's school as part of the withdrawal process.*

All but one (29) of the LAs who responded stated that they **routinely contacted the child's school** on receipt of a parental withdrawal request.

West Dunbartonshire somewhat bizarrely claimed that such activity constituted 'information gathering, not processing of personal data'.

Renfrewshire invoked an exemption as the information was said to be publicly available. Its home education policy alludes to routine contact with the school on receipt of a withdrawal request.

Argyll & Bute, Clackmannanshire, Highland and Inverclyde specified that the purpose of the contact was to notify the school to remove the child from the roll. Perth & Kinross 'ordinarily' made contact without specifying at which point in the process.

Most referred us to their local home education policies or national guidance.

On reflection, our question was poorly worded as it is patently necessary in all cases for the LA to instruct the school to remove a child's name from the roll upon completion of the process. We should rather have asked at what point the school is *first* made aware of a parental withdrawal request.

Our members often complain about councils contacting their child's school without their knowledge, consent or legal necessity. Indeed, the school has no locus in the process as the 1980 Act places full responsibility on the LA, which may not unreasonably withhold consent from the subset of parents whose children are council pupils and cannot claim one of the exemptions.

While some schools actively lend support to parents who are withdrawing their children, most of our forum discussions have focused on the problems that have arisen from LAs' routinely requesting information and inviting comment from schools, often in cases where relationships with withdrawing parents have already broken down. For parents of children with disabilities and other ASNs, involving the school can be especially contentious.

Contact with other agencies

We also asked councils whether they shared personal data with, or obtained it from, other agencies as part of the withdrawal process.

Our emphasis in bold type has been added to highlight differing approaches by LAs.

Five LAs (Argyll & Bute, Clackmannanshire, Dundee, East Ayrshire and Falkirk) said they **did not share information with other services routinely**.

Eight councils (Dumfries & Galloway, East Dunbartonshire, Edinburgh, Fife, Renfrewshire, South Ayrshire, Shetland and West Lothian) confirmed that they **did share information with other services routinely**.

Renfrewshire claimed exemption as the information (confirming routine contact is made with other agencies) was said to be publicly available, and others mostly cited Section 3.3 of the home education guidance as justification for doing so.

> *In order to inform the decision-making process in respect of consenting or withholding consent to the child being withdrawn from school.* (Dumfries & Galloway)
>
> *School and relevant agencies are contacted to inform this information gathering. Information gathered is used to assess whether an efficient and suitable education is proposed, and whether there are any causes for concern related to the request.* (East Dunbartonshire)
>
> *Home Education Guidance sets out the process including the consultation with other Council services and organisations.* (Fife)
>
> *Parents are contacted to inform them that we conduct checks with social work to clarify if the family are known to them or not.* (South Ayrshire)
>
> *A check of SWIFT is requested to comply with Home Education Guidance.* (Shetland)
>
> *Partner agencies for this purpose include Social Policy, Police Scotland, Reporter to the Children's Panel and NHS Lothian.* (West Lothian)

Comhairle nan Eilean Siar said it contacted the Area Principal Teacher of Learning Support but did not mention other agencies, while Scottish Borders made reference to the guidance without specifying the extent of processing.

The remaining 15 councils said that they **sometimes shared information with other agencies as part of the withdrawal process depending on individual circumstances**.

Glasgow and Highland said they did so only where they had evidence of child protection concerns, while Angus indicated that social work and health would only be contacted if deemed necessary, also making specific reference to 'split families' and an alleged requirement to secure agreement for home education from both parents.

Where other services were known to be involved with the child, seven of the 15 considered it appropriate to gather and share information more widely. Most had already made contact with the child's school routinely (not always with parents' prior knowledge or approval).

> *Where there is a Lead Professional.* (Aberdeenshire)
>
> *Other agencies would only be contacted where the school has identified their involvement.* (East Renfrewshire)
>
> *May be advised by the school about the involvement of other agencies, e.g. social work services – this may then involve the processing of Special Category Data.* (Inverclyde)
>
> *Where other services involved, [we] will seek advice from the school and any other services that are engaged with the child in question.* (Orkney)
>
> *Depending on the circumstances, Social Work may be contacted*. (South Lanarkshire)
>
> *Other agencies are occasionally contacted if they are part of the Team around the Child, e.g. social work, educational psychology, and they are relevant to the request.* (Stirling)
>
> *If appropriate, and same premise as response to (a), it is information gathering – not processing of personal data.* (West Dunbartonshire)

The remaining five described a more proactive approach to gathering 'evidence' to justify further processing, including data fishing exercises that are subject to strict legal safeguards.

> *May liaise with others to ascertain existing evidence, including schools, social work, police, Reporter). (Aberdeen)*
>
> *A Carefirst check is requested to establish whether there are any child protection concerns that may have an impact on the request to withdraw the child from school. If concerns arise social work are consulted. (Moray)*
>
> *Depends on circumstances. Sometimes Reporter, social work if deemed necessary. (North Lanarkshire)*
>
> *Council records are checked to identify if there are any child protection concerns for the children for whom the application is being made. In addition, if there are services other than the school working with the child, these services may be asked to provide any comment they feel is relevant to the application. (Perth & Kinross)*
>
> *We have a duty to ascertain whether a young person is the subject of a referral to Social Work/Police, is on the Child Protection register, is subject to a supervision requirement, has been referred to the Children's Reporter or if there is any other evidence related to concerns around 'wellbeing'. We would only contact other agencies if a concern was noted. (North Ayrshire)*

North Ayrshire's reference to 'wellbeing' concerns being a trigger to share information is especially troubling as it does not meet the legal threshold for interference with Article 8 rights as affirmed in key legal rulings.

At the risk of labouring the point, guidance cannot ever exceed what is permitted in law and there is neither legal necessity nor lawful basis to permit the *routine* gathering and sharing of personal and/or special category data with a school or other 'partner' agencies for the

performance of a simple administrative task, namely consenting to the removal of a child's name from the school roll.

When parents have provided a cogent outline of their alternative arrangements, which need not resemble a schooling model, there are very few legitimate grounds for the LA to withhold or delay consent, i.e. prevent the exercise of parental responsibilities. Uncontroversial examples of exceptional circumstances would include situations where compulsory measures for child protection are already in place or where a child is known to be at risk of significant harm in line with the established legal threshold for compulsory intervention.

'Wellbeing' is not the relevant threshold for interference with parents' rights and responsibilities to determine their children's best interests, and the Supreme Court has already ruled in its 'named person' judgment that 'the promotion of wellbeing of children and young people is not one of the aims listed in article 8(2) of the ECHR'.

Quoting from the UNCRC in its 'named person' judgment, the Court also issued the stern reminder to the that:

> *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 supplied)

And lest we forget, from Para 73 of the same judgment:

> *The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way.*

Lawful bases for processing

We wanted to know which lawful bases councils were relying on to obtain and share parents' and children's data with schools and/or other agencies.

Our emphasis in bold type has been added to highlight the bases claimed by LAs.

As expected, the vast majority of LAs – 21 out of the 30 who responded – cited (or we could infer from their responses) **public task** as their main basis for processing, with a further five referring to both **public task and legal obligation** to fulfil a function in the public interest. One council claimed **vital interests** as an additional basis.

Angus, Dundee and Stirling pointed to duties set out in the **Education (Scotland) Act 1980** and South Lanarkshire referred to the necessity of 'discharging appropriate education to a pupil'.

Dundee - presumably confusing legislation and guidance with wishful thinking - made the startling claim that 'the Act also requires parents / carers to provide a yearly update on the pupils' progress and for the authority to monitor this'.

Meanwhile Stirling differentiated between contact with schools and other agencies, the former said to be covered by **public task** and the latter 'always with agreement from the parents/carers and children where appropriate', i.e. **consent**.

Seven councils (Edinburgh, Highland, Moray, North Ayrshire, North Lanarkshire, Perth & Kinross and West Dunbartonshire) said the **home education guidance** underpinned their data processing activities, most claiming it was necessary for them to be able to 'consider existing evidence' from their own records and other sources.

Perth & Kinross also mentioned the **Standards in Scotland's Schools Act 2000** from which the guidance derives, while Moray offered further details of information to be provided by schools about separated parents without specifying any statutory basis:

> *The legal team have been consulted and have advised that where parents are no longer living together there has to be agreement from both to withdraw a child from school. Schools provide this information.*

Aberdeen, Dumfries & Galloway and East Dunbartonshire referred to **both the 1980 Act and national home education guidance**. Dumfries & Galloway offered an especially fulsome explanation in relation to its processing of personal and special category data:

> *The Education Authority has a **'public task'** in terms of Data Protection Legislation to consult with relevant agencies before giving consent to the child's withdrawal from school. The sharing of the child's relevant personal data with relevant agencies, in order to gather information to inform the decision, is necessary and proportionate. It is also in the public interest that such inquiries are made and that the consent is informed and meaningful.*
>
> *Special category data may require to be processed such as the child's health information. This can be done lawfully if there is a substantial public interest in doing so with a clear basis in law. There are various public interest conditions which may apply such as safeguarding of a child at risk of harm or support for those with a disability or a medical condition. The Council's Legal Department can provide support to the Education Department is cases where the legal basis for sharing the information requires clarification.*

Scottish Borders, Shetland and West Lothian Council said that their data processing activities were legitimised by duties set out in the **national home education guidance and their local policies**.

Aberdeenshire described data processing as part of their role as a local authority to provide a service and enable them to carry out that role, from which we inferred a **public task** basis.

Inverclyde claimed **public task** for contact with the school and possible involvement of other agencies such as social work services, including the potential processing of special category data for reasons of 'substantial public interest', but did not refer to specific legislation or guidance.

Orkney also omitted to identify specific underpinning legislation to substantiate its supposed duty to ensure that:

> *…the [home education] proposal presents no infringement of the rights of the child, nor introduces risk to the child. This approach also serves to ensure that, should the request be approved, existing services and support will be continued without interruption. The recipients of such data, including, for example, schools and educational psychologists, will all come under the*

> *organizational <sic> structure and boundaries of Orkney Islands Council (the Data Controller) and, as such, no data is being shared.*

Renfrewshire referred us to 'publicly available information' which stated that the council was 'obliged to ensure homeschooling <sic> is appropriate to the child' and 'although not mandatory for a child to provide views on home schooling <sic>, asking for these is part of the process'.

South Ayrshire did not mention any specific legislation or guidance, simply stating that 'we do not share a large amount of data, only name, address and date of birth'.

East Renfrewshire and Falkirk claimed both **public task and legal obligation** in order to fulfil duties set out in the **Education (Scotland) Act 1980**.

Glasgow referred to a duty of care for 'all our children' and a **legal obligation** to ensure 'all children receive appropriate education'.

East Ayrshire also cited **legal obligation** under Article 6(1)(c) of the GDPR and **public task** under Article 6(1)(e), with duties said to derive, in the case of withdrawal from school, from **Section 35 of the 1980 Act**.

Fife referred to 'consultation with other council services and organisations' as set out in the **home education guidance** and went on to list several legal bases, including **legal obligation**, **public task** and even **vital interests** (surely a stretch in relation to withdrawing children from school):

> *The legal basis is predominately GDPR Article 6(1)(c) – **legal obligation** and Article 9(2)(g) and Data Protection Act 2018, Schedule 1, Part 2 (6) – **public interest/statutory obligations**. However, depending on the purpose of the processing, some aspects would be covered by Article 6(1)(e) - **public task** and Article 6(1)(d) – **vital interests**.*

Clackmannanshire did not specify any legal basis in its response, referring us to its **home education policy** on how to 'deregister' <sic> children from school.

Argyll & Bute did not answer our question, claiming that the processing was 'procedural rather than legal', while Comhairle nan Eilean Siar said it was 'not a valid request under FOISA' because it was 'a request for legal advice rather than recorded information'.

The now common practice among LAs of routinely gathering information from, and sharing it with, myriad agencies is one of the most contentious and complained about elements of the withdrawal process for those families who have been subject to intrusive background checks for simply exercising an equally valid educational option for their children. Ambiguous wording in the guidance has been claimed as justification to interfere with families' Article 8 rights and safeguards have been sadly lacking to prevent abuses of power.

We would stress that not all LAs engage in unlawful data fishing expeditions and recognise that the home education guidance is subject to the limiting provisions of overarching human rights and data protection laws which prohibit arbitrary interference with parents' and children's rights.

However, it has become apparent from many of our members' negative experiences that some councils are ideologically opposed to elective home education and do not respect its equal

status in law. As we noted in our *Home Truths* report, glaring inconsistencies in local policies and practice have led to a postcode and postholder lottery for parents seeking to withdraw their children from school, and there is no effective redress for victims of poor and sometimes unlawful practice, including malicious referrals to social work or the children's reporter.

Prior notification of processing

The 2015 Bara ruling by the Court of Justice of the European Union (CJEU) established the principle that prior notification is required for the transfer of personal data between public administrative bodies in order to ensure foreseeability and accessibility for data subjects.

We therefore asked LAs how and when advance notification of processing was provided to data subjects.

Our emphasis in bold type has been added to highlight differing approaches by LAs.

Eight LAs (Comhairle nan Eilean Siar, Dundee, Dumfries & Galloway, East Dunbartonshire, East Renfrewshire, Moray, Shetland and Stirling) said it was **communicated directly** to data subjects by officers.

Comhairle nan Eilean Siar and Dundee both said **parents were kept informed throughout the process**, while Dumfries & Galloway and East Renfrewshire said they **notified in writing** prior to the school being contacted and Moray indicated that it **notified parents of 'checks'**.

Stirling made **telephone contact with an offer to meet**, Shetland had **discussions with parents and referred them to local policy**, while East Dunbartonshire and Stirling mentioned **securing agreement (i.e. consent)** to contact other agencies.

Disappointingly Edinburgh mis-termed home education as 'home schooling' and volunteered information about flexi schooling in its response:

> *When parents apply for full home-schooling <sic>, the Officer has a conversation with them and **shares that checks are done with Social Work and the school**. For flexi-schooling, the parent speaks to the school prior to applying, however the same checks are carried out by the Officer.*

Four councils (Aberdeen, Falkirk, Orkney and Perth & Kinross) maintained that **notification could be presumed** in respect of parents who had initiated the withdrawal process.

Five (East Ayrshire, Fife, Glasgow, Inverclyde and West Lothian) said they directed parents to **information published on their websites**, with a further four (Angus, Clackmannanshire, Highland and Perth & Kinross) **notifying parents of their home education policies** and associated information.

Aberdeenshire and South Ayrshire Council (the latter stressing that it shared minimal information) **did not specify** when, how or if parents were given advance notification.

Four LAs (Argyll & Bute, North Ayrshire, Scottish Borders and West Dunbartonshire) said they **did not provide prior notification** to data subjects.

South Lanarkshire **conflated advance notification with consent**, stating that:

> *The Council would not seek the consent of the parent or the child (if over the age of 12) to share information. We are, however, in the process of revising*

our Home Education guidance for parents and our GDPR requirements will be addressed in the new version.

North Lanarkshire did not respond to the question.

We were disappointed by most of the responses as LA data controllers do not appear to have taken on board the necessity, under GDPR, of providing clear information to data subjects prior to processing their personal information, regardless of the lawful bases they may be relying on to do so.

Data Protection Impact Assessments

We asked each LA to provide a copy of its Data Protection Impact Assessment (DPIA) for its local home education policy.

The vast majority of respondent councils (26) said they had no DPIA.

Of the 26, eight (Comhairle nan Eilean Siar, Dumfries & Galloway, East Renfrewshire, Glasgow, Highland, South Lanarkshire, Stirling and West Dunbartonshire) claimed legitimate exemption since no changes had been made to their home education policies since the introduction of GDPR in May 2018.

South Lanarkshire planned to conduct a DPIA when its policy was updated and a further three (Dundee, Falkirk and North Lanarkshire) said they followed national guidance.

The remaining four respondents included East Dunbartonshire, which referred us to its privacy notice and Shetland which pointe to its Schools Quality Improvement Policy.

East Ayrshire and Edinburgh said the information was not held and West Dunbartonshire said its DPIA was ‘in progress’.

General observations from FOI responses

Responses to our latest FOI requests revealed the same worrying trends identified in our *Home Truths* report and previous research on home educators’ experiences of the health visiting service.

Our focus on LAs’ data processing activities in their fulfilment of a legal obligation and performance of a public task in relation to home education has led to the uncovering of more evidence of the postcode and postholder lottery facing families in their dealings with officialdom within an underlying culture of hostility and home-eduphobia.

Unsurprisingly, we have found once again that some councils are still failing to use correct terminology. For example, both Edinburgh and Falkirk persist in mis-terming home education as ‘home schooling’ and Clackmannanshire uses the English term ‘deregistration’ instead of withdrawal from school.

Examples of LAs and schools claiming that parents need ‘permission to home educate’, and that councils are responsible for the education of all children in their area when the duty to educate is exclusively parental, are too numerous to mention, along with the old ‘application for home education’ chestnut. Indeed Perth & Kinross refers ‘applications’, which include personal and sometimes special category data, to a ‘panel’ whose make-up and function are unclear and which seems designed to frustrate families and delay the withdrawal process.

Routine contacting of schools for comment on home education withdrawal requests is objectionable to the majority of home educators who expect to deal with the LA as set out in legislation. Most teachers have no experience or expertise outside the schooling system and are unqualified to comment on alternative learning approaches, so the involvement of schools in the withdrawal process is, at best, unhelpful and, at worst, undermines parental rights and responsibilities.

Contact with other agencies and data trawling expeditions by LAs is also deeply objectionable when home education is no more of a risk to children than, say, vegetarianism. Where there has been no indication that a child who is being withdrawn from school is at risk of significant harm, the test of 'necessity' for data sharing will not be met as the council's role is limited to processing consent based on proposed parental provision and the *absence* of risk of significant harm, a notably much higher threshold than the subjective notion of wellbeing that the Supreme Court dismissed as 'notably vague' and lacking precise definition.

Burdensome bureaucracy, lack of training, pro-schooling prejudice and a command and control culture within the public sector means that home educators frequently face an uphill battle in exercising their rights. Moreover, the high turnover of staff often leaves them with no point of contact at all, which is hardy conducive to building trusting relationships.

Case studies

Where council consent is required for the withdrawal of a child from a state school in order to exercise the exclusively parental duty to educate by other means, the processing of such consent is a legitimate task to be undertaken by the LA, whose consent may not be unreasonably withheld. However, neither legislation nor guidance confers powers on public bodies that arbitrarily interfere with Article 8 rights, as re-affirmed by the Supreme Court.

This point has already been conceded by one council in response to a home educator's complaint:

> *With regard to your concern about the implication that the Council's decision to proceed and contact other statutory agencies, without your prior informed consent, for checks on any concerns that they may have about your children, I find that you are justified in this aspect of your complaint. In relation to this specific point of complaint about the absolute decision by the Council to withhold consent from parents to home educate their children, if the parents do not give consent to the Council for undertaking their checks with statutory agencies, I find that there is nothing in the national guidance or the relevant legislation that confers either a duty or a power to support the Council's procedure and its decision in this respect.*

The Scottish Public Services Ombudsman (SPSO) also upheld a parent's complaint about unlawful and intrusive data fishing expeditions designed to obstruct her children's withdrawal from school:

> *The referral to the Reporter resulted in confidential information about your family being shared between a number of agencies (some of which was wrongly delivered and opened by an unknown third party who had nothing to*

> *do with your family). Your family was scrutinised for several months and your children's names added to the Vulnerable Persons Database. The intervention of the Children's Reporter effectively put on hold the application to home educate, while social work carried out an assessment. It is worth mentioning here that no grounds for action were established, and the social work assessment was very positive about the home schooling <sic>environment.*

Yet another parent encountered multiple obstacles when she decided to withdraw her son from school and shared this letter with us as an illustration of the council's 'disdain for home educators and human rights':

> *The council have a statutory duty to consider each request received. In this case (Named Officer) Learning Support Manager will engage with you on behalf of the council to complete the process in place to consider granting consent. Initially they will establish with the head teacher, the educational psychology service, social work services and the NHS whether there is any reason as to why permission to home educate <sic> cannot be granted. This letter is copied to a number of officers to that end.*
>
> *If objection is raised by any one of the range of professional officers engaged, the council and officers from partner organisations may then need to share any existing information relating to (child). The extent and nature of the information to be shared and the purpose for which it will be shared will be outlined to you and your consent will be sought. Any information sharing is likely to be used to inform a meeting focusing on the welfare and wellbeing of (child). Delay in providing consent, for whatever reason, will affect the timescale of this process and subsequent response to your application.*

In the above case, consent was clearly not the appropriate lawful basis for the council to rely on after mentioning a statutory duty in the first sentence. They went on to unlawfully obtain special category health data on the parent from the NHS, which had no relevance to parental competence or the child's education, yet was shared across agencies and used to withhold consent until the parent instructed solicitors.

One of our members, herself a victim of what she describes as 'GIRFEC gang culture', has commented on recently released information sharing guidelines that appear incompatible with the 2016 Supreme Court ruling and believes they invite legal challenge via the new group action route:

> *Practitioners using GIRFEC to obtain personal and third-party personal data from children that is not necessary for providing their service had better be careful. Vague and subjective 'wellbeing' data cannot be processed with consent unless freely given which falls foul of GDPR Recital 43. Are parents agreeing to the state creating low level wellbeing opinions about them and their children without evidence?*

The above cases represent the tip of an iceberg of data misuse reported by our forum members, and the FOI responses from LAs serve to illustrate the extent of over-reach that has gone unchallenged for too long.

ICO audit of DfE pupil data handling

On 7 October 2020, the UK ICO published the findings of its compulsory audit of the Department for Education (DFE) in England which focused on the handling of pupil data following complaints by Defend Digital Me and Liberty. The regulator found the department to be failing in its duty to process data 'lawfully, fairly and in a transparent manner' and made 139 recommendations for improvement with more than 60% deemed urgent or high priority.

Of particular relevance to our report on Scottish LAs which are subject to the same reserved data protection legislation is the criticism levelled by the ICO, that:

> *There is an over reliance on using public task as the lawful basis for sharing which is not always appropriate and supported by identified legislation.*

Our members have already expressed disappointment that the Assistant ICO with responsibility for Scotland has taken no action on similar data protection failings that have infected our public sector.

One asked publicly:

> *Any chance of an investigation into SEEMiS (Scottish pupil database)? Systematically, 'wellbeing' data is being unlawfully collected by Scottish education authorities below legal thresholds.*

adding that:

> *continuing failure to offer Scots the same protections that they offer the English is discriminatory.*

Similar criticism has been levelled at the Scottish Children's Commissioner (CYPCS) for refusing to represent young people whose UNCRC rights were infringed by multiple agencies when they were being withdrawn from school. A petition urging the Commissioner to reconsider his refusal to support them and other victims on the basis that his office 'cannot investigate every children's rights issue' has since garnered over 600 signatures, but a hierarchy of rights and rights-holders has clearly been permitted to evolve. The message is stark: children's data in Scotland, as in England, is deemed fair game for the state to use and abuse, even by 'watchdogs' with enforcement powers who were appointed to uphold the law.

Meanwhile a joint parliamentary petition by the Scottish Home Education Forum and Tymes Trust for a public inquiry into the human rights impact of GIRFEC since its inception is currently being considered by the Education and Skills Committee. It highlights the role of the Assistant ICO in facilitating a data free-for-all by issuing 'advice' in March 2013 at the behest of the GIRFEC Programme Board which later had to be withdrawn but lingers on in the mindsets of service providers.

In a response to a different home education related petition in October 2019, the Cabinet Secretary for Education and Skills helpfully separated and re-stated the relevant thresholds for state intervention on education and child protection grounds:

> *It is important to emphasise that these **provisions on education are separate from any wellbeing concerns regarding the child or young person that is being home educated**. Local Authorities have a duty to safeguard and promote the welfare of children in their area regardless of*

> *where there are educated. It is* ***always the case that if a child is considered to be at risk of significant harm, then practitioners have a duty to take necessary and proportionate actions to address those concerns through child protection procedures.*** [our bold]

And as we have been at pains to point out, the duty of LAs to safeguard and promote the welfare (and indeed 'wellbeing') of children in their areas does not extend to permitting unwanted and unnecessary interference with Article 8 rights.

Lawyer Allan Norman also reminds us that the Supreme Court left no room for doubt in its 'named person' judgment that:

> *positive state duties to protect families cannot metamorphose into positive state rights to direct families.*

Home education guidance review 2020

We are pleased to have had confirmation from the Scottish Government that the home education guidance review is shortly to go ahead after being interrupted by the Covid-19 crisis.

The Forum has already submitted a fulsome response to an initial discussion paper and published comprehensive research on relationships between home educators and LAs. We have circulated briefing papers to public and third sector organisations as well as to MSPs, several of whom have invited us to discuss our work and research findings in more detail. We have also met with Scottish Government on a number of occasions and continue to engage with the lead officer for the guidance review.

We understand that no changes are planned to primary legislation, which rules out the removal of the consent anomaly, but we have already made a series of recommendations for inclusion in revised guidance that would address the most serious concerns of home educating families. For example, we have called for a significant reduction in the timescale for processing withdrawal from school requests and a presumption of consent where LAs fail to adhere to it.

We also believe that education professionals who wilfully misrepresent the law in breach of their GTCS registration requirements (2.2.1) should face disciplinary action due to the damaging impact of such misinformation on parents of children whose needs are not met by schools, often as a result of failures to make reasonable adjustments under the Equality Act 2010. As our 2018 survey found, and our 2020 *Home Truths* research confirmed, children with disabilities, chronic conditions and other additional support needs (ASNs), are disproportionately represented in the home education community and their parents are more likely to meet with increased resistance and receive less favourable treatment from professionals when seeking to withdraw them from school.

Given the volume of complaints about data misuse raised by our members, and in the light of our further findings, we will once again be highlighting the need for the most problematic and ambiguous sections of the current guidance, in particular Section 3.3, to be re-written to comply with data protection, human rights and equality legislation in line with UK Supreme Court and CJEU judgments.

Having also discussed possible resolutions with colleagues with expertise in data protection and human rights law, we believe that LAs should be strongly urged to adopt new 'model'

guidance that includes detailed explanations of how it fits into overarching legislation. As well as protecting data subjects' interests, this would afford greater protection from legal challenges that may become more likely now that group action is available in Scotland.

Moreover, in anticipation of the UNCRC's incorporation into Scots law, much greater care needs to be taken to protect children from arbitrary interference with Convention rights in their entirety, including Article 16. It is morally wrong and reprehensible that home educated children and young people have had their rights infringed on a routine basis by prejudiced public services that are hostile to home education, and continue to receive less favourable treatment from those who are tasked with upholding these rights, including the ICO and Children's Commissioner.

Conclusion

Concerns over councils' and other services' cavalier attitude to data protection are among the most discussed by our members, whose data subject access requests have revealed catalogues of unlawfully obtained information, jaw-dropping factual errors and a culture of secrecy and contempt for parents who object to infringements of their own and their children's rights.

Since the publication of our *Home Truths* report, it has not been 'business as usual' for schools or home educators due to extended Covid-related restrictions and school closures from April to August. Our community has grown significantly over this period as more parents have embraced home education, having found it is nothing like schooling - even in the midst of a pandemic when home educators' community-based activities have been drastically curtailed.

Parental withdrawal requests have been handled inconsistently since March, with some going unacknowledged and reminders ignored. A small number of councils - already well known to us for their hostility to home education - have delayed or refused consent for no good reason, even where other services including health and social work have supported the families concerned. Other parents have simply been told their 'applications' are not a priority due to Covid and that council staff have no time to carry out the 'necessary checks'.

Responses to our FOI requests for details of LAs' data 'trawling' activities in relation to parental requests to withdraw children from school paint another bleak and inconsistent picture. Most described arbitrary interference with families' Article 8 rights as integral to the withdrawal process, despite there being no lawful basis for such intrusion and no adequate safeguards to prevent abuses of power.

Our longstanding concerns over data misuse have never been properly addressed and we are increasingly frustrated by routine flouting of the law by LAs. Some still appear not to realise that Parts 4 & 5 of the 2014 Act never came into force and are to be repealed, nor that the discredited ICO 'advice' from 2013 (which is still referenced in public policies, including the national child protection guidance) had to be withdrawn in 2016.

Given such ignorance of the law, we wonder what hope there is for UNCRC incorporation when the self-defined, rights-based, immovable object that is the Convention meets the state outcomes-driven, irresistible force that is GIRFEC?

To end on a more positive note, our colleagues at Home Education Scotland have been proactively engaging with councils to improve the visibility, quality and accuracy of home

education information on their websites, and have challenged the routine data sharing that has been adopted in local policies. Good progress has been made in some areas, notably Angus and South Ayrshire, but a few councils remain resistant to 'getting it right' and are remarkably defensive when challenged.

Another new and positive development has been the availability of a dedicated contact for home education within the Scottish Government who can now be reached directly by email at homeeducation@gov.scot.

We very much hope that the deep-rooted prejudices and problems we have identified at council level will be fully addressed in the upcoming review of the home education guidance, data protection being one of the key areas of concern, and that our research will usefully contribute to the process.