

Response to the Children and Young People (Information Sharing) (Scotland) Bill by the Scottish Home Education Forum

The Scottish Home Education Forum (established in 1999) is a busy peer support network of home educators, whose large and diverse membership is drawn from every local authority area in Scotland and whose collective knowledge, experience and expertise ensures that families who have opted for, or are considering, 'education by other means' have access to reliable information and support, as well as signposting to local groups and specialist resources.

The forum monitors policy and legislation which affects, or may affect, home education in Scotland, including developments in other parts of the UK, and takes a proactive stance in defending children's rights and parents' responsibilities in relation to education, care and welfare issues.

Home educators were among the first to identify legal problems with the Children and Young People (Scotland) Bill, with specific reference to the overarching human rights and data protection legislation with which the devolved Holyrood administration is bound to comply. We had regularly raised concerns over local authorities' misrepresentation and misapplication of the legal framework pertaining to home education and our members had reported increasing misuse of their personal data as a result of implementation of the GIRFEC policy (which lacked statutory foundation), and the premature *ultra vires* operation of named person schemes that sanctioned the misuse.

Our concerns had been robustly expressed, and summarily dismissed, during the passage of the 2014 Act. We subsequently supported the judicial review and joined the coalition of interests that opposed the legislation, sharing the evidence we had accumulated over 15+ years of following UK 'early intervention' policy, which had derived *not* from case reviews of the tragic deaths of children, as had been claimed, but from the UK government's 2002 policy document, [Privacy and Data Sharing: the way forward for public services](#).

This aimed to progress "*joined-up and responsive services*" which required agencies to share information in order to "*identify and support children at risk of social exclusion*" (as defined by government) and "*provide the support they need to keep them on track*" (as also defined by government). Tony Benn later hit out at his own government's policy, describing it as "*eugenics, the sort of thing Hitler talked about*". Human rights campaigners and the UK ICO meanwhile opposed it as an infringement of citizens' civil liberties which would also, inevitably, place the most vulnerable children at greater risk.

Scottish ministers were sent a [briefing paper](#) (originally submitted by home educators to the CME steering group) highlighting the dangers under England's *Every Child Matters* policy (the blueprint for GIRFEC) of universal surveillance and children's databases such as ContactPoint, which had become mired in controversy due to human rights and data protection problems.

These same dangers applied to GIRFEC, but remained unaddressed in the 2014 'enabling' Act, which was passed without adequate scrutiny or any meaningful debate as to its implications for children's and families' civil liberties. It also left concerned constituents unrepresented by elected members and let down public and third sector organisations who promoted (and in many cases still support) the opportunistic, unlawful breaching of privacy on the flimsiest of grounds, thereby condoning arbitrary interference in families' lives via routine non-consensual data processing and intervention below the established legal threshold (risk of significant harm).

Our forum also directly questioned the legality of [‘advice’](#) co-produced by the GIRFEC team and assistant Scottish ICO in April 2013, which effectively changed the law (on reserved matters, without reference to parliament) by lowering the threshold to a statutorily undefined risk (or potential risk) to the nebulous notion of ‘wellbeing’. This was a gross error of understanding of the use of public bodies’ statutory ‘wellbeing powers’ which are subject to the limiting provisions of the Human Rights Act.

It also came just weeks after a binding English [judgment](#) maintained the significant harm (child protection) threshold and awarded damages to parents whose rights had been infringed by Haringey Council. In short, that case established that ‘early intervention’ measures required consent in the absence of ‘necessity’ to protect a child’s vital interests. ‘Wellbeing’ concerns without evidence of significant harm, or the likelihood thereof (as assessed by trained social workers, not box-ticking amateurs), were not a valid way to circumvent data protection and Article 8 rights.

This point was highlighted during the passage of the 2014 Act by Allan Norman, the lawyer who had acted for the Haringey parents, in a [submission](#) on behalf of a home education charity in which he accurately identified the deficient provisions that would later be struck down by the Supreme Court.

The court ruling essentially nullified the assistant Scottish ICO’s information sharing advice which had become embedded in public policy from 2013 without any independent legal or parliamentary scrutiny. It directly contradicted longstanding UK ICO advice that had specifically [warned](#) against the blurring of information-sharing boundaries between child protection and lower-level concerns. The current bill also fails in this regard.

Similar debates had already been held in England on the threats to children’s and families’ rights posed by databases like ContactPoint, which was abolished in 2010 after a hard-fought campaign by children’s rights groups, including ARCH (with which our forum was closely allied), leading social workers, lawyers, academics, data protection experts and network security advisors.

Children with additional needs are disproportionately represented in home education community networks as many have been denied their right to education in schools and any effective right to redress. Families also home educate due to bullying, severe school anxiety and other school-related issues, while a growing number cite falling academic standards under the CfE, testing, GIRFEC outcomes and a preoccupation with intrusion into family life as reasons to reject schooling and, increasingly, other optional services such as health visiting.

The 2014 Act had the effect of eroding the already fragile trust in public and third sector services and has contributed to growing disengagement and resentment among parents and young people with genuine concerns, lived experiences and fully-documented evidence of services’ over-reach.

A plethora of ill-informed, intemperate and discriminatory comments by proponents of SHANARRI-engineered childhoods for all, including some elected members and heads of public services, have also betrayed an apparently widespread belief that human rights should only apply to those holding ‘approved’ views, rather than being universal in nature..

The Supreme Court judgment underlined the same problem with the legislation that forum members had repeatedly raised with elected members and service providers, namely that their personal data was routinely being processed without their knowledge or consent. Moreover it was being used to undermine their legitimate parenting decisions as members of a minority group with strongly held

convictions and philosophies of education which often profoundly differ from those of the state, its agencies and contractors.

These rights are enshrined in law and were directly referenced in the court ruling, but families had already been subjected to unwanted interventions (including the 'arrest' of school-age children going about their lawful business and repeated referrals to social work services for declining home visits or interrogations by health visitors). Meanwhile, services they had identified as being appropriate or necessary for their children were being withheld, or only made available on condition that they submitted to unreasonable demands.

Our forum considers that this bill does not address the fundamental problems raised by the Supreme Court ruling, but our members were excluded from participating in the 'intense engagement' that preceded its introduction, presumably because our stated position does not concur with that of 'preferred' stakeholders. We must therefore work from the assumption that our evidence of continuing failure to address the fundamental issues raised by the judgment will again be ignored.

However, our members take comfort from the fact that the law, as upheld by the UK's highest court, affords protection from arbitrary interference by state agencies seeking to enforce compliance with 'wellbeing' pathways and outcomes, no matter what the parliament proceeds to enact.

This bill is essentially superfluous in that the overarching legislative framework – now definitively interpreted in a binding judgment - has painted government policy into a corner where consent will be a prerequisite for wellbeing-driven data processing in the absence of justifiable, evidenced child protection concerns.

We would draw the committee's attention to comments on the bill by Allan Norman who accurately predicted that the 2014 Act would not survive a legal challenge on human rights and data protection grounds. He believes this latest legislative attempt does not meet the tests set by the Supreme Court and will also be liable to challenge.

Overall, we consider the bill to be a wasted opportunity to 'get it right' and embed the established legal threshold (risk of significant harm) into primary legislation, along with a statutory requirement for prior consent to be obtained before personal data is processed beyond strict necessity (including its collection, sharing, storage and deletion), preferably including an opt-in (not opt-out) to the widely-despised named person scheme.

'Wellbeing' lacks (and indeed defies) statutory definition, with the supposed indicators of its presence or otherwise being described by judges as "notably vague". The government's preferred notion of wellbeing, which is far from universally accepted, is outcome-based rather than rights-based (and does not derive from the UNCRC, as has been claimed), leaving it open to highly subjective, value-laden interpretation by uninvited strangers intruding into children's, parents' and associated others' private lives.

Data subjects (children and parents) must be able to prohibit the processing of information about themselves and third parties if they so choose, and any assessment of 'wellbeing' that is measured against the state's desired outcomes must be fully consent based, including the covert data collection activities conducted in schools where children are a captive, malleable and essentially subservient audience.

A Code of Practice is not a substitute for primary legislation, which demands precision so that citizens are afforded protection from abuse and suitable statutory safeguards to ensure access to justice in the event of over-reach. The bill and accompanying illustrative code appear to be an attempt to circumvent the court ruling by simply restating the primacy of overarching legislation while shifting responsibility (and blame) on to individual practitioners who are unlikely to have a grasp of the interface between human rights and data protection laws, let alone the concept of proportionality (which the GIRFEC information sharing lead struggled to explain on national radio).

The code expects that practitioners will all quickly become legal experts as they will have to document their 'balancing' calculations and show justification for every case in which they decide to process private information without the prior consent of the relevant data subjects (including 'collateral' third parties who happen to be tangentially associated with a child).

The resource implications are self-evident, and vulnerable children will unquestionably be placed at greater risk due to the deliberately blurred boundaries and delays that have been built in to the bill. Meanwhile, children services (including schools) can expect to be inundated with regular subject access requests, complaints and challenges to any non-consensual data gathering or sharing.

Presuming consent and/or obtaining it by coercion or misrepresentation (also known as 'data rape') will offer no defence, and the court ruling (para 95) made it clear that any advice and services may be declined by parents and/or young people; moreover, they should suffer no detriment as a result of non-engagement (of which we have ample recorded evidence).

As Allan Norman has previously noted; practitioners will be "damned if they don't share information when they should, and damned if they do when they shouldn't".

Under data protection legislation, soon to be strengthened by the GDPR, 'processing' is the regulated activity, which means that, from collection through sharing to deletion, consent must be obtained unless the processing is 'necessary' to protect vital interests and is in accordance with the law.

While the promotion of the state's own idea of wellbeing might be afforded the benefit of the doubt as being benign in intention, the court held that it is not an aim which can override the need for consent under Article 8(2) of the ECHR, so parents and children must be able to prohibit the use of subjective 'wellbeing' data and prevent fishing expeditions into their private family lives by named persons and 'partners' on frolics of their own.

Failure to build the requirement for consent into primary legislation will have the effect of discouraging disclosure of personal information and limiting families' engagement with health and other services due to concerns about excessive data processing. Children and young people will be especially reluctant to use confidential services if they have no control over who can access their most sensitive information.

Our forum receives numerous reports from parents about health visitors, nurseries, schools and third sector agencies using 'wellbeing wheels' and indicators to indoctrinate children into accepting the validity of government outcomes on all aspects of their lives, which essentially infringes children's rights to privacy and self-determination as sovereign human beings. Children do not belong to the state, but to themselves, and parents are presumed to give effect to their rights within the family until they have capacity to make their own informed decisions.

It is misguided to mandate one true 'universal pathway' to 'wellbeing' and 'getting it right' when 'wellbeing', 'it' and 'right' have all been pre-determined by the state and are not open to debate or challenge. If, as is claimed, the aim of this legislation is to give effect to children's rights under the UNCRC, imposing state-dictated wellbeing outcomes does the polar opposite.

Another crucial omission from the bill is its failure to provide any statutory means of access to justice which is both independent and affordable. Current complaints processes and redress mechanisms are unfit for purpose and some are demonstrably partial, with judicial review being largely inaccessible on cost grounds, especially in the absence of class action in Scotland.

As with employment tribunal fees, which the Supreme Court recently ruled to be an unacceptable barrier to accessing justice, the cost of judicial review must surely also be considered an unfair obstacle for the average citizen. Public services which misrepresent the law and/or act beyond their powers must be held to account, and be seen to be held to account, if public confidence is to be restored. This bill has missed an opportunity to remedy that deficit.

The named person as a single point of contact on a purely voluntary basis ("don't call us, we'll call you") has never been contentious, albeit requested services are often denied or unavailable due to resource constraints and/or lack of respect for parents' unique insight and understanding of their own children's needs. Indeed home educators have previously had to submit FOI requests to identify the council contacts who deal with home education issues, since little regard is paid to statutory guidance which requires accurate information and a named contact to be made available to them.

Allocated 'named persons' (if they can be identified) are generally ignorant of the law and often voice personal prejudices against home education (which has equal legal status to council schooling and needs no permission because the choice and provision of education is a parental responsibility). Some (but by no means all) have created problems for families who reject the CfE/GIRFEC outcome-based approach to education in favour of autonomous learning or unschooling, those who do not subscribe to the school-at-home approach, and even those who do where their perceived socio-economic status is not in line with middle class professionals' expectations.

Vexatious referrals to the children's reporter or social work services are commonly-used tactics when parents exercise their rights, only to be labelled as 'hostile' or 'non-engaging' and therefore a 'risk' to their child's 'wellbeing'. Disregard for the law and children's rights is overt among council-allocated 'named persons', many of whom seek to impose their own ideas of how children should be educated and how their 'wellbeing' should be safeguarded, when their role is in fact limited to taking prescribed actions in the event of parental failure.

Our forum members have regularly reported incidences of 'named person' gatekeepers preventing access to services, imposing unreasonable and unlawful conditions and/or forcing unwanted services on families. Along with intrusive snooping, a culture of bullying has become so ingrained that our members are advised to keep all communications in writing, to record all conversations, to disclose minimal personal information, to withhold or withdraw consent for records to be shared, and to submit regular subject access requests to each and every agency they have dealt with.

We have no reason to believe this bill will do anything to help rebuild the trust and confidence that has been lost as a result of the government's determination to cling to the wreckage of a discredited policy and force it on families who are philosophically opposed to it (nearly 37,000 Scots at the last

count). Scottish ministers have made no more a case for its necessity or proportionality than has been made by UK ministers for the snoopers' charter, which is also the subject of a human rights challenge and which, for the record, is also opposed by our forum.

As MSPs consider this bill and accompanying code of practice, they may wish to reflect on the counsel of Lyndon B. Johnson:

"You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered."

Many wrongs have already been perpetrated by wolves in wellbeing clothing and families deserve far better than this flawed attempt at 'putting it right'.

Having been excluded from the restricted stakeholder 'engagement' exercise, the Scottish Home Education Forum is willing to provide oral evidence to the committee based on our specialist knowledge and extensive research in this area.

Scottish Home Education Forum

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