Counting Children coalition

Committee Stage proposed amendment: Background

There is a common misunderstanding that the registers to be created through Clause 48 will be used to record children who are "not in school" or not registered on school rolls. This is incorrect and the registers will be far broader. Children in Alternative Provision, part-time or flexi-schooled children who are on school registers are to be included, as well as those electively home educated, or children missing education. See Bill Explanatory Notes (286).[1]

> "Section 436B(1) would impose a duty on a local authority to maintain a register of eligible children. Section 436B(2) to (5) sets out that a child is eligible if they are of compulsory school age, living in the authority's area, and are either not registered at a "relevant school" (defined in subsection (7)), **or they are registered as a pupil at a relevant school but it has been agreed by that school's proprietor that they can be absent for some or all of the time and receive some or all of their education otherwise than at a relevant school. This would include, for instance children who are flexi-schooled or who attend alternative provision otherwise than at a relevant school while remaining registered at such a school.** Subsection (6) sets out that regulations may be used to clarify whether a child registered as a pupil at a relevant school is in scope or not, and if so the cases when they are or are not eligible for registration on a local authority's Children not in School register."

These children who are on a school roll, are already named on school registers. As such their personal confidential data is available in real time to schools, and is already distributed across school Multi Academy Trusts ("MATs") and can be and is already made available to Local Authorities and the Department for Education on a named basis today. Access is based on the purposes of use, its necessity and proportionality, and there are no barriers to 'sharing' or granting access to children's named records in this way for compatible purposes.

Children's named data is sent every term from every state funded educational setting for children age 2-19 to the Department for Education termly, in the School Census.[2] This is one of seven different national census collections.[3] Another is the Children-in-Need ("CIN") census for which Local Authorities collect detailed, child-level information about all children who are referred to children's social care services, even if no further action is taken. This includes children looked after ("CLA"), those supported in their families or independently ("CSF/I"), and children who are the subject of a child protection plan.The detailed personal confidential data sent to the Department for Education includes all vulnerable children, including: unborn children; babies; older children; young carers; disabled children; and those who are in secure settings. The highly sensitive personal records include details of adoption, diability, sexual abuse, neglect, and "family dysfunction" (see Codesets page 63-69).[4]

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[1] Bill Explanatory Notes https://publications.parliament.uk/pa/bills/lbill/58-03/001/5803001en06.htm
[2] School census dates https://www.gov.uk/guidance/complete-the-school-census/census-dates
[3] See defenddigitalme research 2.1.10 Fig 1 A National Pupil Database Record over a child's lifetime https://defenddigitalme.org/research/the-state-of-data-2020/report/#h.m0h3lm6vel2l
[4] Children in Need national annual child-level census https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1025195/Children_in_need_census_2022_to_2023_guide.pdf

There is another separate named pupil-level collection of personal data from every child in Alternative Provision sent by Local Authorities to the Department for Education on an annual basis[5] and that already includes other AP unregistered providers.[6] The Department's guidance explains how codes are used to differentiate between status, for example using 'S' current subsidiary for pupils with dual registration.

> "Some pupils may legitimately appear on the AP census and the schools census. For example, where their main source of education could be in AP, but they could also be registered at a maintained school that has not arranged the AP."

Which children does the Clause 48 include who are not already known to services, counted somewhere by an educational setting, Local Authority and/or the Department for Education?

The only children we can see may be children who are not known to any services at all by choice, and a new compulsory duty on parents to register will not solve that. In fact the suggestion that police will have access to these registers or that they could be used punitively is more likely to drive parents making the decision to become less likely to choose to engage with *any* services including health. The LAs in *Counting Children* research all said that they would track such children on their existing registers if they became known to them.

There is no necessity for the new data powers in Clause 48 at all. There is however, a need to raise the standards and quality of data governance of the information already collected, and how it is collected and handled at Local Authority level, including their responsibilities towards families and explaining the rights of parents and children protected in law.

This proposed amendment is similar to the data processing Code of Practice set out in the Digital Economy Act 2017[7] to support better clarity, consistency and confidence in data processing at Local Authority levels. It would also raise the profile of the importance of knowing what you do, and being transparent about it, publishing the fact that such registers exist and informing families, which does not happen today (even though it should by law.)

Like the Age Appropriate Design Code created in the Data Protection Act the code would not be a new law but set standards and explain how UK data protection law applies in practice in the context of Local Authorities processing children's data across their services. It would follow a thorough consultation process that includes speaking with parents, children, schools, children's campaign groups, the Department for Education, Local Authorities and children's service providers.

Clause 48 explains how "new" registers it creates should operate, but in fact these registers already exist, so here we explain how a Code of Practice to address existing practice would address each part of the intended Clause which could instead be removed.

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[5] AP Census guidance https://www.gov.uk/guidance/alternative-provision-ap-census
[6] AP Census children in scope (at named pupil level)
https://www.gov.uk/guidance/alternative-provision-ap-census/which-pupils-to-include
[7] Digital Economy Act 2017 (Part 5, Chapter 1, section 43)
https://www.legislation.gov.uk/ukpga/2017/30/section/43/enacted

For the purposes of explaining what it would do, we take each part of Clause 48 using the Bill reference codes to demonstrate why and how each part of the Clause is taken care of by the replacement Code of Practice. You will note that the Bill reference codes (new clauses to be inserted into the Education Act 1996) are not mentioned in the drafting of the Clause, because those new numbers would not exist since the Education Act 1996 would not have them inserted.

The Code of Practice, like Clause 48, leaves some discretion for detail to be written during its creation. For example in,

> "1(d) the nature and frequency of data processing demands by a public authority."

This would take care of the intent of Clause 48 Section 436C(1) sets out the information that must be contained in a register. This includes in subsection (1)(c) details of how the child is being educated, which would be set out in regulations, but is likely to include for instance details of out-of-school education providers being used. Subsection (1)(d) also gives scope for further information to be prescribed for inclusion, as set out in regulations. Section 436C(2) allows a local authority to also include any additional information they consider appropriate within the register that has not been stipulated in legislation.

While Clause 48 suggests a section 436C(3) that sets out that regulations may be used to specify how a local authority must maintain and publish their register, the form it should take, and how local authorities should publicise how their registers operate in order for parents to know what they are required to do and the timelines they are to work to. – instead, the Code of Practice could do all of that through

> **"**(1)(a) The Information Commissioner must issue a code of practice about obligations and rights when processing personal information of parents and children under the Act by, local education authorities and their further processors".

Clause 48 Section 436D(1) is perhaps one of the most contentious in the Home Education sector, as it requires parents of eligible children to *"inform the local authority of specified information – child's name, date of birth, home address, name and home address of each parent of the child, any details of the means by which the child is being educated that are set out in regulations, and <u>such other information as may be prescribed</u>*" – which is open ended. Subsection (2) sets out that parents whose children are already registered with their local authority must provide specified information to their local authority on request. Parents of an eligible child must inform the local authority of any changes to information that is required for the register, such as changes to the home address of the child, and when the child ceases to be eligible, for example if they move outside of the local authority area.

The Education Act 1996, s436a already requires by law that Local Authorities identify children not in receipt of suitable education. Research by the *Counting Children* coalition, shows that Local Authorities already keep registers of children in receipt of home education in order to fulfil this existing statutory obligation of identifying which children are not receiving "a suitable education" at all. A <u>significantly</u> smaller number of known children missing education "CME" (registered as CME and known to services), are of unknown whereabouts.

This was researched in 2014 through FOI requests by the NCB and counted 1,022 children as once CME but "off the radar" and extrapolated to estimate 3,000 children nationally[8]. *Counting Children* is currently conducting our own research in this area.

Furthermore, should any child deregister from an educational setting, Local Authorities are already obliged to record this under the Education (Pupil Registration) (England) Regulations 2006, and Local Authorities choose between fifteen different codes to record the reason for the deregistration, including Elective Home Education.[9] Again, research by the *Counting Children* coalition, to date from 60% of Local Authorities shows that 100% of local authorities who replied already does this.

As written in Clause 48, Section 436D(5) provides that this requirement of parents to provide information to their local authority does not apply when the children are receiving full-time education by a combination of attendance at a relevant school, arrangements made under section 19 of the Education Act 1996 by the local authority and/or similar arrangements made by a relevant school. But it is very unclear why this register has been labelled a "Children Not in School Register" since in practice, this will include those children for registration who have been placed in alternative provision (otherwise than at a relevant school) part-time, or where children receive the remainder of their education at a relevant school, or are flexi schooled. There is no clear reference made to virtual schools, or other non full time arrangements, all of which are already able to be recorded. Rather than the Clause leaving open the Bill to "fix" this confusion and gaps in who is in and who is out of scope to regulations, there is simplicity and better clarity by creating a Code of Practice that covers all children's data handling without differentiating between the handling of some children's and not others simply based on setting.

Therefore, rather than a new Clause 48, the Code of Practice, like Clause 48, leaves some discretion for detail to be written during its creation about what information should be necessary and proportionate to meet standards such as data minimisation, again set out in the Code "1(d) the nature and frequency of data processing demands by a public authority."

While Clause 48 Section 436D(3) and (4) sets out an unrealistic and punitive 15 day timeframe that parents have to comply with in providing relevant information to the local authority, the Code can stipulate both rights as well as responsibilities for parents and Local Authorities when cooperating to process children's personal data for these purposes, and through a constructive rather than punitive framing, we believe that it is much more likely to achieve the aims of Clause 48 than its current wording.

Clause 48 Section 436E says it creates a system for local authorities to require certain persons to provide information about educating establishments.

> *"Subsection (1) means that the system applies to any person that a local authority in England reasonably believes is a provider of out-of-school education to an eligible child, without a parent being present, for more than a prescribed amount of time. Subsection (2) defines "out-of-school education" and "prescribed amount of time".*

[8] Ellison, R., and Hutchinson, D. (2018). National Children's Bureau. Children missing education report. (page 5) https://www.ncb.org.uk/sites/default/files/uploads/files/Children%2520Missing%2520EducationFINAL.pdf

[9] For example Bristol https://www.bristol.gov.uk/documents/20182/34960/CME+Guidance+for+schools Grounds for deleting a pupil of compulsory school age from the school admission register as set out in the Education (Pupil Registration) (England) Regulations 2006 (as amended) https://www.legislation.gov.uk/uksi/2006/1751/regulation/8/made

It is unclear what this is trying to achieve above what is already required in law. Chapter 1 of Part 4 of the Education and Skills Act 2008 ("the 2008 Act") provides for independent schools to be registered by the Secretary of State for Education. It is an offence to conduct an unregistered independent school the definition of which appears to remain unchanged. Regulations made under section 94 of the 2008 Act set out the standards that all independent schools in England must satisfy as a condition of registration – "the independent school standards" ("ISS"). The standards are set out in the Schedule to the Education (Independent School Standards) Regulations 2014 (as amended).[10]

The fact that Clause 48 Section 436E(6) is needed for changes to be made in regulations, and sets out that regulations may provide exceptions so that some out-of-school providers are to be exempt from the duty to provide information–for example, informal groups of home educating parents or museums that offer extensive educational programmes to children–appears to show that this is ill-thought out, who will in fact be in and out of scope or that the powers are drawn too widely, and monetary penalties too punitive, if they need fixed afterwards by regulations.

Clause 48 Section 436F(1) is unnecessary since the Secretary of State already has these powers. It requires local authorities to provide prescribed information from their registers to the Secretary of State (in practice the Department for Education), as directed by the Secretary of State. *The Education Act 1996 c.56 Part I Chapter VI Section 29 Provision of information*[11] already includes the data processing powers between the Local Authority and Secretary of State proposed under 436F(1).

> *"Provision of information by local authorities. (1)A local authority shall—*
>
> *(a) make such reports and returns to the Secretary of State, and*
> *(b) give to the Secretary of State such information,*
>
> *as he may require for the purpose of the exercise of his functions under this Act."*

In fact section *The Education Act 1996 c.56 Part I Chapter VI Section 29*(4) provides that,

> *"The Secretary of State shall exercise his powers under subsection (3) so as to secure, in particular, the provision of information relating to the provision of education for children with special educational needs."*

What efforts has any Secretary of State made to use this power to address the provision of education for children with special educational needs, since lack of such provision is recognised as one of the reasons why many children are out of school in the first place?

Clause 48 S.436F(2) authorises local authorities to provide information from their registers to persons (to be set out in regulations) if it is for the purposes of promoting or safeguarding the education, safety or welfare of the child or any other person under the age of 18.

Again, these powers already exist (for example expressly in the Digital Economy Act Part 5, Chapter 1, s40(2)(f) including schools, national government and local public authorities) and

[10] Registration of independent schools. Departmental guidance for proprietors and prospective proprietors of independent schools in England. (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865049/BRANDED_independent_school_registration_guidance_21_August_2019Ms.pdf

[11] The Education Act 1996 c.56 Part I Chapter VI Section 29 Provision of information https://www.legislation.gov.uk/ukpga/1996/56/section/29

across a number of further duties affecting public authorities and are not needed to be set out again. The Code of Practice could clarify data processing around the important area of, "*the purposes of promoting or safeguarding the education, safety or welfare of the child*" and tie together the various pieces of law which affect it for Local Authorities. This would address the handling of such data for all children, not only the "new" registers for these children, but all children and better support local authority staff and their wider data processors / prescribed persons with whom they share children's data.

Therefore, nothing in today's law prevents local authorities from providing necessary data about a child who will move, or has moved, to another local authority area. So section 436F(3) is not necessary either.

Section 436H gives the Secretary State the power to give statutory guidance to local authorities in England, on the operation of any of the above powers and duties; and requires local authorities in England to have regard to this guidance. The Department for Education is not in a good position to give guidance on data. The 2020 ICO audit findings included 139 recommendations for improvement and >60% classified as urgent or high priority. ***"Urgent priority recommendations …represent clear and immediate risks to the DfE's ability to comply with the requirements of data protection legislation".***[12]

The parts that remain of Clause 48 (that would be deleted) include

A duty to support parents (in practical effect, those who home educate).

This duty is so open ended as to be somewhat meaningless and no more than is already done or not done today and excludes specifically a large number and in fact those who may have most needs. If so desired this could be included separately in the Bill but needs strengthened to be useful rather than interfering and there is no reason why this cannot happen already today.

(1) Section 436G(1) a duty on Local Authorities to support and promote the education of children that are included in their register, if requested by the parent of a child on the register. Section 436G(2) gives discretion to the local authority to decide what they feel is most appropriate in regard to meeting the parent's request for support. They must consider what the parent has asked for, but the local authority can decide to offer a different kind of support instead. Section 436G(3) gives examples but a local authority does not have to provide all or any of these and could choose to provide or arrange support in a form not listed. Section 436G(4) means it excludes help to those dual registered in alternative provision arranged by their school, flexi-schooled children and those that are (or ought to be) subject to an arrangement for the education of the child under section 19 of the Education Act 1996 and / or section 42 of Children and Families Act 2014 (i.e. those who have been placed by the local authority in alternative provision or have an education, health and care plan).

[12] Defend digital me assessment of the ICO 2020 audit of the DfE (one year on) https://defenddigitalme.org/2021/10/07/the-ico-audit-of-the-department-for-education-one-year-on/

Monetary penalties for failure to provide information.

This is highly concerning for groups who collectively educate their children otherwise, perfectly within the law and meeting their own rights as parents and the rights of the child to education (Article 26, UDHR (1)(2)(3).) Subsection (4) of clause 48 inserts a new Schedule 31A, after Schedule 31 of the Education Act 1996, which sets out details relating to the failure to provide information under section 436E (provision of information to local authorities: education providers), including the imposition of monetary penalties.

(2) A new Schedule 31A, via subsection (4) of clause 48, the imposition of monetary penalties. Paragraph 7 of the inserted Schedule 31A sets out that, in case of non-payment, the penalty would be recoverable as if the person had been ordered by the county court to pay it.

There is some concern that parents will be subject to fines as “education providers” even if the local authorities demand excessive data and without restriction on type and frequency, in order to discourage such models of education provision, and that if, “the penalty would be recoverable as if the person had been ordered by the county court to pay it” that could mean automatic deductions from welfare payments or wages. The Department could be asked to clarify if they can rule out that this would ever be the case.

The broad policy remains unevidenced that any fines are beneficial or effective for children and families, indeed the opposite was found where it has been researched (Zhang, 2008).[13]

[13] Zhang, M. (2007). School Absenteeism and the Implementation of Truancy-Related Penalty Notices. *Pastoral Care in Education*, *25*(4), 25–34. https://doi.org/10.1111/j.1468-0122.2007.00422.x

Amendment Explanatory notes summary

The processing of personal data of children not-in-school by Local Authorities already happens. Local authorities in our research cited a number of both legislation and guidance which bestowed duties upon them authorising the collection of the children's data. (The Children Act 1989, Duty to identify 'Children Missing Education' (s436a Education Act 1996), Education (Pupil Registration) Regulations (England) 2006, Children Missing Education Statutory guidance for local authorities 2016, the Elective home education: departmental guidance for local authorities 2019) The personal data of the other children in the scope of the Schools Bill Clause 48(5)(b) (ie Alternative Provision, flexi-and part time schooling) is already processed on the school roll/registers. The Education Act 1996 *c.56 Part I Chapter VI Provision of information* also already includes the data processing powers between the Local Authority and Secretary of State proposed under 436F(1) of the Act in Clause 48 of the Schools Bill. This amendment will bring all data processing by Local Authorities under a consistent Code of Practice to provide governance of the new and existing powers to be exercised by Local Authorities and the Secretary of State. This would also provide oversight of the powers of Local Authorities 436C and the Secretary of State powers in the Schools Bill to expand 436D what data items may be collected, expand the list to whom identifying data may be given and for what purposes 436F, creating consistent processes for family notifications before data is collected, and guidance on the capacity of the child and parental rights. Provision of information from parents to the Local Authority is today characterised as a power imbalance without redress creating a "one-way mirror" without transparency or accountability from the LAs' side. A published register must show where personal data has been passed on to (a register of third party use), updated in a timely way and parents should be provided with a free copy of their record on request (*charges are proposed under reforms set out in the DCMS Data Protection Act consultation, Data A New Direction*) to check for missing data, make corrections, and be assured with whom what data has been shared.

Clause 48, page 40, line 25, leave out 'Registration' and insert 'Data processing'.

Clause 48, page 40, line 27, leave out 'After section 436A insert—' and insert 'After section 30 insert—'.

Code of practice

(1) The Information Commissioner must issue a code of practice about—

(a) obligations and rights when processing personal information of parents and children under the Act by,

(i) local education authorities and their further processors, and

(ii) disclosure to the Secretary of State, or any other prescribed person under the Act,

(b) a Local Authority duty to maintain a transparency register of third-party data processing about children and families under the Schools Act 2022 or Education Act 1996,

(c) the right of parents and children to make a Subject Access Request without charge in order to receive a copy and validate the accuracy of personal data held by the Local Authority on no less than an annual basis, and to request correction where necessary,

(d) the nature and frequency of data processing demands by a public authority.

(2) The code of practice must be consistent with the code of practice prepared under section 121 of the Data Protection Act 2018 (data-sharing code) and issued under section 125(4) of that Act] (as altered or replaced from time to time).

(3) A public authority must have regard to the code of practice in processing and disclosing personal information.

(4) A data processor or data controller must have regard to the code of practice for the processing of information under the Act by any person who is accredited under—

(a) section 71(1)(a) of the Digital Economy Act 2017; or
(b) any prescribed person under the Education Act 1996; or
(c) the Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009; or
(d) any other person.

(5) The Information Commissioner may from time to time revise and re-issue the code of practice after consultation with—

(a) the Minister for the Department for Education,
(b) the Statistics Board,
(c) the Welsh Ministers,
(d) organisations that represent the interests of children and families and such other persons as The Information Commissioner considers appropriate.

(6) The Information Commissioner may not issue the code of practice unless a draft of the code has been laid before, and approved by a resolution of, each House of Parliament.

(7) In disclosing information, a person must have regard to the further codes of practice issued by the Information Commissioner under section 128 of the Data Protection Act 2018 (other codes of practice), so far as they apply to the information in question—

(a) any code which makes provision about the identification and reduction of the risks to privacy of a proposal to disclose information;
(b) any code which makes provision about the information to be provided to data subjects (within the meaning of that Act) about the use to be made of information collected from them.

###

Schools Bill Committee Stage

Our *Counting Children* coalition research to date with responses from 60% of Local Authorities ("LAs") found that 100% who responded (107), already track children in the scope of the Bill.

Does the Local Authority track children who are deregistered:	YES	NO	DID NOT YET REPLY
to receive an education otherwise than at school	107	0	69
due to permanent exclusion	106	0	70
due to unauthorised and unexplained absence (authorised absence plus ten days or 20 days) for which reasonable enquiries have been unable to resolve	100	2	73
to move from state into private education	90	3	83
to move out of independent (private) education to anything else	90	7	79
Do you track children whose destination is unknown leaving	**YES**	**NO**	**DID NOT YET REPLY**
Nursery	81	7	88
Alternative provision	96	2	78
Custody	93	2	81
Post-16 education	85	7	84
Do you track children if the authority becomes aware of a child	**YES**	**NO**	**DID NOT YET REPLY**
educated otherwise than at school (Elective Home Education "EHE")	106	0	70
about whose education there is nothing known	102	4	70
whose parents the authority considers to be failing to provide a suitable education (Child Missing Education "CME")	105	0	71
Do you track children who the authority has children in its geographical area that may be passing through but not in education	**YES**	**NO**	**DID NOT YET REPLY**
child born outside England	85	13	78
child of a service family (army, navy etc)	86	13	77
child of a family without permanent address	91	7	78

Notes: FOI obtained data from Local Authorities ("LAs") in England and Wales (as of June 5, 2022).This is ongoing research and will be updated with responses as returned.

(1) Four LAs that responded no to tracking children about whom nothing is known, said they could not if *nothing* was known, but suggested they would track if they became known.

(2) Named data on pupils in Alternative Provision, and/or unauthorised and unexplained absence is already recorded at educational setting / school level daily and is shared in the school census termly at Local Authority and national ("DfE") levels. The Department for Education has furthermore already begun real-time live (data transfers every 2-4 hours) tracking of named attendance / absence data with 13,000 schools (as of May 2022) and intends this real-time tracking to apply to all 8 million+ pupils from September 2022.

With reference to

The Schools Bill https://bills.parliament.uk/publications/46433/documents/1770
The Education Act 1996 https://www.legislation.gov.uk/ukpga/1996/56/contents