Counting Children coalition

Report Stage proposed amendment: Briefing

During the Schools Bill Committee Stage debate peers raised a wide range of concerns and failings around data practices in Local Authorities ("LAs") and the powers it specifies for the Secretary of State to extract data from LAs. We propose a Code of Practice is needed to address existing processes, not new powers in new law.

These plans are part of policy aims that bring a securitisation approach to school attendance through more surveillance, and that will be joined up with the Department for Education Attendance Alliance work — including Home Office and police.[1]

While the government may claim that a Code of Practice is unnecessary because data processing must be compliant with the UK Data Protection Act 2018, in practice the Department for Education does not meet these standards in pupil data processing. The 2020 ICO Audit[2] **found a range of failures and made over 139 recommendations:**

- "The DfE cannot demonstrate accountability to the GDPR"
- "The DfE are not providing sufficient privacy information to data subjects as required by Articles 12, 13 and 14 of the GDPR."
- "The DfE are not fulfilling the first principle of the GDPR, outlined in Article 5(I)(a), that data shall be processed lawfully, fairly and in a transparent manner."
- "The lack of awareness amongst staff presents a high risk that data will not be processed in a compliant manner and could result in multiple data breaches or further breaches of legislation."
- "The Commercial department do not have appropriate controls in place to protect personal data being processed on behalf of the DfE by data processors."
- "there is limited oversight and consistency around how data is shared externally".

Databases already exist – new Local Authority powers are not needed

- Local Authorities already have such databases.
- Existing legislation and practice on recording and retaining personal data at individual named child level has existed for over 20 years for every circumstance that is proposed in the Schools Bil.
- Every Local Authority (in a 67% response rate) already has such databases given the statutory obligation in the Education Act 1996 to identify children not in receipt of a suitable education, a power they use widely to track a wide range of children.
- However, how it is done varies. The quality of data is inconsistent across Local Authorities and needs data *standards* to improve data on counting children correctly, not any new or unlimited powers to collect more data or what to do with it.
- All these categories of children are already counted where known, and logically cannot be counted if not known.
- We find a significant factor in the challenge of counting children, in or out of school, is that they may be counted in multiple categories multiple times if their status over the

[1] DfE Attendance Alliance https://www.gov.uk/government/groups/attendance-alliance-group

[2] The ICO audit of the DfE (2020) https://defenddigitalme.org/wp-content/uploads/2021/10/department-for-education-audit-executive-summary-marked-up-by-DDM-Jan-2021.pdf

year changes (eg a child might potentially be counted 3 times, once in-school, once as elective home educated (EHE) and again as a child missing education CME all in the same year if their status over the year changes this way).[3] New data obligations will do nothing to improve this. Creating standards not powers of *how* data should be recorded in clear, consistent ways will provide better information than today.
- Child Protection Information Sharing (CPIS) is already a statutory requirement. It covers 100% of Local Authorities in England, and is the national register of social care status. It also provides information when a child is out of area.[4]

Current legislation used for data collection, processing and distribution

1) Section 100 of the Education and Inspections Act 2006c.
- Due to permanent exclusion

2) Section 436A of the Education Act 1996 to make arrangements to identify, as far as it is possible to do so, children missing education (CME)

- When a child is deregistered to receive an education otherwise than at school (15 reasons are coded nationally to label the reason for removal from the school roll)
- When the authority becomes aware of receiving education otherwise than at school
- Due to unauthorised and unexplained absence (authorised absence plus ten days or 20 days) for which reasonable enquiries have been unable to resolve.
- To move from state into independent (private) education
- To move out of independent (private) education to anything else
- When the destination from Alternative Provision or Custody (YOI) is unknown
- A child about whose education there is nothing known
- A child whose parents the authority considers to be failing to provide a suitable education
- when the authority has children in its geographical area that may be passing through but not in education (born not in England, a services family, a child of a family without permanent address)
- If alerted by other professionals or members of the public who have had contact with a family and the child is not believed to be in education.

3) Tracking children post-16 NEET duty – DfE Statutory guidance for local authorities 'Participation of young people in education, employment or training'.
Guidance is issued under sections 18 and 68(4) of the Education and Skills Act 2008 (ESA 2008) in relation to sections 10, 12 and 68 of that Act, setting out what a local authority must have regard to it when exercising its functions relating to the participation of young people in education or training.)

[3] FOI has provided various case studies, for example both The Isle of Wight and Blackburn with Darwen Borough Council counts each child in multiple categories across a single year if they change status, whereas Brighton City Council only counts each child once across the year. It is unclear which category they assign (for example starts on school roll becomes EHE then becomes CME) if the status changes across a single year. This is widespread and reflects the same lack of data standards issues defend digital me identified in 2018 on counting children in the Alternative Provision Census.
[4] NHS https://digital.nhs.uk/services/child-protection-information-sharing-service The Child Protection - Information Sharing (CP-IS

4) Data distribution powers from Local Authorities to the Secretary of State
The Education Act 1996 c.56 Part I Chapter VI Section 29 Provision of information[5] **already** includes the data processing powers between the Local Authority and Secretary of State proposed under The Schools Bill Clause 49, 436F(1). New powers are unnecessary.

Examples from Local Authorities in England and Wales

Powys
As of June 30, 2021 there were zero Children Missing Education ("CME").[6]

Blackpool[7]
As of June 30, 2021 there were 45 Children Missing Education ("CME") (in the area waiting for provision to start, mainly recently arrived). 112 Children missing "Out" (left area being tracked) (61 had been located) and 307 Elective Home Education ("EHE").

East Riding[8]
As of June 30, 2021 there were 17 Children Missing Education ("CME").

Isle of Wight
Across the academic year September 2020 – July 2021, the Isle of Wight recorded 49 children as Children Missing Education (CME).

Leicester
Children on these registers have been recorded in these ways since 2003.

Harrow's central database includes Family Name, Forename, Middle name, DOB, UPN, Former UPN, Unique Learner Number, Address (multi-field), Chosen surname, Chosen given name, NCY (year group), Gender, Ethnicity, Ethnicity source, Home Language, First Language, EAL (English as additional language), Religion, Medical flag, Connexions Assent, School name, School start date, School end date, Enrol Status, Ground for Removal, Reason for leaving, Destination school, Exclusion reason, Exclusion start date, Exclusion end date, SEN Stage, SEN Needs, SEN History, Mode of travel, FSM History, Attendance, Student Service Family, Carer details, Carer address details, Carer contract details, Hearing Impairment And Visual Impairment, Education Psychology support, and Looked After status. Yet the Bill grants Local Authorities to expand this collection to any further data at all of their choosing, without any limitation.

There is inconsistency across Local Authorities for what age group they record which data. For example, children missing education ("CME") is often Reception through to age 16 but for other categories it is for children to age 18, and age 25 for children with a special educational needs and disability (SEND) plan into young adulthood. Most use the definition in section 8 of the Education Act 1996 but that is out of step with the revised school leaving age in England. https://www.gov.uk/know-when-you-can-leave-school
https://www.legislation.gov.uk/ukpga/1996/56/section/8

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[5] 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
[6] WDTK FOI request to Powys Council https://www.whatdotheyknow.com/request/pupil_data_children_not_in_educa_170#incoming-2061805
[7] Blackpool council FI example https://www.whatdotheyknow.com/request/801504/response/1916280/attach/2/211015%20FOI%20Children%20not%20in%20education.pdf
[8]https://www.whatdotheyknow.com/request/801554/response/1916726/attach/4/FOI%2013779%20211117%20Response%20Persson.pdf

This data is at risk and creates risk for children

In a very recent case, hackers reportedly stole private data including children's passports, disciplinary records and child protection reports relating to vulnerable pupils from schools.[9]

Concerns and comment from Committee Stage Part one[10] and Part two[11]

Baroness Barran

"It is also important that the Secretary of State is able to, if needed, collect individual level data. This can be linked to other datasets for research purposes; for example, to understand who benefits from home education. It is also vital in improving our understanding of children going "missing" from data systems. We would be unable to gather a full picture of this from aggregated data."

Note: If the government is now adding new purposes onto the use of this data, not set out in the Explanatory Notes, it must be explicit about what they are and state them on the face of the Bill with appropriate protections for example from research for commercial purposes, as school pupil data is used for today[12] without adequate safeguards[13]. Since this data has been available for several years, we wonder what attempt has been made to use it to understand "*who benefits from home education".* The new powers all appear punitive or coercive in nature and none of the positive powers offer anything beyond what is already done today.

Lord Lucas:

"*There have been extraordinary exchanges between people who do not appear to have sufficient qualifications to be a teaching assistant and a home educator who has been a teacher for 20 years, asking the most ridiculous questions. Under those circumstances, it does not surprise me that the relationship between the local authority and the home education community breaks down; a lot of difficulties arise because of that."*

"I note the breadth of powers given to local authorities in the Bill, in particular the ability to make any demand of a home educator under a totally open new subsection that allows them to ask whatever they want and, if the parent does not provide it, to dump them into school attendance order proceedings without any appeal. That is a system in which it would be tremendously easy to be a bad local authority. Local authorities will have total power over home educators, with no one controlling how those powers are used."

" I say that being able to tip parents into punitive action after just one fault does not seem the right way: there should be a pattern of behaviour that then requires the whips and scorpions to be got out."

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[9] Daily Mail (July 2, 2022) Thousands of children at risk from grooming gangs as hackers leak their private details to the dark web https://www.dailymail.co.uk/news/article-10976707/Hackers-leak-private-data-thousands-children-dark-web.html?ito=social-twitter_mailonline

[10] Schools Bill, Committee Stage Volume 823: Wednesday 22 June 2022 https://hansard.parliament.uk/lords/2022-06-22/debates/69622FA6-4853-4188-9D4A-D49BDF9BE8DC/Debate

[11] Part two Day 4 of Committee Stage https://hansard.parliament.uk/lords/2022-06-20/debates/76534AA3-AEB0-498B-9BAC-9B25CE0EB3B3/Debate

[12] https://www.gov.uk/government/publications/dfe-external-data-shares

[13] The ICO audit of the DfE (2020) https://defenddigitalme.org/wp-content/uploads/2021/10/department-for-education-audit-executive-summary-marked-up-by-DDM-Jan-2021.pdf

…the Government should "justify why stronger penalties are needed."

…"Amendment 101B asks that we specifically identify those who are electively home educating so that we can know exactly which children come under that category."

"Paragraph (d) allows the Secretary of State to invent anything. This really gets at undermining the relationship between the Government and home educators; just at a flick of the pen, some whole new suite of information can be required of them, greatly altering the relationship between them and the system, and introducing that level of uncertainty."

Baroness Brinton

"Parents are being fined now despite their children being ill. Clauses 48 and 49 will make this much worse, especially if Ministers, local authorities and head teachers are able to decide what is and is not medical, contradicting the advice of professional doctors."

"We keep saying, on different parts of the Bill, that it is not ready to be enacted, is not going to work and is not fit for purpose. It seems completely inappropriate for the House to approve this part of the Bill without any notion of what personal information may be included or what will be published, or who will have access to that information. These are Henry VIII powers gone mad."

"it will be held for long after children have left the school system. If data is held, it should be deleted once the child reaches 18, unless that is because the Government want to track their future lives. If that is the case, Parliament needs to know."

"The Bill says in Clause 48, in new Section 436C(2): "A register under section 436B may also contain any other information the local authority consider appropriate." New Section 436C(3) states: "Regulations may, in relation to a register under section 436B, make provision about … (c) access to and publication of the register"."

Baroness Garden of Frognall

"In Amendment 110, there is concern about the register being published, with too much information being put into the public domain. We want "publication" to be deleted, because this is not necessary."

Lord Knight of Weymouth

..."having some means of appeal is really important. That might be through the ombudsman that the noble Lord, Lord Wei, is proposing in Amendment 171X or by some other means."

…"I share the concerns of the noble Baroness, Lady Brinton, about the scale of change regarding the penalties being proposed for parents who fail to abide by this. There is a further amendment on school attendance orders and there having to be some kind of judgment about what is suitable education from someone who at least knows something about education; that is also an important safeguard that we could put in to protect parents."

"this move to criminalise parents through the use of the single justice procedure—given the specific way in which that works—is causing some significant concern".

"when I read new Section 436C(1)(d)—"any other information" as required—the alarm bells then ring about taking on excessive powers, and I understand why parents worry."

“This data collection should then be the basis of some kind of annual check by the local authority; it should be able to see the child to fulfil its child safety duties, but in a reasonable and proportionate way that respects the right of parents to home educate their children. I had a very interesting conversation with Professor Eileen Munro of the London School of Economics, who is opposed to any of these measures. She made a really important point that, if we had properly funded child social care workers who could go around and do the human business of working with the children in their area, things would be a lot easier, and it would take a lot of the heat out of this debate. At the moment, the worry is that this is all going to be done by algorithms, registration and data collection—an inhuman approach.”

“My Amendment 97BA in this group questions the need to double register pupils. New Section 436B(5)(b) at the top of page 41 concerns children already registered as pupils at a relevant school, and then opens up powers for them to also be required to be registered with the local authority. I would just like to know why that is, because schools, although they might not do it very well sometimes, should have responsibility for the safeguarding and education of all pupils who are registered with them, even if they have—to use a pejorative term—parked them in alternative provision. If they are registered with the school, it should know where they are, and it should have a responsibility towards their well-being. I do not really understand why those children then need also to be subsequently registered with a local authority. That then raises the question of how parents with children they know are registered in a school will know when they are suddenly mandated to register them with a local authority. What is the trigger?”

“I hope that, as part of [the Minister’s] reflections on how regulation is being used generally in the Bill, she can include whether regulation is being used too liberally and whether the Secretary of State is taking on too many powers, which in the end they would pass on to local authorities, some of whom—a minority—might use them in a draconian fashion.”

Baroness Chapman

“I think that this is really sloppy, particularly when you are talking about something that could lead to imprisonment. I have done a lot of justice Bills, and I do not think I have ever seen anything quite like this where, in new Section 436C(1)(d), parents are asked to provide “any other information that may be prescribed”, then, in new subsection (2), the local authority register “may also contain any other information the local authority consider appropriate.” That is limitless at that point.

The Bill goes on, in new Section 436D(2)(c), to say that the onus is on the parent to inform the registering authority—the local authority—of any changes to this information, which could be anything, as yet to be decided, “of which the parent is aware”. That is vague. Who decides whether the parent should be “aware”? How do you know that the parent is “aware”? That needs to be tidied up.

“Nobody wants to alarm anyone unnecessarily, which is why we are trying to get the Bill right, but it states clearly that a person “must” comply with the duty within a period of not less than 15 days. To me, that reads like something that we are compelling people to do and that if they do not, there will be a consequence. I do not want to drag this out further but it is important that we interpret this as something that is being made into an offence. I can see why people are concerned.”

It is no good the Minister standing there and saying. "This will hardly ever be used; it will be an exceptional circumstance", because we are here to consider those circumstances. If that circumstance should be a very rare thing, we need to know the circumstances that would lead to it, rare or not. Being asked to agree to including in the Bill "any other information that may be prescribed" is very troubling to us. So we support the idea of a register and want very much to support the Government in what they are trying to do but we cannot just let this matter go, given the slack way in which the legislation is currently drafted."

Lord Storey

"We need to ensure that we know where every pupil is. That is why the sorts of measures we have heard about on registration are important." << Note: LAs already do exactly this.

"We probably all agree, including in respect of the amendments that I have put down, that we need to take a chill on this and think it through carefully, because I can see that there are issues here."

The Lord Bishop of St.Albans

Amendment 105 curbs the local authorities' proposed power to contain within the register "any other information that may be prescribed"—Amendment 108 removes the wide-ranging power for local authorities to collect any other data they consider appropriate. Again, this is a highly undefined power that could be used to target individuals with protected characteristics, and it makes the state ever more intrusive."

"Amendments 111 and 112 ensure that parents are properly informed about the data collected: how it will be stored, shared, published, and when it will be deleted."

"Finally, Amendment 127 safeguards any data collected by local authorities when directed by the Secretary of State to provide information on the register. This is done by requiring that all data is either aggregated or anonymised unless there is sufficient reason for the Secretary of State to request information relating to an individual child, the sufficient reasons listed being safeguarding concerns or issues of public safety and criminality."

Baroness Fox of Buckley

"We have to be careful not to simply make safeguarding a matter of the children who are not in school, because many children who are in school and in plain sight are missed by social services and the authorities in terms of their abuse. This seems to be the greater problem."

"Finally, while a register sounds sensible it is right that we raise concerns about data tracking and surveillance. There are those who have indicated that we cannot just allow data collection to happen without asking some questions about why it is needed and how it will be used."

Baroness Jenny Jones

…"part of the problem is that the Government are trying to fix all three with one piece of legislation, and they are extremely different. We should be trying to find children who will receive no education or a dangerously poor education. However, the net is cast far too wide and it risks trapping many home-educating families within a web of unnecessary bureaucracy and red tape."

“Some concerns are fairly simple, such as the time limits being too short and the registration requirements being unclear. However, others are much deeper, such as the breadth of discretion granted to local authorities to decide whether a child is receiving an adequate home education or should be subjected to a school attendance order. If the Government’s intention is to extend the grasp of the state into the lives of home-educating families, they should be explicit about it, but so far the Government justify this policy as being about helping children who are not receiving any education. If that really is the policy intent, there must be a better way of legislating for it than this bureaucratic mess.”

“Part of the fallacy on this children not in school register is the idea that local authorities do not already have the information about children who are not in school, but that is not true. For the most invisible children, who have had no contact with any service at all, of course it might apply; otherwise, the truth is that local authorities have a great deal of information about almost every child, whether they attend a school or not. ***Instead of adding yet more data collection, there should be an overhaul of how local authorities collect and process this data, and perhaps some sort of universality about it. That overhaul should be made in a code of practice, as set out in my Amendment 171S.”***

Amendment explanatory notes summary

Clause 49 will create duplication and confusion over data processing from families and children at Local Authority level. The processing of personal data of children not-in-school by Local Authorities is already required under s436Aof the The Education Act 1996, *Duty to make arrangements to identify children not receiving education*. The personal data of the other children in the scope of the Schools Bill Clause 49(5)(b) (ie Alternative Provision, flexi-and part time schooling) is already processed on the school roll/registers and censuses. 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 49 of the Schools Bill. Our research with Local Authorities shows that new powers for the collection and processing of data are unnecessary both for LAs and the Secretary of State.

However, we understand that the Children's Commissioner and others have found difficulty in obtaining the data held by Local Authorities in a consistent manner but they have not published their data obtained so it is harder to compare with our own research. This amendment proposes a Code of Practice that will bring all data processing by Local Authorities under a consistent set of standards 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 and the Secretary of State powers that already exist to expand what data items may be collected, expand the list to whom identifying data may be given and for what purpose, creating consistent processes for family notifications before data is collected, and guidance on the capacity of the child and parental rights. There might also be an obligation on Local Authorities to publish statistics.

Provision of information from parents to the Local Authority is today characterised as a power imbalance without redress that creates 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) and updated in a timely way and parents should be provided with a free copy of their record on request to check for missing data, make corrections, and be assured with whom what data has been shared.

Consequently we would recommend the removal of all of Part 3 since it is closely tied to the new registers, and replacing it with a Code of Practice to deliver standards of clarity, consistency and confidence in data processing at Local Authority and national levels. Amendments to remove Part 3 of the Bill entirely and leave a Code of Practice as a stand alone clause or remove clauses 50-56 and Schedule 4 of consequential amendments might therefore be proposed in addition.

Clause 49, page 41, line 25, leave out 'Registration' and insert 'Data processing'.

Clause 49, page 41, 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 their own personal data held by the Local Authority, and to request correction where necessary,

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

(e) an obligation on Local Authorities to publish statistics on an annual basis.

(f) routes for complaint and redress.

(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 Report Stage

Our *Counting Children* coalition research to date with responses from 67% of Local Authorities ("LAs") found that 100% who responded (119), already track children in the scope of the Bill.

Does the Local Authority track children who are deregistered:	**YES**	**NO**	**TBC/ YET TO REPLY**
to receive an education otherwise than at school	119	0	57
due to permanent exclusion	118	0	58
due to unauthorised and unexplained absence (authorised absence plus ten days or 20 days) for which reasonable enquiries have been unable to resolve	112	3	61
to move from state into private education	101	3	72
to move out of independent (private) education to anything else	101	7	68
Do you track children whose destination is unknown leaving	**YES**	**NO**	**TBC/ YET TO REPLY**
Nursery	89	8	79
Alternative provision	106	2	68
Custody	104	2	70
Post-16 education	95	7	74
Do you track children if the authority becomes aware of a child	**YES**	**NO**	**TBC/ YET TO REPLY**
educated otherwise than at school (Elective Home Education "EHE")	118	0	58
about whose education there is nothing known	113	4	59
whose parents the authority considers to be failing to provide a suitable education (Child Missing Education "CME")	115	0	57
Do you track children who the authority has children in its geographical area that may be passing through but not in education	**YES**	**NO**	**TBC/ YET TO REPLY**
child born outside England	92	13	71
child of a service family (army, navy etc)	94	13	69
child of a family without permanent address	98	7	71

Notes: FOI obtained data from Local Authorities ("LAs") in England and Wales (as of July 5, 2022, 67% response rate).This ongoing research will be updated as responses are returned.

(1) 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.

(2) Four LAs that responded no to tracking children about whom nothing is known, said they could not if *nothing* was known, but logically suggested they would track if they became known. This is a logic missing in the argument for the creation of registers in this Bill which presupposes a duty on parents to register will mean registration can be enforced without any additional knowledge or funding for staff in the Local Authority.

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

Proposed amendments by peers already include

A right of appeal to an independent body
"(4) Regulations must, in relation to a register under section 436B, make provision about the right of appeal to an independent body against any interpretation or discretion applied by a local authority in compiling the register or in taking action based on information contained in or requested for the register." and also, "Amendment 143B asks that a refusal of the revocation of a school attendance order must be reasonable."

A right to see the data held by the Local Authority regularly and on demand
"Amendment 130A asks that data held by the local authority should be made routinely available to home educators. If we want a good, open, conversational relationship between good home educators and their local authority, sharing information plays a very important part."

A Home School Ombudsman

All data should be aggregated or anonymised
any data collected by local authorities when directed by the Secretary of State to provide information on the register should mean data is either aggregated or anonymised

Background on Clause 49 and Part 3 of the Bill

There is a common misunderstanding that the registers to be created through Clause 49 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).[14]

> "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

[14] Bill Explanatory Notes https://publications.parliament.uk/pa/bills/lbill/58-03/001/5803001en06.htm

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.[15] This is one of seven different national census collections.[16] 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).[17]

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[18] and that already includes other AP unregistered providers.[19] 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 49 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 49 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.

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[15] School census dates https://www.gov.uk/guidance/complete-the-school-census/census-dates
[16] 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
[17] 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
[18] AP Census guidance https://www.gov.uk/guidance/alternative-provision-ap-census
[19] AP Census children in scope (at named pupil level) https://www.gov.uk/guidance/alternative-provision-ap-census/which-pupils-to-include

This proposed amendment is similar to the data processing Code of Practice set out in the Digital Economy Act 2017[20] 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 49 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.

For the purposes of explaining what it would do, we take each part of Clause 49 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 49, 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 49 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 49 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".

[20] Digital Economy Act 2017 (Part 5, Chapter 1, section 43)
https://www.legislation.gov.uk/ukpga/2017/30/section/43/enacted

Clause 49 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 such other information as may be prescribed*" – 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 significantly 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[21]. *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.[22] 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 49, 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 it 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 49, the Code of Practice, like Clause 49, leaves some discretion for detail to be written during its creation about what information should be

[21] 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

[22] 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

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 49 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 49 than its current wording.

Clause 49 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".*

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).[23]

The fact that Clause 49 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 49 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*[24] 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,*

[23] 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

[24] 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

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 49 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 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".***[25]

The parts that remain of Part 3 of the Bill (that should be removed) 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. The routes for redress are however weak, and the creation of an independent Ombudsman for complaints and mediation would be welcomed.

[25] 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/

(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).

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 49 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.

There is 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).[26]

About Counting Children | https://countingchildren.uk/policy/

Counting Children is a growing coalition of UK based organisations and academics in England and Wales, with intersectional interests from across the fields of safeguarding and child protection, education, SEND, data protection, law, and human rights. We are concerned about current quality and standards in debate about children out of school and the inaccurate use of facts and figures by senior politicians, and national institutions.

Our supporters include 4Front; Big Brother Watch; defenddigitalme; No More Exclusions; Not Fine in School; Square Peg; York Travellers Trust; The Victoria Climbié Foundation UK; Professor Andy Bilson of The Parents, Families and Allies Network (PFAN); Dr Ian Cunningham, Centre for Self Managed Learning; Professor Eileen Munro, Emeritus Professor of Social Policy, London School of Economics (and author of the government 2011 Review into Child Protection); Dr Harriet Pattison, Centre for Personalised Education.

[26] 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