Proposed amendments for the CWBS Bill

Page 7, line 17, in section 16LA Duty to Share Information, insert subsection —

11. Duty to maintain a transparency register of the use and access of information shared

(a) A relevant person must maintain an audit or register of processing of the use and access of the data mandated under the duty to share information under section 16LA or 25.

(b) The audit or register under subsection (a) must contain the following information about data use or access to data—

(i) the date on which the data was accessed or used;
(ii) the name of the individual accessing or using the data;
(iii) the name of the organisation under which the individual has been granted use or access;
(iv) the purpose for which the data was accessed or used;
(v) a list of the data items in each data release;
(vi) whether the data accessed or used contained sensitive data;
(vii) the method of use or access by relevant persons;
(viii) the date after which it is expected that the data must not be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are shared;
(ix) any further relevant persons to whom the data is granted onward subsequent permission to access or reuse by the recipient under sub-section (b).

(c) A relevant person must ensure that the register under subsection (a) is maintained in accordance with data protection legislation, including the Data Protection Act 2018, the UK General Data Protection Regulation, and Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [1].

(d) Regulations may make provision about—

(i) the form in which the register under subsection (a) is to be kept;
(ii) the period for which information recorded in the register is to be retained;
(iii) the circumstances in which information recorded in the register may be disclosed, including any restrictions or safeguards that apply to such disclosures.
(iv) and the circumstances in which information recorded in the register must be disclosed, to the data subject or their legal guardian.

Member's explanatory statement

The proposed amendment to section 16LA of the Children's Wellbeing and Schools Bill introduces a new subsection mandating that a relevant person maintain a transparency register detailing each instance of data access and usage under the duty to share information. This register will record specific information for every data access or use, including the date, individual and organisation involved, purpose, data items released, sensitivity of the data, expected retention period, and method of access. The amendment ensures that the register complies with all relevant data protection legislation to the UK, which is important since Clause 25 is about the register of Children Not in School and requires data distribution to various relevant persons including the Secretary of State under 463F, and 16LA(9) is unclear on whether disclosure would contravene Data Protection law and

[1] https://rm.coe.int/1680078b37

because (7) revokes any duty of confidence owed by the person making the disclosure and because data release and distribution is high risk of onward disclosure beyond that expected by the data controller over time and for purposes beyond the scope of the original release. Without this record of processing, there is a high risk of loss of oversight and accountability after its disclosure to an unlimited number of relevant persons who may have limited understanding of data protection law and do not understand their new responsibilities they have as data controllers under clause 16LA, where they may otherwise only be data processors. Additionally, it allows for regulations to specify the register's format, retention periods for recorded information, and conditions for disclosure, including provisions for informing data subjects or their legal guardians.

Page 50, line 42, in Clause 25, section 436C Content and maintenance of registers remove subsection (3)

> "A register under section 436B may also contain any other information the local authority considers appropriate."

Member's explanatory statement

In the Schools Bill 2022 peers opposed limitless data collection powers and here too it should be removed as it may encourage a breach of the data protection principles of necessity and proportionality. Unclear wording leads to confusion around what is "appropriate" and heightens dispute between Local Authorities and families about what information is the minimum and maximum requirement and with what frequency of collection as well as who and what may be in scope.

Page 53, line 37, Clause 25, 436F Use of Information in the Register leave out paragraphs (1) and (2) and insert—

(1) The Secretary of State may collect and process

(a) statistical data regarding children in receipt of Elective Home Education (EHE) for the purpose of monitoring educational trends and informing policy decisions.
(b) Information relating to an individual child only on an individual case by case basis for the purposes of adjudication of a school attendance order, and not in bulk.

(2) The data collected under subsection (1)(a) shall be limited to prior aggregated statistical information and shall not include any personal data that would enable the identification of individual children or linkage with other data that would do so. The statistical data collected may include, but is not limited to—

(a) the collective number of children recorded as receiving EHE on the census date;
(b) the percentage of children recorded as receiving EHE on the census date;
(c) the rate of children receiving EHE on the census date, relative to the overall population.

Member's Explanatory Statement

There is no necessity for the Secretary of State, or any person acting on behalf of the Secretary of State at national level to collect, process, or retain data that identifies, or could reasonably lead to the identification of, any individual child in receipt of Elective Home Education or suitable education otherwise. The Secretary of State may use a limited exemption for the purposes of adjudication of

school attendance orders (SAO) on an individual basis, and must retain data only as necessary in line with data retention in legal proceedings after closure of the case, in which time it may not without consent be distributed or made accessible to any other person outside the core functions in support of the SAO case at the Department for Education. MPs may wish to further enable the Secretary of State to make further provision regarding the manner and frequency of collection of statistical data under this section, and changes to this should be by regulations by the affirmative procedure.

Page 69, line 27 After Clause 28 Guidance on children not in school and school attendance orders 436R Guidance at end, insert—

(1) The Secretary of State must issue guidance including a code of practice to be followed by Local Authorities in England in respect of their functions under Clause 25 prior to the commencement of the clause.

(2) Before issuing a code of practice, the Secretary of State must consult—

(a) families and organisations with experience of Home Education and/or barriers to school attendance,
(b) organisations with relevant experience of mental health and well-being,
(c) organisations with experience of data protection and the Information Commissioner, and
(d) such other persons as may be considered appropriate.

(3) The Code of Practice must specify how Local Authorities are to take a holistic approach to home education registration and school attendance issues including the mental health of the families' affected and the provision of support to families and children."

Member's explanatory statement

Families who offer a suitable education and safe environment to children may still want to not be part of a state register. This Bill pushes non-consensual compulsory registration onto them which will create concern and adversarial relationships between families and council staff. The amendment is designed to require the Secretary of State to issue a code of practice on how Local Authorities must take a holistic approach to registration of home education, including the mental health of the children and parents and providers affected and the provision of support.

Page 69, line 9, After Clause 29, insert the following new Clause—
Home Education Ombudsman

(1) Prior to the commencement of Clause 25: Registration, the Secretary of State must appoint a person as the Home Education Ombudsman ("the Ombudsman") to mediate between families and—

(a) Local authorities, or persons acting on their behalf
(b) the Department for Education
(c) providers of education
(d) independent educational institutions
(e) magistrates courts
(f) persons with interests across devolved jurisdictions, and
(g) other appropriate persons and organisations.

(2) The Ombudsman must—

(a) possess relevant experience and independence and must not be an employee of the Department
for Education, and
(b) be appointed in consultation with the home education community.

(3) A local authority must consult the Ombudsman if they are concerned that any investigation into the education of homeschooled children would infringe on the rights of children and families, including—

(a) freedom of expression,
(b) freedom of religion
(c) the right to privacy
(d) Article 2 of Protocol No.1 of the European Convention on Human Rights.

(4) Parents of children who are being educated otherwise than in a school may appeal to the Ombudsman with regard to treatment by their local authority or the Department for Education, including where the parents believe the local authority or the Department have acted ultra vires.

(5) Where an appeal under subsection (4) has been made, the Ombudsman must attempt to mediate between the parties to find a solution with which all parties agree, on behalf of the child and without charge to the child, or parents on their behalf.

(6) When mediating, the Ombudsman must take account of the rights of children and parents, including the rights under subsection (3)(a) to (d).

Member's explanatory statement
This aims to provide a means to more cost effectively resolve disputes in the courts and for Local Authorities, families, children and caregivers to seek advice and if necessary appeal decisions made in the course of any attempt to register families and providers of education to children who are not in school and in receipt if suitable education otherwise.

Proposed related Amendments for the Data Use and Access Bill

Current Data Use and Access Bill – changes to data protection law are on the way (currently House of Lords, Report Stage 21st January 2025) that remove safeguards about the processing of vulnerable individuals for the purposes of undefined safeguarding aims. Stephen Cragg KC highlighted in his Opinion on the prior version of the Bill, the DPDI Bill, some of these key areas of concern, including that the legitimate interests for the purposes of 'safeguarding' condition is drawn too widely and requires safeguards.

Numbering will depend on how the Bill arrives at the Commons after the Lords.

Amendment to Schedule 5: Risk assessment of Vulnerable Individuals

Page XXX. After paragraph X (b), after the definition of "vulnerable individual" insert the following new sub-paragraph—

> "X. This condition is met only where the controller has made an assessment of vulnerability and makes it available to the data subjects prior to processing, at minimum on an annual basis for any subsequent processing.

Member's explanatory statement
Transparency and accountability obligations must not be removed from data controllers when processing personal data for the purposes of safeguarding vulnerable individuals based on an undefined characteristic that may change, and that may apply or not apply to any given individual at any point in time. The data subjects may not be aware that they have been categorised as vulnerable and therefore data is being processed on the basis of legitimate interests under the condition that exempts controllers from offering the data subject an opt-out or requiring a balancing test based on the data subject's particular case as today.

Key areas for probing the intent include:

This amendment seeks to explore whether the government intends to remove transparency and accountability obligations from data controllers when processing personal data for the purposes of safeguarding vulnerable individuals based on an undefined characteristic that may change, and that may apply or not apply to any given individual at any point in time

By adding a requirement to make an assessment of vulnerability and ensure its public availability to affected data subjects, the amendment raises questions about the practical implementation of safeguarding measures, including:

1. How data controllers determine vulnerability,
2. The mechanisms for ensuring that data subjects are informed and have visibility into assessments of their categorisation as vulnerable affecting their data rights,
3. The balance between transparency, professional confidentiality, and the rights of data subjects and that the balancing test currently required will no longer be mandated.

The government would need to clarify whether this additional transparency aligns with its intentions for safeguarding vulnerable individuals and maintaining compliance with data protection principles.

Amendment to Schedule 5: Attribution of Vulnerability to Individuals

Page XXX. In paragraph X, after the definition of “vulnerable individual”, insert the following new sub-paragraph—

> “X. The condition ceases to apply when the nature of the vulnerability for the individual, or the type of individual, is no longer present or has otherwise expired.

Member’s explanatory statement

Clarification is required on the safeguards and processes for ensuring that processing activities tied to an undefined and changeable characteristic of ‘vulnerability’ do not persist unnecessarily or disproportionately.

Key areas for probing the intent of the Bill include:

This amendment seeks to clarify whether and how the conditions for processing personal data based on the vulnerability of an individual should expire when the individual's circumstances change. It raises the following questions for consideration

1. Time-Limited Processing: Should the processing of personal data for vulnerable individuals automatically continue when the vulnerability no longer exists? How and when is that to be assessed by data controllers and processors?
2. Assessment and Review: What mechanisms are in place to ensure that data controllers regularly assess whether the justification for processing based on vulnerability remains valid?
3. Impact on Data Subjects: Since data subjects who are vulnerable are also more susceptible to data exploitation and otherwise have a lack of protection or agency, can the government justify in what circumstances such a persistent condition would apply that would be proportionate to necessitate the removal of the data subject’s rights to a balancing test and being offered an opt-out?
4. Practical Implementation: Are data controllers equipped to identify and act on changes in an individual’s vulnerability in a timely and accurate manner and how will this not simply lead to lazy application of this weakening of the protections that should accompany legitimate interests and are (rightly) already necessary for processing under the basis of Vital Interests?
5. The reason this is important is that this is a key element of data protection law: “conditions” create certain permission or exemptions from other aspects of data protection law that protect people from their personal confidential data in ways they do not expect or would be compatible with their other rights, like human agency and dignity. If another adult has decided arbitrarily to remove someone’s rights, there should be justification that can be if not challenged, at the time, at least scrutinised and challenged when the condition no longer applies. The drafting of the Bill as it is makes no distinction or limitation on this characteristic so a company could decide that it will simply use everyone’s personal confidential data as adults that the company collected from those people as a child and retain the exemptions from the law to need to do a risk assessment or “balancing test” as it is called, forever. Whereas in data protection law, without the new condition the Bill creates, you would need to have greater respect for the data over time and a duty towards the people it is from.

Proposed New Clause: Information to Be Provided to Data Subjects

Page XX, in clause XX, insert the following new sub-paragraph—

> "Exemptions from Data Protection law Article 13, Information and access to personal data; and Article 14, Information to be provided where personal data have not been obtained from the data subject; shall not apply where the data subject is a child at the time of data collection or at the time of any data processing.

Member's explanatory statement

The exemption regarding the obligation to provide information about further processing should not apply to children, since these purposes will be broadened if the definition of research is explicitly expanded as per clause 67 of the draft Bill, "whether carried out as a commercial or non-commercial activity". Article 12(1) of the GDPR necessitates informed processing to form part of the most fundamental adequate protection, in particular where data is collected from or about children that may have lifelong effects, and in the spirit and letter of GDPR recitals relevant for children (38) Special Protection of Children's Personal Data (58) The Principle of Transparency (59) Procedures for the Exercise of the Rights of the Data Subjects (60) Information Obligation (73) Restrictions of Rights and Principles. Commercial reuses of personal data necessitates stricter safeguards and transparency in such contexts since the long 'daisy chain' of multiple processors' reuse will otherwise become entirely unaccountable to the data subject, to a child, or as future adults. Informed processing is fundamental to public trust in data processing, and fundamental to data protection law.