



STATE GUARDIAN OR HEAD GARDENER?

The imposition of state guardianship by the Scottish Government

A Discussion Paper from the Centre for Welfare Reform

Robin Jackson

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FOREWORD

One of the frustrating things I found as an MP was just how often an original, worthy policy idea became almost unrecognisable when the policy was finally implemented. As the proposal worked its way through the legislative sausage machine and then through the Civil Service implementation teams it was distorted out of shape, to the extent it was sometimes difficult to remember what the original purpose of the legislation was. So what started as a great idea became either unworkable or threw up a range of unintended consequences as it was put into practice.

Legislation which had widespread support to begin with could also suffer the same fate. Because everyone supported the principle, the detailed critical scrutiny required of the proposal was missing.

I fear that this will be what happens to the Named Person legislation which comes into force across Scotland at the beginning of August 2016. Many supported its introduction when it was first proposed, including the Scottish children's charities and most MSPs, and emotive language was invoked about how it would save children's lives. Who could argue with that?

To me, the Named Person scheme has become a huge mallet to crack a small nut. Yes, some children "fall through the net". Yes, for some families no-one is joining up the dots to see that the family is in crisis and the children are in a vulnerable situation. But I find it hard to believe that the answer to either of these is to appoint an external Named Person for all children, especially when resources are already stretched to provide the support for the families who need it.

This paper by Robin Jackson explores many of the concerns which are being expressed as the date of the implementation of the Named Person legislation draws near. Will it "Get It Right For Every Child" as its proponents claim or will it be a bureaucratic nightmare and unwelcome intrusion into family life as its opponents fear?

Dame Anne Begg

Chair: Work and Pensions Select Committee (2010-2015)

BACKGROUND

The imposition of state guardianship by the Scottish Government

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack.

Article 12. The Universal Declaration of Human Rights, 1948

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8. The European Convention on Human Rights, 1950

The named person or state guardian?

On the 17th April 2013 The Children and Young People Bill was introduced to the Scottish Parliament. The Bill was passed on the 19th February 2013 and received Royal Assent on the 27th March 2014 making the Bill an Act of the Scottish Parliament. The Act seeks to further the Scottish Government's ambition for Scotland to be the best place to grow up by putting children and young people at the heart of planning and services and ensuring their rights are respected across the public sector. In order to improve the way services work to support children, young people and families, the Act will ensure that all children and young people from birth to 18 years old have access to a Named Person.

What is the Named Person?

According to the Scottish Government most children and young people receive all the help and support they need from their parent(s), wider family and community. However, sometimes they may need a bit of extra support. From the 1st August 2016, all children and young people from birth to 18, or beyond if still in school, will have access to a Named Person. That person will be a central point of contact if a child, young person or their parent(s) want information or advice, or if they want to talk about any worries and seek support. They can also, when appropriate, reach out to different services that can help.

Who will be a Named Person?

In normal circumstances a Named Person will be the health visitor for a pre-school child and a promoted teacher - such as a headteacher, or guidance teacher or other promoted member of staff - for a school age child. The Named Person duties will be integrated into their current role and strengthen the support they at present provide, formalising their role as a central contact for children, parents and other people working with them.

What will a Named Person do?

The Named Person will be available to listen, advise and help a child or young person and their parent(s), provide direct support or help them access other services. For example, a health visitor might ask for help from a speech and language therapist, or a guidance teacher or may put parents in touch with a local bereavement counselling service.

Who will provide and support Named Persons?

Local authorities and health boards are the main organisations that have a duty to make sure a Named Person is available to children and young people wherever they live or learn. They will make sure children, young people and parents know about their local Named Person service and what it means for them. Other organisations, like independent or grant-aided schools, secure accommodation services and the Scottish Prison Service (for the small number of young people held in custody), have a duty to make sure a Named Person is available to the children and young people in their care.

I. Introduction

According to the First Minister, Nicola Sturgeon, the Named Person scheme is essentially about protecting the most vulnerable children and young people in Scotland through the appointment of state guardians. While this idea may appear superficially attractive, when one looks more closely at how the scheme is to be implemented then the alarm bells start to ring. Indeed mature reflection suggests that part of the legislation relating to the Named Person provides a clear illustration of the way not to introduce educational and social welfare reform.

Alan Cochrane, Scottish editor of The Daily Telegraph has commented that it is difficult to avoid the conclusion that political correctness has played a key role in the development of the policy. In other words, it is an attempt not to be seen to stigmatise unfairly families whose children might be deemed to be most at risk by just singling them out for what critics might claim could be construed as state guardianship.¹

The question arises as to what pre-legislation scrutiny was undertaken by the body responsible for drawing up the Bill? Where is the evidence from other countries that such a scheme works? Whilst the incidence of child neglect, maltreatment and abuse where it occurs within families is abhorrent, what evidence is there that the incidence is sufficiently high to warrant nationwide state intervention? It would seem unwise to develop such a framework, before one is in a position to mount effective support for those most disadvantaged; otherwise one has overinclusive regulation and limited resources to accomplish effective support or intervention.²

Since the Children and Young People (Scotland) Bill was originally tabled in 2013, there has been strong and growing opposition to the proposals relating to the Named Person scheme. Some of the strongest opposition has come from groups representing the legal profession in Scotland: The Faculty of Advocates and The Law Society of Scotland.

2. The Faculty of Advocates

The Faculty of Advocates noted that part of the Act relating to the Named Person dilutes the legal role of parents.³ In so doing, it undermines family autonomy and provides a potential platform for interference with private and family life in a way that could violate Article 8 of the European Convention on Human Rights. Whilst the Faculty accepts that there may be cases where a Named Person will be of assistance, the provision is not focused on the children for whom the measure would be helpful and it does not cohere with other similar measures for such children.

3. The Law Society of Scotland

The Law Society of Scotland has expressed a number of its concerns about the introduction of a Named Person scheme.⁴ It has noted that the Named Person would usually be a practitioner from a health board or an education authority, and someone whose job would mean they were already working with the child.

This arrangement prompted a number of concerns:

- It would add an additional layer of responsibility to people who already had full-time jobs in sectors that were notoriously under-resourced.
- It could present a considerable dilemma where a Named Person might feel obliged to point out a failure on the part of her/his employing local authority in relation to a child.
- It ran the risk of diverting services away from where they were needed most, as the role of the Named Person was going to be more onerous in some parts of the country than in others, resulting in potential gaps in provision.
- Leaving aside the EU implications, it is necessary to point out that data protection is reserved to the UK parliament and that legislation affecting data protection rights is outwith the competence of the Scottish Parliament.
- Although the government considers that the provisions of the Act are compliant with the European Convention on Human Rights (ECHR) as they have a legitimate aim, children and young people are entitled to confidentiality and may seek the services of a service provider on the basis that their right to confidentiality will be respected. There is a concern that widening the scope of information-sharing could affect the level of trust between older children and young people and their Named Person, undermining the function of the role.
- The scheme appears to challenge Article 8 of the European Convention on Human Rights with regard to the parent's right to respect for private and family life and it provides scope for interference between the role of the Named Person and the exercise of a parent's rights and responsibilities.
- The purpose of the Named Person provisions appears to grant control to the State over the development of children in a manner that is intrusive and could be construed as disproportionate State interference.

4. The Christian Institute

Whilst the Christian Institute, a non-denominational body, has acknowledged that those promoting and supporting the Named Person scheme may be well-intentioned, there is little evidence that its introduction will prevent abuse.⁵ Indeed the contrary may be argued for it may lead to resources being over-stretched with the result that genuine cases of neglect are missed.⁶ The Institute challenges the claim that the Named Person scheme will provide a known point of contact for children and parents given that families can already contact a health visitor or teacher if they have concerns. It questions the claim that nobody will be required to engage with the Named Person in view of the fact that if a family refuses to cooperate it seems likely that this will heighten suspicions and lead to increased intervention from other professional workers.

Those supporting the Named Person scheme contend that it is merely formalising what is already happening and that nothing has changed which prompts the Christian Institute to ask why such legislation is needed. It is noted that the weight of legal opinion demonstrates that the new law usurps parental authority and will lead to cases of unjustified interference in the private lives of innocent families.⁷

A ComRes survey was commissioned by The Institute and carried out between 2nd and 3rd March 2016. The online survey interviewed 2,030 Scottish adults in relation to the Scottish Government's proposal to introduce the Named Person scheme. Almost two-thirds of the parents believed the Scottish Government's plans to appoint a "Named Person" for every child was "an unacceptable intrusion". Less than a quarter of Scots (24 per cent) thought every child should have one of the state-appointed individuals to assist with their "wellbeing".

The Christian Institute along with three other charities decided to submit the Named Person government's proposals to judicial review.⁸

The prominent role played by The Christian Institute in the national debate has prompted some supporters of the Named Person scheme to claim that religious organisations in the 21st century are not well placed to speak on behalf of the nation so their views can be discounted. However, it is possible that this high profile may have resulted from the fact that many charities and voluntary organisations in Scotland, which are dependent directly or indirectly on state support for their survival, are reluctant to engage in an open public debate. The extent to which the state can through its patronage influence the expression of professional opinion is well documented and should not be underestimated.^{9, 10}

5. NO2NP

NO2NP – the leading campaigning group opposed to the Named Person scheme has identified a number of additional reasons for challenging the scheme:

- The legislation covers every child from 0 to 18. Guidance even suggests that the Named Person would become involved before a child’s birth.¹¹ It will be implemented regardless of whether or not there is any need for state intervention demonstrating it is not aimed at protecting vulnerable children.
- Under the Named Person approach, the list of potential indicators of ‘wellbeing’ is so broad that most parents could find themselves under investigation. Parents could be reported to state officials if judged to be showing their child inadequate levels of “love, hope and spirituality”.¹²
- An Easy to Read Guide to the plans describes ‘wellbeing’ as “another word for how happy you are”.¹³ The same guide says a Named Person will check that a child is respected which includes being given a say in what they watch on TV and how their rooms are decorated.
- The Named Person scheme appears to be predicated on the idea that the proper primary relationship that children will have for their wellbeing and development, nurturing and education is with the State rather than within their families and with their parents.¹⁴ Named Persons will be able to advise and talk to children, which may include very personal issues, without their parent’s knowledge or consent.
- Currently, information can be shared without a child’s consent if there is a ‘risk of significant harm’ to a child. But under the Named Person scheme information can be shared if there is simply concern for a child’s wellbeing. According to the Community Law Advice Network (Clan Childlaw) this could result in children having no expectation of privacy, and could lead them to shunning helplines and advisory services.¹⁵
- During the course of the Court of Session in 2014, the Scottish Government’s QC informed the court that if a young girl was in hospital and discovered to be pregnant then the Named Person would definitely be contacted – but was unclear whether the parents would be informed.
- Guidance on relationships, sexual health and parenthood education published by the Government states that where a child is known to be sexually active and there is a risk to ‘wellbeing’ the Named Person should be informed but there is no mention of parents. It would appear that it is more important for the Named Person to know what is going on than their parents.

- The extent to which a Named Person can intervene is particularly concerning when considered alongside the compulsory nature of the law. Although Government ministers have repeatedly insisted that parents are under ‘no obligation’ to engage, children will be appointed a state guardian whether parents want one or not.¹⁶ There is no opportunity to opt out.
- Indeed the Government QC acknowledged at the judicial review hearing in 2014 that allowing parents to opt out would “defeat the purpose of the scheme” and that the scheme had to be universal because every child is “potentially vulnerable”. Not only is it not possible to opt out but parents have positively to co-operate or they could be characterised as ‘hostile’ or ‘non-engaging’ which could lead to further state involvement.¹⁷
- First Minister Nicola Sturgeon has claimed the scheme is about protecting “the most vulnerable in our society”.¹⁸ However it can be argued that widening the net to assess every child in Scotland, and every associated adult, will undoubtedly make “resources much scarcer”.¹⁹
- It is noted that when a similar scheme was launched on the Isle of Man in 2010, public authorities were encouraged to report even the slightest of concerns to the children’s social care department. This resulted in a deluge of abuse referrals, many of them groundless. The scheme which was based on the *Every Child Matters* agenda²⁰ operating in England was scrapped as the volume of work due to over-referral caused a huge problem with the employment and retention of social workers.²¹
- In 2015 the Scottish Government held a series of events for professionals involved in implementing the Named Person scheme. Nearly two thirds of attendees at the events felt that the guidance on information sharing failed to provide professionals with the insight they needed to be able to manage the process.²²

6. The legal opinion of Aidan O'Neill QC

The clearest, most incisive and cogent critique of the Named Person scheme has come from Aidan O'Neill QC who has been legally representing the four charities.²³ The essential points that he has identified are here set out. He observed that what is startling about the legislative schema for a Named Person service is that it appears to be predicated on the idea that the proper primary relationship that children will have for their well-being and development, nurturing and education is with the State rather than within their families and with their parents.

A remarkable aspect of this arrangement is that it is intended to be universal in scope – applying to every child regardless of any assessment of need – and for it to be compulsory for all children to have a Named Person, without any provision for consent of either the child or its parents or the possibility of opt-out from this State monitoring and mentoring scheme, whether at the instance of the individual child or its parents.

These characteristics of universal and compulsory application of the scheme for the general 'well-being' of children, which would supplement and circumvent the child's existing family structures and which expressly exclude parents from being able to carry out the Named Person function in relation to their own children bears, if anything, certain of the hallmarks of a State absolutist model which do not appear to be compatible with the requirements of subsidiarity understood within a modern European democracy governed by the rule of law and respectful of fundamental rights which Scotland aspires to be.

It is against this background that one has to understand the specific protection given under the European Court of Human Rights (ECHR) to private and family life and the home and separately the rights of parents in relation to the education of their children. The appointment by the State of a Named Person to a child constitutes an interference with the rights to private and family life and home protected under the terms of Article 8 ECHR. In order to be lawful, such interference by the State has to be aimed at one of the legitimate ends specified in Article 8(2) (the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the right and freedoms of others) and necessary in a democratic society.

Further the interference with individuals' right to respect for their private and family life and home must not only be based on the law but also be

“necessary in a democratic society”, which is to say that it must answer a “pressing social need” and, in particular, be proportionate to the legitimate aim pursued.

Whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by that Article. This includes ensuring that parents know and have access to information which may be relied on by the authorities in taking measures of protective care or in taking decisions relevant to the well-being of a child to ensure that parents have the possibility and right of effective participation in any official decision-making process concerning the care and protection of their child.

The Convention duty to respect private and family life and the home means that, in its regulation of matters concerning the well-being of children, the State must not ignore or fail to give proper weight also to the parents’ interests in the integrity of their family.

Any State interference in these areas must be “in accordance with the law” which is to say that the legal framework governing State action and setting out the limits on State powers in relation to children and the family must have the attributes of transparency, accessibility and predictability. Thus, individuals have to know what the law is, what their rights are and the extent of the powers that the State may lawfully claim to exercise in their situation.

The Court is clear that “in matters affecting fundamental rights it would be contrary to the rule of law if one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of a unfettered power” because this would provide insufficient legal protection to the individual – and to families – against any possible arbitrary application of those powers. To protect a person against arbitrariness it is not sufficient to provide a formal possibility of bringing adversarial proceedings to contest the application of a legal provision to his or her case.

The provisions of the Act which require the appointment of a Named Person to every child in Scotland without exception or any individual assessment as to whether a child needs the services of a named person may not be lawful on the basis that the blanket nature of this provision constitutes a disproportionate and unjustified interference with the right to respect for individual family’s private and family life and home.

Given that the functions, duties and powers of – and crucially the limitation on – the Named Person are not set out in terms of this legislation, these provisions appear to fail the test of being in accordance with law in the sense of having the qualities of accessibility, foreseeability and precision which would provide proper protection against the possible arbitrary and

oppressive use of powers which would be accorded to State bodies such as the nominated person under this legislation.

Those supporting the Named Person contend that it is merely formalising what is already happening and that nothing has changed which prompts the question as to why such legislation is needed. It is claimed that opponents of the scheme have deliberately misrepresented its intentions; however the weight of legal opinion demonstrates that the new law usurps parental authority and will lead to cases of unjustified interference in the private lives of innocent families.²⁴

7. Judicial Review: 2014

The Christian Institute along with three other charities decided to submit the Named Person government's proposals to judicial review.²⁵ The review was held by Lord Pentland in the Outer House of the Court of Session in 2014. Lord Pentland refused the petition for judicial review. The petitioners had argued that the provisions which lead to the creation of a "named person" service were outside the Parliament's legislative competence, as demarcated by section 29 of the Scotland Act 1998, because they were incompatible with rights guaranteed under the European Convention on Human Rights and with the law of the European Union on data protection. It was also claimed that the provisions were unlawful as they contravened fundamental constitutional rights protected by the common law.

Refusing the petition, Lord Pentland concluded that:

- Part 4 of the Children and Young People (Scotland) Act did not contravene Convention rights, EU law or fundamental common law rights.
- The fact that the Named Person service will be provided for (nearly) every child and young person did not, in itself, necessarily mean that there will be a breach of Convention rights.
- He did not believe that the provisions in Part 4 of the Act were necessarily disproportionate to the legitimate aim of the legislation, which is to promote and safeguard the wellbeing of all children and young people in Scotland by establishing a system for the appointment of Named Persons.
- It was "unnecessary" to make a reference to the European Court of Justice for a preliminary ruling.

Lord Pentland concluded that the subject matter of the legislation was "within the devolved competence" of the Scottish Parliament, stating that it was clear that the provisions did not relate to matters reserved to Westminster. He further held that the four charities had no standing to bring the present proceedings as they lacked "sufficient interest" entitling them to seek judicial review of Part 4 of the Act.

8. Court of Session: 2015

In 2015 the matter was brought to the Court of Session's appeal chamber – the Inner House – by three individual petitioners, as well as The Christian Institute, Family Education Trust, The Tymes Trust, and Christian Action Research and Education (CARE). The Inner House rejected the petitioners' reclaiming motion (appeal). It was concluded that creating a Named Person had no effect whatsoever on the legal, moral, or social relationships within the family and to suggest otherwise had the "appearance of hyperbole".²⁶ The legislation did not involve the state taking over any functions carried out by parents. Having a Named Person no more confused or diminished the role and responsibilities of parents than the provision of social services or education generally. There was no interference with Article 8 of the ECHR.

The Court also found that there was no interference with the right of parents and children to freedom of thought, conscience, and religion under Article 9. Moreover, the legislation contained no provision which impacted upon a child's right to education or a parent's right to bring up their child according to their own conscience and religion.

Though not necessary, the Court also addressed the issue of proportionality finding that any interference with Convention rights would nonetheless be justified. First, the legislation had a legitimate aim, namely, the promotion of child welfare. The petitioners had tried to draw a distinction between promoting the wellbeing of children and protecting them from harm, arguing that State intrusion was only justified in the latter scenario. However, it was understandable that policy makers would want a scheme which identified threats in advance rather than waiting for a child to be the subject of a specific threat. Secondly, the chosen scheme was rationally connected to its objective. Without it there was the potential for a lack of communication which would "seriously undermine" the government's aims. Finally, whilst the role of parents was to be respected there was nothing to prevent the State from putting in place reasonable measures to support children and their parents. The scheme was designed to ensure that crucial information about a child's welfare was not missed, with the need to ensure early detection of welfare issues outweighing any adverse effect on children and parents.

In relation to the data sharing provisions, the Court found that the 2014 Act could be operated consistently with the data protection regime, including the Data Protection Act 1998 which transposed the EU Charter and Directives concerning personal data into domestic law. Whilst it was

possible that breaches of data protection principles could occur in particular cases there was nothing to suggest that the legislation necessarily infringed those principles.

The Named Person scheme has been politically controversial with criticism directed in particular at the perceived interference with family life and the role of parents.²⁷ It was striking that the Inner House attached little weight to these arguments, suggesting that they were hyperbolic. For the court, the Named Person scheme was similar to other public services. It was designed to help children and their families, offering advice and assistance, and had no effect on familial relationships and parental responsibilities.

When the Inner Court of Session ruled that it could see nothing illegal in what the Government was proposing, the opponents of the Named Person scheme signalled their intention to appeal to the UK Supreme Court.

9. Supreme Court: 2016

The appeal was heard at the Supreme Court on the 8th and 9th March 2016. The following issues were addressed:

1. Whether the provisions of the Children and Young People (Scotland) Act 2014 requiring the appointment of a named person to every child and young person in Scotland (other than those serving in the UK Armed Forces) are compatible with: (a) fundamental common law rights; and (b) the European Convention on Human Rights?
2. Whether the provisions of the 2014 Act concerning information sharing and disclosure of information associated with the exercise of the named person functions are compatible with EU law.
3. Whether the provisions of the 2014 Act concerning information sharing and disclosure of information associated with the exercise of the named person functions relate to matters reserved to the Westminster Parliament under the Scotland Act 1998.

Whilst the Supreme Court was restricted to examining the legality of what was being proposed in the Act, anyone who attended the three sessions or has seen the seven hour video record of the proceedings will be aware of the Court's close interest in the practicalities involved in the implementation of the scheme.²⁸

Implicit in some of their questioning were concerns about:

- the apparent lack of guidance relating to the implementation of the Named Person scheme
- the awareness and understanding by Named Persons of the legal limitations of their role
- the operational complexity of the role of Named Person
- equipping the Named Person with the knowledge, skills and expertise to successfully undertake that role
- the awareness, understanding and respect by the Named Person for the different professional protocols involved in the exercise of the role
- finding a sufficient number of professionals possessing the appropriate knowledge, skills, expertise and personal qualities to undertake a highly complex and as yet wholly untested role.

10. Problems in implementation

Over and above the problems relating to the collection and collation of information to which reference has been made is the issue of individuals possessing the requisite skills and insight to be able to interpret it and then act appropriately, expeditiously and judiciously. It would seem that none of the lessons arising from the Orkney child abuse case have been taken on board.

On the 27th February 1991 social workers and police removed nine children from their homes on the island of South Ronaldsay in Orkney because of allegations of child abuse. The children denied that any abuse had occurred, and medical examinations failed to reveal any evidence of abuse. An inquiry report published in October 1992 heavily criticised Orkney Social Services and produced no fewer than 194 recommendations for changes in child care practices.²⁹ A number of these key recommendations warrant highlighting as they have particular relevance in terms of the operation of the Named Person scheme.

The Report highlighted the failure:

- to consider the children individually
- to keep a wholly open mind about the allegations made thus allowing the investigation not to be coloured by suspicions
- to have a proper case conference to which the parents were invited
- to keep a proper record of decisions and of disclosures
- to give sufficient thought as to whether it was necessary to remove the children from the family
- to appreciate the significance that the allegations of abuse had not come from the children in question
- to assess properly the degree of risk to which the children were exposed
- to act with due caution and to take time to pause and think
- to provide the parents with proper information about the Place of Safety Orders and their rights of challenge and the process
- to support the parents after their children's removal and to provide much fuller information about the reasons for removal, and
- to recognize that the interview process employed was wholly ineffective for the sensitive kind of investigative work being carried out.

What confidence can one have that health visitors, head and guidance teachers responsible for the implementation and operation of the Named Person scheme have the requisite knowledge, experience and expertise to undertake such highly sensitive work?

Whilst it may be argued that the recommendations in the Clyde Report applied to social workers, any Named Person wishing to submit a case to a Social Work Department or the Police would need to follow the kind of guidelines which are set out above.

11. Feedback from the professional workforce

Realisation of the full implications of the introduction of the Named Person scheme has been made evident by all the professional groups directly involved.³⁰ The public sector union UNISON Scotland recently undertook a survey among health visitors and found that more than half of health visitors (52%) did not think that the Named Person scheme “would be a good thing”. The fears expressed include:

- being made “scapegoats” if a child is harmed
- facing legal action and being sued by parents
- being consumed by an avalanche of information; and
- having their relationships with parents damaged.

Particularly concerning is the fact that the majority of respondents were in the 45-54 age bracket (48%) and 24% were aged 55-64. This will mean a considerable reduction in the numbers employed over the next 10 years or so. All staff surveyed had concerns about their role: 48% cited reduced staffing; 95% said their workload had increased; 71% said they were covering for vacancies and 57% were worried about cuts in the service they could provide.

The report concluded that there was a significant shortage of health visitors in post and with the increase in duties and change in focus in health visitor jobs; the service was likely to become more and more stretched. With the introduction of the Named Person scheme there would be an inevitable increase in administrative work for health visitors who would have to collate information from the many different sources which dealt with children under five (e.g. nurseries, GPs, hospitals, and police).

The comments from UNISON members show a workforce with low morale, facing increased responsibilities and feeling stretched to the limits. It is argued that adding new child protection responsibilities to the role of health visitors is not sensible at this time. The Royal College of Nursing has estimated that an extra 450 health visitors will be needed to fulfil this new role, yet no such commitment to financing the scheme has been given by the government and no funding has been allocated.

The Scottish Secondary Teachers Association has indicated that there are concerns among the members of the teaching profession about the scheme, in particular, fully understanding the legislation which underpins it. It remains unclear if teachers will be able to ‘opt out’ of the role if they find the workload too heavy. Whilst the Educational Institute for Scotland agrees

with the principle of a Named Person, it makes clear that this will have significant implications where a school is expected to be the provider of the Named Person. There will also need to be extensive guidance for Named Persons regarding their role, responsibilities and legal position.

Police Scotland (the newly created national police force) has raised concerns given the lack of clarity as to the expectations, roles and responsibilities of those operating the Named Person scheme.³¹ It has argued for a national training package to allow some sort of minimum and consistent standard for those professionals who will have a statutory duty to assess the wellbeing needs of a child.

12. Academic debate

Some of the most forthright criticism of the Named Person scheme has been expressed by Maggie Mellon, an independent consultant on social work practice and public policy.³² In an article in the *Scottish Journal of Residential Child Care* she identified four reasons for opposing the Named Person scheme.³³ Firstly, there is no local, national or international research evidence to support the imposition of Named Persons for all children. The ‘evidence’ quoted is usually anecdotal in character or based on the opinion of professionals. One sign of the lack of proper thought that had gone into the legislation was the confusion and delay in getting out guidance on how it will work, about resources and responsibilities and about complaint procedures.

Mellon’s second point is that the legislation does not state what its supporters claim. There is no mention of the Named Person having a duty to act on the request of, or to consult with, parents, families, children or young people, or even to take their views and wishes into account. There is no mention of confidentiality, partnership or of rights and entitlements. There is not one single mention of families and very few references to parents in the whole Act.

The third point of criticism is that the Act is not about ‘prevention’ as is claimed, but rather ‘net-widening’. The legislation lowers the threshold for compulsory intervention and information sharing well below the current test of ‘significant harm’ to one of any concern about a child’s wellbeing, for which there is no legal definition. This constitutes a dangerous breach of the right to family and private life and because we cannot predict which families are potentially dangerous, the government is arguing for extending the net.

The fourth and final point made by Mellon is that the state ‘makes a really lousy parent’. She argues that the state needs to get its own house in order before looking for wider territory into which to make mistakes. Those responsible for public services need to get it right for the children who are already looked after and accommodated. Mellon concludes that the Scottish government should accept the fact that service providers fall far short of parents and families in the quality of the care they offer and therefore it should seek to emulate and learn from them instead of imposing ‘as we see fit’ interventions on the whole population of children.

13. Governmental confusion

Ahead of a debate on the Children and Young People (Scotland) Bill at Holyrood in February 2014, Aileen Campbell, the Minister for Children and Young People, wrote to all MSPs urging them to support measures contained in the legislation, including the Named Person policy. She stated that misrepresentations and misunderstandings about the Named Person provisions which were circulating should be ignored. She claimed that the proposals contained in the Bill were not about treating every child with the same procedures with which vulnerable children were treated nor was it recommending a social worker be appointed for every child, or giving Named Persons the authority to enter every house.³⁴

According to the Minister the Named Person's responsibilities were at the lower end of the scale of concern. Their function would almost always be discharged through routine contact with the child either in health or in education. She concluded that those parents who do not want to engage with the Named Person are under no obligation to do so.³⁵

During First Minister's Questions in Holyrood in March 2016, Nicola Sturgeon re-asserted her view that parents would be able to opt out of the scheme. She repeated her claim that the scheme was an entitlement rather than an obligation and that neither children nor parents were legally obliged to use the service or follow the guardian's advice.³⁶ This directly contradicts the legal opinion articulated by the Government's QC at the Court of Session in 2014.

Kezia Dugdale, the Scottish Labour leader, has indicated that her Party supports the principle behind the Named Person scheme but that the introduction of the scheme had been mishandled. She stated that a Labour Government, if elected in May 2016, would halt the process so that the concerns of parents could be addressed.

The Scottish Conservative leader, Ruth Davidson, has argued that she would call for a pause and has suggested that the scheme should not be introduced in August. She encouraged people to get round the table in order to find a way to best allocate resources to those who were most vulnerable. It was her view that the Named Person scheme was an unacceptable intrusion into family life. She stated that it was dishonest to suggest that a parent choosing not to engage with a Named Person was the same as a parent being able to stop their child from having a Named Person imposed in the first place. Earlier, she had reminded the Holyrood chamber that the Conservatives had attempted to amend the legislation to give parents an opt-out but this had been voted down by the Scottish National Party.

The point should be made that when the Children and Young People (Scotland) Bill came before the Scottish Parliament it was passed unanimously, there were no dissenting voices. A possibly more principled position from the opposition parties at Holyrood, given their serious concerns surrounding the Named Persons scheme which formed a crucially important part of the Bill, would have been to abstain. Those of a possibly cynical disposition might conclude that the strength of the current opposition to the Named Person scheme might not be unrelated to the fact that in the run up to the Parliamentary election in May 2016, opposition parties tend to exploit any instances of what they perceive to be governmental mismanagement and confusion.

14. Lack of operational clarity

Notwithstanding the fact that the Named Person scheme comes into force on the 1st August 2016, there are many issues relating to its operation for which no satisfactory answers have yet been forthcoming.

- For how long can confidential information relating to a child or young person be held; the presumption being that such material is destroyed once a pupil completes her/his secondary education or attains the age of 19?
- What measures are to be put in place to ensure that all material relating to young people who no longer fall within the ambit of the Named Person are destroyed?
- What happens in a situation where a young person moves to a further education college at the age of 16? Is there an expectation that there will be a Named Person in the college, if so, who would assume that role?
- Who is the Named Person for children who leave school before they are 18? Guidance on the implementation of the Act states that each council should agree arrangements for children in this position but it does not specify which professionals should undertake this role.
- Does an external body such as the Social Work Department or Police have a legal right to demand access to material held by a Named Person without written authority?
- If under the terms of the Data Protection Act 1998 patients have a legal right to access their own health education records, which contain confidential information about their mental and physical health, why cannot parents or legal guardians access information on their children which they have good reason to believe is held by a Named Person scheme.
- The possibility is ignored that some children and young people may use the threat of going to a Named Person as a lever in securing a possible advantage in their dealings with their parents.
- Should the particular ethnic or religious background of parents or guardians be taken into account when appointing Named Persons? In other words, is there a risk of misperception, misunderstanding or misrepresentation, where the Named Person is unfamiliar with the particular lifestyle of a child's or young person's family background?
- It is unclear how the Named Person scheme is meant to operate during school holidays; official guidance offers only the vague recommendation that 'contingency arrangements' should be put in place.

15. Final reflections

The principal objection to the Named Person scheme that has been advanced is that it constitutes an unjustified interference with the right to private and family life and home protected under the terms of Article 8 of the European Convention on Human Rights. The introduction of the scheme enjoys neither public nor relevant professional support.

A disturbing aspect of the proposed introduction of the scheme has been the evident failure by the Scottish Government to think through the financial and practical implications. There is the untested assumption that the relevant professional groups (i.e. health visitors, head teachers, guidance teachers) can assume the role of Named Person on top of their existing role and that the scheme can be implanted without extensive financial support.

Governmental confusion about the functioning of the Named Person scheme may result, in part, from a degree of political naïveté on the part of the Scottish government which has had relatively little experience in introducing major changes in educational and social welfare legislation. There is a strong indication that the government did not seek a wide range of expert advice and guidance or if it did, it was ignored.

Why might that be so? A former Deputy Chairman of the SNP party has drawn attention to a feature of the SNP parliamentary party at Holyrood which is that there are no backbench policy groups looking at various important issues and getting experts involved in offering advice.³⁷ A contrast is made with the practice at Westminster where it is taken for granted that backbench MPs form different groups with the intention of contributing ideas to internal debates on party policy.

A measure of caution is perhaps warranted where organisations have come out in unqualified support for the Named Person scheme. For example, Alison Todd, Chief Executive of Children 1st in Scotland, welcomed the High Court decision to reject the judicial review challenging the implementation of the Named Person section of the Children and Young People (Scotland) Act 2014.³⁸ She went on to express the hope that the role of the Named Person would be implemented as speedily as possible. It is perhaps worth noting that of its £10.5 million income in the financial year ending the 31 March 2015, one third was derived from grants – the largest being from the Scottish Government.³⁹ There is no shortage of evidence that governments can, if they so wish, exercise pressure and influence on the decision-making of bodies which are in receipt of government funds.^{40, 41}

Perhaps the most concerning aspect of the notion of imposing ‘state guardians’ is that for a significant number of people it smacks of a political

system where the State recognizes no limits to its authority and strives to regulate every aspect of public and private life wherever feasible. Some might argue that it bears the hallmarks of a totalitarian approach.

A particular anxiety felt by those opposing the Named Person scheme is that if it goes ahead a significant precedent will have been established for further encroachment by central government on the private lives of its citizens. When one combines this kind of intrusive intervention with the growing centralisation of powers to which the present Scottish government appears committed, there is perhaps cause for genuine concern and unease.

One of the more dispiriting aspects surrounding the proposed introduction of the Named Person scheme is the apparent reluctance by individuals and organisations avowedly committed to educational and social welfare reform to express not only their concerns but their opposition to what has been proposed. The history of 20th century Europe provides us with all the evidence we need of what happens when people and relevant professional organisations fail to speak out when governments appear to act in an authoritarian manner.

*Imagine a country where the government so mistrusted parents that every child was assigned a state guardian – not a member of their family – to act as a direct link between the child and officials. Imagine that such a scheme was compulsory, no matter how strongly parents objected. Welcome to Nicola Sturgeon’s Scotland in 2015.*⁴²

Alan Tomkins, Professor of Public Law, University of Glasgow

The SNP’s state guardian scheme has come under fresh attack after it emerged that children have been asked to think of their named person as the “head gardener”.

During workshops with 107 youngsters aged between 9 and 12, the document (created for the Children’s Parliament) related how they were encouraged to imagine Scotland as a garden, with each child as a plant growing within it.

*Children were told “all the adults in their lives” were “gardeners” while the named person would have overarching responsibility and be considered “Head Gardener”.*⁴³

Tom Peterkin, The Scotsman

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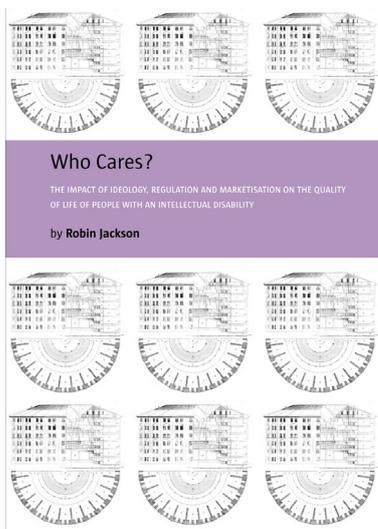
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ABOUT THE AUTHOR

Robin Jackson is currently a Visiting Research Fellow at the University of Hertfordshire. He has a PhD in Education from the University of Exeter. The subject of his doctorate was an assessment of the post school adjustment of leavers from day special schools for pupils with an intellectual disability in Edinburgh and Midlothian. Robin has written on a wide range of issues relating to people with an intellectual disability and has a particular interest in exploring the meaning of community inclusion as it relates to people with an intellectual disability. He recently guest reviewed a special issue on this topic for the Journal of Intellectual Disability Research (2011) and is currently guest editing a special issue of the International Journal of Developmental Disabilities on the same subject. A more extensive exploration of the theme of community living, inclusion and intellectual disability is to appear in a book to be published in 2016 which he is co-editing.

Email Robin: r.jackson8@herts.ac.uk



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