

Briefing on the Children and Young People (Information Sharing) (Scotland) Bill

August 2017

Introduction

The Children and Young People (Information Sharing) (Scotland) Bill and an illustrative Code of Practice were introduced to the Scottish Parliament in June 2017 to respond to the Supreme Court's judgment in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland) [2016] UKSC 51. The judgment ruled that the information sharing provisions of the Children and Young People (Scotland) Act 2014 did not comply with article 8 of the European Convention on Human Rights (ECHR) in that they were not 'in accordance with the law'.

Following the Supreme Court judgment, Scottish Government engaged widely in advance of publishing the Children and Young People (Information Sharing) (Scotland) Bill. This included over 50 meetings with 250 organisations and groups and around 700 people, including children and young people between 12-18 years of age.¹ Following this consultation, the Bill was introduced to the Scottish Parliament in June 2017, accompanied by an illustrative Code of Practice.² Views are sought on the draft Bill by the Education and Skills Committee by the **25th August**.³

[Respond to the consultation here](#)

Key Messages

The information-sharing provisions in the Named Person scheme did not comply with Article 8 of the European Convention on Human Rights (ECHR).

The Supreme Court ruled that information-sharing provisions included in the Named Person scheme in Part 4 of the Children & Young People (Scotland) Act 2014 may result in a disproportionate interference with the rights of children, young people and their parents under Article 8 of the ECHR. The Court was very clear that the policy intention behind the 2014 Act is 'unquestionably legitimate and benign' and does not breach human rights.

Specific issues were raised by the Supreme Court in relation to a lack of 1) clarity on information sharing 2) safeguards and 3) requirement to gain consent to share information.

The judgment expressed concern at the lack of safeguards against disproportionate sharing of information. These safeguards must include requirements that children, young people and their parents provide consent to the sharing of confidential information, and are informed of the possibility that information will be shared.

The draft Children and Young People (Information Sharing) Bill and illustrative Code of Practice do not adequately address all concerns raised by the Supreme Court.

The new Bill and illustrative Code of Practice takes steps to help safeguard the proportionality of information shared. They do not succeed in providing clarity as to when or how to share information about children and young people, or ensure that the views of children and young people are taken into account when sharing information about them. The issue of consent has not been included on the face of the new Bill.

¹ See CRWIA page 6. <http://www.gov.scot/Resource/0052/00521287.pdf>

² See <http://www.gov.scot/Resource/0052/00521285.pdf>

³ See <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105562.aspx>

Supreme Court judgment

Specific issues were raised by the Supreme Court in relation to:

Clarity:

Although the Scottish Government had published draft statutory guidance in 2015⁴, the Court considered that it gave *“very little guidance”* on information sharing. They raised concern that the guidance was not binding, and that information holders only had to 'have regard' to it rather than being compelled to follow it.⁵ The Court concluded that there were *“...very serious difficulties in accessing the relevant legal rules when one has to read together and cross refer between Part 4 of the Act and the DPA and work out the relative priority of their provisions”*.⁶

Safeguards:

Of more concern to the Court was the lack of safeguards which would enable the proportionality of information sharing to be properly examined:⁷

- There was no requirement to inform parents that information is shared;
- Where there is a duty to share information⁸, then the views of the child should be sought and had regard to *“so far as reasonably practicable”*;
- Where there is a power to share information⁹, then the views of the child do not need to be sought.

Consent:

Whilst an amendment to the 2014 Act introduced a requirement to *“have regard to the child or young person’s views”* when sharing information under the ‘duty’ to share, Scottish Government was clear that this did not amount to consent. The 2014 Privacy Impact Assessment noted that *“...whilst there is a distinct difference between the use of consent and having regard to the views of the child, the child’s views are more likely to be followed and as a result they will be consenting to the sharing”*.

The Court found that the 2014 Act didn’t effectively balance the requirement to share information with the benefit to be achieved. Significant issues raised were:

- A lack of any requirement to obtain the consent of the child, young person, or their parents to share information;
- A lack of any requirement to inform children, young people or their parents about the possibility of sharing information when the information is first obtained from them;
- A lack of any requirement to inform them about any sharing of information after it has taken place.¹⁰

The Court noted that: *“[...] without such safeguards, the overriding of confidentiality is likely often to be disproportionate”*.¹¹

⁴ See <http://www.gov.scot/Resource/0049/00490013.pdf>

⁵ Para 82

⁶ Para 83

⁷ Para 84

⁸ (s.26(1) and (3))

⁹ (s.26(8)),

¹⁰ Para 100.

¹¹ Para 100.

Children and Young People (Information Sharing) (Scotland) Bill

The Children and Young People (Information Sharing) (Scotland) Bill makes changes to the information sharing provisions in Parts 4 and 5 of the Children and Young People (Scotland) Act 2014 to respond to the Supreme Court's judgment. The policy objective of the bill is to ensure that the information sharing provisions are "*in accordance with the law*" and that the rights of children, young people and their parents are upheld when information about them is shared.

The new Bill includes provisions that **remove**:

- Duties on service providers to share information relevant to Named Person function with Named Person service provider;¹²
- Related duty on service provider to have regard to the views of the child when sharing information,¹³ taking into account age and maturity of child;¹⁴
- Power for service provider to decide that information should only be shared if the benefit to child's wellbeing outweighs adverse effect;¹⁵
- Additional power for Named Person service provider to share information with service providers, as deemed necessary.¹⁶

The new Bill adds provisions that **add**:

- Duties on Named Person service provider to consider sharing information if it could promote, support or safeguard a child¹⁷ and could be shared in line with the Data Protection Act and other law;¹⁸
- Duties on service providers, when they acquire information, to consider sharing information with the Named Person if it could promote, support or safeguard a child¹⁹ and could be shared in line with the Data Protection Act and other law;²⁰
- Power for the Named Person to share information with service provider, and for service provider to share information with Named Person service provider, if it could promote, support or safeguard the wellbeing of the child.²¹

The new Bill also **adds** provisions that:

- Information should not be shared if it breaches the Data Protection Act or other law or prejudice a criminal investigation;²²
- Place a duty on Scottish Ministers to issue a Code of Practice for Named Persons to provide safeguards for information sharing;²³
- Ensure Named Persons must share information in accordance with the Code of Practice.²⁴

¹² 2014 Act. Part 4, Section 26(1-4).

¹³ 2014 Act. Part 4, Section 26(5).

¹⁴ 2014 Act. Part 4, Section 26(6).

¹⁵ 2014 Act. Part 4, Section 26(7).

¹⁶ 2014 Act. Part 4, Section 26(8).

¹⁷ Bill. Part 4, Section 26(1)(a).

¹⁸ Bill. Part 4, Section 26(1)(b).

¹⁹ Bill. Part 4, Section 26(2)(a).

²⁰ Bill. Part 4, Section 26(2)(b).

²¹ Bill. Part 4, Section 26(3).

²² Bill. Part 4, Section 26(A).

²³ Bill. Part 4, Section 26B(2).

²⁴ Bill. Part 4, Section 26B(3).

The new Bill also ensures that Scottish Ministers must consult on the Code of Practice before it is issued²⁵, present a copy to Parliament²⁶, wait at least 40 days before launching it²⁷ and take account of comments from Parliament within this 40-day period.²⁸

Key points

Clarity

It is difficult to fully assess the adequacy of the new Bill in the absence of an accompanying Code of Practice. The 'illustrative' Code of Practice published to accompany the Bill does not succeed in providing clarity to practitioners as to when or how to share information about children and young people. In recognition that this is only an 'illustrative' Code of Practice, we shall not provide comment in detail. The next draft of the Code of Practice must be written in an accessible manner that can be actively used by practitioners and include case examples of:

- Situations in which practitioners may need to share information;
- The kind of information that might need to be shared;
- What informed consent looks like;
- When information might need to be shared without consent.

It would be helpful if it could include flowcharts to support decision-making around information sharing and accompanied by training materials that highlight the views and experiences of children, young people and their parents.

Safeguards

The removal of the duty and its replacement with a power to share is to be welcomed. This is likely to help to safeguard the proportionality of information shared. The fact that the Code of Practice includes guidance on deciding whether to share information, obtaining consent and informing children, young people and parents that information has been shared is also welcome, subject to the caveat that this information must be present in a far more clear and accessible manner. This can be addressed in the redrafting of the Code of Practice and associated training materials.

Consent

The new Bill has repealed the requirement to *"have regard to the views of the child or young person"*²⁹ and in doing so, to *"take account of the child's age and maturity"*³⁰. This requirement was introduced into the 2014 Act to ensure that *"both the information holder and Named Person are far less likely to appear that they are infringing on the right to privacy, as decisions will be more inclusive and transparent"*.³¹ No equivalent provisions have been included on the face of the new Bill.

Throughout the consultation for the 2014 Act and the subsequent consultation for the new Bill, it is clear that children and young people have had strong views on the issue of consent. It is not enough to rely on an undrafted Code of Practice to ensure that the views of children and young people are taken into account when sharing information about them. Given the fact that Scottish Government eventually agreed that children and young people's views needed to be recognised on the face of

²⁵ Bill. Part 4, Section 26B(5)(a,b).

²⁶ Bill. Part 4, Section 26B(6).

²⁷ Bill. Part 4, Section 26B(7).

²⁸ Bill. Part 4, Section 26B(8).

²⁹ 2014 Act. Part 4, Section 26(5).

³⁰ 2014 Act. Part 4, Section 26(6).

³¹ Pg. 11 Privacy Impact Assessment. See <http://www.gov.scot/Resource/0044/00447626.pdf>

the 2014 Act, it does not make sense that, after the Supreme Court raised consent as a concern, that their views are to be relegated into a Code of Practice. It is wrong to allow a Bill to pass through the Scottish Parliament which is reliant on an unpublished Code of Conduct to meet its obligations to children's human rights. Therefore, an amendment should be introduced to ensure that the importance of children and young people's views is recognised when sharing information about them. This amendment should explicitly recognise the importance of the views of the child on the face of the Bill.

New Data Protection regulations

In May 2018, the Data Protection Act (DPA) will be replaced by the EU's General Data Protection Regulation (GDPR), a framework which sets a higher standard for consent to process personal data.³² The new framework has significant implications for the Children and Young People (Information Sharing) Bill.

The impact of the GDPR framework on the Information Sharing Bill must be adequately interpreted and clarified, and include a focus on empowering children and young people through support and resources to ensure their views are taken into account when sharing information about them.

Conclusion

The Supreme Court ruling provided an opportunity to ensure that children and young people's rights are fully respected, protected and fulfilled throughout the implementation of the Named Person scheme. Central to this consultation on the Children and Young People (Information Sharing) (Scotland) Bill must be the Court's conclusion that safeguards should be put in place to allow children, young people and their parents to provide consent to the sharing of confidential information, and to be informed if - and when - information is shared. As it works on the necessary amendments to the Named Person scheme, it is essential that the views of children and young people, as well as their parents and practitioners are sought and listened to.

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³² See <https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/>