

Information Sharing Provisions Clauses 26 & 27 Children and Young People (Scotland) Bill

"In the areas in which GIRFEC is well implemented, there have been significant improvements in information sharing, and professionals are now confident about what needs to be shared with whom and how that is to be done."
Claire Mayo, Royal College of Nursing¹

Key messages:

- In considering the Stage 1 report, we urge the Education and Culture Committee to reflect on the range of written and oral evidence given on the information sharing provisions included in the Bill. This evidence highlighted that:

Procedures followed by Scottish Government to assess the impact of clauses 26 and 27 are flawed. Clauses 26 and 27 are unnecessary and are likely to operate against their policy intentions. The balance between a need to share information with the child's right to privacy is not struck.
- The Information Commissioner has stated that the Bill as currently drafted 'does not comply with [data protection] principles' and has recommended redrafting of [clause] 26 and the removal of [clause] 27.²
- Good information sharing is already taking place, enabling the Named Person role to function as envisaged and improving outcomes for children and young people. The role of the Named Person has been stated to be a key element in the success of the Highland Pathfinder Project. This is taking place within existing legislation.³
- There is no need for additional legislation.

The Education and Culture Committee should recommend the removal of clauses 26 and 27 from the Bill.

¹ Col 2798 [Education and Culture Committee, Official Report, 17 September 2013](#)

² Information Commissioner's Office (3 October 2013) Additional evidence submitted to the Education Ctte

³ Para 88. Scottish Government (2013) Children & Young People (Scotland) Bill Policy Memorandum

What makes a good law?

- It addresses a need and has a worthwhile purpose
- It is clear, sufficiently precise, coherent, so that it is readily understood
- It is enforceable and effective
- It minimises negative outcomes and unintended consequences
- Its provisions must be compatible with provisions of Article 8 ECHR

Necessity for legislation?

- There is nothing in current law that prevents proportionate and relevant information being shared about children and young people where it is in their best interests to protect them.⁴
- Problems with information sharing can be successfully addressed through training and clear practical guidance for professionals.
- Evaluation of GIRFEC pathfinder indicates that good information sharing enabling the Named Person to function as envisaged led to improvements in consistency and quality of information shared, with no concerns arising about existing legal frameworks.

How is Article 8 applied in relation to personal data sharing provisions?

European Court of Human Rights case about disclosure of medical records:

"In determining whether the ... measures were "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued...

In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general...

The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest."⁵

⁴ ICO statement 28 March 2013: "Where a practitioner believes, in their professional opinion, that there is risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Act in such circumstances." www.scotland.gov.uk/Resource/0041/00418080.pdf

⁵ Z v Finland [1997] 25 EHRR 371

Concerns raised in evidence to the Education Committee relating to clauses 26 and 27:⁷**PROCEDURE** followed by Scottish Government:

- No Consultation on Information sharing proposals
- No Child Rights Impact Assessment carried out
- No up-to-date Privacy Impact Assessment

PRINCIPLES:

The right balance between the need to share information with the child's right to privacy under Article 16 UNCRC and Article 8 ECHR is not struck. It is doubtful that the provisions of clauses 26 and 27 are compatible with Article 8 of ECHR. What is proposed is a statutory **duty** ie an obligation to share information, which omits certain provisions fundamental to striking the right balance:

- Consent of anyone, including child
- The views of the child
- The best interests of the child
- Proportionality
- Respect for the child's right to confidentiality

The **consequences** of failing to strike the right balance include:

- a. Information will be shared based on a subjective consideration by the information holder that sharing **might be relevant** in order to promote, support or safeguard the wellbeing of the young person, as defined using SHANARRI indicators, which is likely to result in **unnecessary** and **disproportionate** sharing of information.

"The concern that our members have is that, if a woolly approach is taken and not enough guidance is given, they will, by default and in order to cover people's backs, end up sharing information that is not necessarily needed."

John Stevenson, UNISON⁸

⁷ See Joint Briefing by SCCYP, cl@n childlaw, NSPCC & CELCIS <http://clanchildlaw.org/2013/08/information-sharing-briefing/>

⁸ Col 2689 Education and Culture Committee, Official Report, 3 September 2013

- b. **Children and young people will be reluctant to access and engage with confidential services** if they feel that information is likely to be shared without their consent and without protection of their right to confidentiality.⁹

"The worst section in the bill is section 27. If you manage to strike it out and leave everything else, you will have achieved quite a lot." Professor Kenneth Norrie, University of Strathclyde¹⁰

PRACTICALITIES:

- **"White Noise"**: Important information about vulnerable children will be lost due to the large quantities of information being shared. This will lead to vulnerable children being placed at risk. Already this can be a problem, where information is shared but not acted upon.
- **Training of Professionals**: The Scottish Government is not intending to put in place a national training programme to support the Named Person provisions. There is a need for consistent and adequate training to ensure proportionate information sharing, taking account of children's rights.
- **Lack of capacity**: of public bodies if information is over-shared, especially at a time of ongoing funding cuts within bodies carrying out the Named Person role.

CONCLUSIONS

- The provisions in clauses 26 and 27 do not meet the criteria for good law.
- There is an imbalance between children's rights and the requirement to share information.
- The performance improvements from the Highland Pathfinder show that the policy intentions of clauses 26 and 27 can be - and already have been - met within existing information sharing legislation.¹²
- There is no need for additional legislation. Clauses 26 and 27 of the Bill are not necessary.
- To meet the policy intentions of the Bill, there need to be clear guidance and training. This will give confidence to practitioners and will support them in making sound professional judgments about appropriate and proportionate information sharing.

⁹ Finding the Balance: Children's Right to Confidentiality in an age of Information Sharing. Hill, L and Wales, A., 2011 <http://www.togetherscotland.org.uk/pdfs/Finding%20the%20Balance%20Children%27s%20right%20to%20confidentiality%202011%20Final> ; BMA Scotland (26 June 2013) evidence submitted to the Education Cttee

¹⁰ Col 2691 [Education and Culture Committee, Official Report, 3 September 2013](#)

¹² Para 88. Scottish Government (2013) Children & Young People (Scotland) Bill Policy Memorandum