Information Sharing provisions: the way forward

HISTORY

Protection of Vulnerable Groups (Scotland) Bill 2006

An attempt was made to introduce legislation imposing duties to share confidential information relating to children by virtue of Part 3 of the Protection of Vulnerable Groups (Scotland) Bill[1] ("the PVG Bill") in 2006. It was proposed that the threshold for sharing such information be lowered from "risk of significant harm" to "protecting a child from harm". Part 3 of the PVG Bill drew much criticism from organisations working with children. The Children's Commissioner submitted that young people would not share sensitive information if they thought that *"it [would] be shared with a huge number of people on the ground of 'harm', which is undefined and is a low threshold."*[2] In its Stage 1 Report on the PVG Bill, the Education Committee called upon the Scottish Executive to delete Part 3 of the PVG Bill and said this:

> *"[T]he Committee has serious concerns with Part 3. Its proposals are fundamental, far-reaching and potentially life-changing for those upon whom they impact. The Committee accepts that the protection of children is a top priority but it considers that the issues involved are so complex and sensitive, encompassing the welfare needs of children and others who may have suffered harm and wider human rights concerns as well as (sic). Whilst accepting the principle of appropriate information sharing in the child's best interests, the Committee believes that further time for reflection and full consultation should be allowed. … The Committee believes that consultation on this aspect of the Bill has been insufficient."*[3]

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1 http://www.parliament.scot/S2_Bills/Protection%20of%20Vulnerable%20Groups%20(Scotland)%20Bill/b73s2-introd.pdf

2 http://www.parliament.scot/S2_EducationCommittee/Reports/edR06-12.pdf, paragraph 142

3 http://www.parliament.scot/S2_EducationCommittee/Reports/edR06-12.pdf, paragraphs, 149 to 150, and 155

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Consultation 2012

In July 2012, Scottish Government published "A Scotland for Children: A Consultation on the Children and Young People Bill"[4] ("the Consultation"). Paragraph 120 of the Consultation was in these terms:

> *"Scottish Ministers will consider issuing guidance that would help to clarify the circumstances under which information about the risks to the wellbeing of a child or young person can be shared with or through the Named Person, but the intention is that such information sharing would occur within existing legal frameworks."*

Clan Childlaw responded to the Consultation[5]. In our response to Question 18, we said this:

> *"We agree that issues of information sharing and confidentiality can be addressed within the existing legal frameworks and that no further legislation is required in this area."*

Introduction of Children and Young People (Scotland) Bill

However, in March 2013, the Children and Young People (Scotland) Bill ("the Bill") was introduced into the Scottish Parliament, including duties to share information about children with and by Named Persons, based around concerns for a child's wellbeing. No prior consultation about the information sharing proposals had taken place.

Stage 1

In October 2013, we briefed MSPs on the Scottish Parliament Education and Culture Committee ("the Committee"), ahead of their Stage 1 report, to the effect that they should recommend the removal of the information sharing provisions from the Bill. Our briefing[6] included the following observations:

- There was no need to introduce legislation on information sharing, since the "child protection" threshold for sharing information was already in place in the common law.
- There had been no consultation on the information sharing proposals.
- No Child Rights Impact Assessment had been carried out.

[4] http://www.gov.scot/Resource/0039/00396537.pdf
[5] http://www.gov.scot/Resource/0040/00406431.pdf
[6] http://www.clanchildlaw.org/app/uploads/2015/06/Clan-Childlaw-Stage-1-Information-Sharing.pdf

- The right balance was not struck between the need to share information with the child's right to privacy under Article 16 of the United Nations Convention on the Rights of the Child ("UNCRC") and Article 8 of ECHR.

- We doubted that the provisions were compatible with Article 8. (We referred to the case of Z v Finland [1997] 25 EHRR 371, a case later referred to in our Intervention in the Supreme Court case, and mentioned in paragraph 76 of the Court's judgment.)

- Fundamental provisions necessary to striking the right balance were omitted, including:
  Consent of the child to sharing the information
  Respect for the child's right to confidentiality.

- Information would be shared on subjective consideration by the information holder as to relevance to the promotion, support or safeguarding the wellbeing of the child.

- Children and young people would be reluctant to access and engage with confidential services, if they felt that information was likely to be shared without their consent and without protection of their right to confidentiality.

- There was a risk of "white noise". Important information about vulnerable children could be lost due to the large quantities of information being shared, thereby placing vulnerable children at risk.

In their Stage 1 Report on the Bill[7], at paragraphs 125 to 126, the Committee recorded the following concerns expressed during their taking of evidence:

> *"[T]he Govan Law Centre was concerned that the proposals would result in a diminution of an individual's right to privacy. It described the Bill as proposing a significant erosion of the right to privacy for children and families with few (if any) safeguards built in. It also argued the broad definition of wellbeing would inevitably leave the matter to subjective interpretation, and questioned whether there was any justification for breaching an obligation of confidence and sharing information about a mild concern regarding any aspect of wellbeing.*

> *"LGBT Youth Scotland felt that the Bill could exacerbate situations where the confidentiality and privacy of LGBT young people could be breached by allowing information about, for example, sexual orientation to be shared without consent. In relation to children and families living with domestic abuse, Scottish Women's Aid was concerned that the proposal would be interpreted as legislation for the sharing of any*

[7] http://www.parliament.scot/S4_EducationandCultureCommittee/Reports/edR-13-11w.pdf

information about any child or young person, their family and family life and personal circumstances even where they are not considered to be at risk."

Stage 2

Some attempt to address concerns raised by us and others was made by Scottish Government at Stage 2. Amendments were passed which required the views of the child to be sought, and there was some improvement in the wording around the consideration by the information holder as to the relevance of the information to be shared. However, there was still no mention of the consent of the child, and it was still proposed that the sharing of information should take place at the lower, somewhat vague and subjective threshold of the child's wellbeing, rather than at the child protection level of risk of significant harm to the child.

Again, we issued a briefing[8] to members of the Committee. Even with the amendments introduced at Stage 2, we continued to take the view that the correct balance would still not be struck between the need to share information with the child's right to privacy under Article 16 UNCRC and Article 8 ECHR. No reference was made to seeking consent of the child. There was a significant risk that, if the information sharing proposals proceeded, children and young people would be reluctant to access and engage with confidential services if they felt that information was likely to be shared without their consent and without protection of their right to confidentiality[9].

We also pointed out that evaluation of the GIRFEC pathfinder indicated 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. The performance improvements from the Highland Pathfinder showed that the policy intentions of the information sharing provisions could be - and already had been - met within existing information sharing legislation[10].

Stage 3

By the time the Bill reached the Stage 3 debate in the Chamber of the Scottish Parliament, in February 2014, we had worked with Liam McArthur MSP to introduce amendments[11], to

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[8] http://www.clanchildlaw.org/app/uploads/2015/06/Clan-Childlaw-Stage-2-CYPB-Briefing-060114.pdf

[9] see Finding the Balance: Children's Right to Confidentiality in an age of Information Sharing. Hill, L and Wales, A., 2011 http://withscotland.org/resources/finding-the-balance-children-s-right-to-confidentiality

[10] see Scottish Government (2013) Children & Young People (Scotland) Bill Policy Memorandum, paragraph 88 http://www.parliament.scot/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd-pm.pdf

[11] Information Sharing Stage 3 Amendments 165 to 171, Group 9, pages 18-19 http://www.parliament.scot/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27as4-stage3-g-rev.pdf

include reference to consent on the face of the Bill. Our amendments would have required the information holder, when information to be provided was confidential, to seek to obtain informed and explicit consent from the child, or their parent if the child lacked capacity. An exception was proposed if "the information holder considers that to seek consent would be likely to adversely affect the wellbeing of the child or young person." This time we briefed[12] all MSPs about our information sharing amendments. However, they did not have Government support. The proposed amendments were not carried[13]. The Children and Young People (Scotland) Act 2014 ("the Act") was passed by the Scottish Parliament on 19th February 2014.

SUPREME COURT CASE

Clan Childlaw Intervention

We focused our Intervention entirely on the information sharing provisions, and their adverse impact on the rights of children. At no time, either before or after the passage of the 2014 Act, did we seek to challenge the entire Named Person scheme. In our written Intervention[14], at paragraph 13, we made the following submission:

> *"The intervener accepts that, were it defined with sufficient precision, the concept of wellbeing might be an appropriate concept in informing the duties of local authorities in relation to a child, it is not appropriate or lawful to use the same concept as the threshold for sharing confidential information. If the provisions permitting the sharing of confidential information were struck out, the concept of wellbeing would remain as the criterion for various other matters in the Act. It would, for example, still form the basis of decisions by a named person as to whether it was appropriate to advise, inform or support a child or young person."*

In addition to intervening in writing, we were given permission to intervene orally[15].

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[12] http://www.clanchildlaw.org/app/uploads/2015/06/Clan-Childlaw-Stage-3-Information-Sharing-Briefing.pdf

[13] Stage 3 debate report, pages 50-55
http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9473&mode=pdf

[14] http://www.clanchildlaw.org/app/uploads/2016/09/here.pdf

[15] https://www.supremecourt.uk/watch/uksc-2015-0216/080316-pm.html

Our submissions can be summarised as follows:

1. The disclosure of confidential material is an interference with the rights protected by Article 8 ECHR which can be justified only by an overriding requirement in the public interest.

2. The disclosure of confidential material may therefore be justified where that is necessary to avert a risk of significant harm.

3. Respect for and protection of individual autonomy are important aspects of the rights protected by Article 8 ECHR.

4. The importance of the interest in confidentiality protected by Article 8 ECHR is underlined by reference to Article 16 of the UNCRC.

5. One aspect of the privacy of the individual which is protected by Article 8 is the right to informational autonomy.

6. In order for an interference with Article 8 rights to be permissible, it must be in accordance with the law. The law must be precise and accessible. The conditions in which the Act permits disclosure of confidential information are not set out with sufficient precision to satisfy this standard.

7. The Revised Draft Statutory Guidance does not make any additional provision which would permit the Court to conclude that the conditions for disclosure of confidential information are set out with sufficient precision to satisfy those standards of precision and accessibility.

8. The lack of precision is such as to create real, practical difficulties for professionals providing named person and other services in determining how they ought to act in relation to disclosure of information.

9. The circumstances in which the Act permits disclosure of confidential information are considerably broader and set a lower threshold for disclosure than is compatible with the rights protected by Article 8 ECHR.

Supreme Court Judgment

On 28th July 2016, the Supreme Court delivered their judgment[16]. They concluded that the information sharing provisions of the Act (a) were incompatible with the rights of children, young persons and parents under article 8 of the ECHR because they are not "in accordance with the law" as that article requires; and (b) may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents, through the sharing of private information. The information sharing provisions were, therefore, not within the legislative competence of the Scottish Parliament.

Excerpts from the judgment are summarised and quoted below. The relevant paragraphs of the judgment are shown in square brackets.

Article 8 ECHR

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) 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 wellbeing 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.*

1. **The interests protected by Article 8 include confidential information** [75, 76]

2. **The operation of the information sharing provisions will result in interferences with rights protected by Article 8 ECHR** [78]

3. **Information sharing provisions of Part 4 & the RDSG are not in accordance with the law** [85]

   In order to be "in accordance with the law" a measure must be accessible to the person concerned and foreseeable as to its effects. [79] The court can look not only at formal legislation but also at published official guidance and codes of conduct. [81]

   - **A rule must be formulated with sufficient precision to enable any individual to regulate his or her conduct [79]**

[16] https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf

"… there is no compulsion to follow the guidance. The RDSG gives very little guidance as to the requirements of the DPA or article 8 of the ECHR but envisages that separate practice materials will be made available to practitioners." [82]

"… the powers and duties of disclosure set out in sections 23 and 26 cannot be taken at face value. In several crucial respects, the scope of the duties and powers to disclose or share information set out on the face of the Act are, in reality, significantly curtailed by the requirements of the DPA and the Directive." [83]

"… The relationship between the Act and the DPA is rendered particularly obscure by … the logical puzzle arising from sections 23(7) and 26(11) when read with section 35(1) of the DPA. … There are thus 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." [84]

- **A rule must be sufficiently precise to give legal protection against arbitrariness, which requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. [79-80]**

"Of even greater concern is the lack of safeguards which would enable the proportionality of an interference with article 8 rights to be adequately examined. … [T]here is no statutory requirement, qualified or otherwise, to inform the parents of a child about the sharing of information. … It is thus perfectly possible that information, including confidential information concerning a child or young person's state of health (for example, as to contraception, pregnancy or sexually transmitted disease), could be disclosed under section 26 to a wide range of public authorities without either the child or young person or her parents being aware of the interference with their article 8 rights, and in circumstances in which there was no objectively compelling reason for the failure to ascertain and have regard to their views." [84]

4. **Whether the Interference is Proportionate: 4 questions** [90]

(i) whether the objective is sufficiently important to justify the limitation of a protected right

"… Part 4 of the 2014 Act pursues legitimate aims. … Improving access to, and the coordination of, public services which can assist the promotion of a child's wellbeing are legitimate objectives which are sufficiently important to justify some limitation on the right to respect for private and family life." [91]

(ii) whether the measure is rationally connected to the objective

"Part 4 of the Act is rationally connected to the legitimate aims pursued. … [T]he aims of the legislation are to move public bodies with responsibility for children towards early intervention to promote children's wellbeing rather than only responding to a serious occurrence and to ensure that those public bodies collaborated and shared relevant information concerning the wellbeing of individual children. … [T]he named person is at the heart of the Scottish Government's proposals. That person is tasked with advising on the wellbeing of a child, helping a child or parent to access a service or support, and being the single point of contact for public services in relation to the child in order to promote, support or safeguard the child's wellbeing." [92]

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective

"The third question … does not involve a court in identifying the alternative legislative measure which was least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the fundamental right is one which it was reasonable for the legislature to impose … . If … a named person should be appointed in relation to a child only if the parents consented or, absent such consent, if the appointment was necessary to protect the welfare of a child who was at risk of harm, the scope for early intervention to resolve problems and for the coordination of public services in support of a child's wellbeing would be diminished. Separate questions will arise as to whether, in an individual case, early intervention and coordination of services could be achieved by less intrusive means. That issue can be considered under the final question of fair balance." [93]

(iv) whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure

"[T]he task facing the information holder is a daunting one because the Act does not address the factors to be considered in an assessment of proportionality and the RDSG gives exiguous guidance on that issue. The provisions of the Act appear to point toward a more relaxed approach to disclosure than is compatible with article 8. Section 26(1) and (3) oblige the information holder to provide information which meets the criteria set out in subsections (2) and (4). Those criteria include an assessment of whether the information is likely to be relevant to the exercise of functions which may affect the wellbeing of the child or young person. In turn, the assessment of that wellbeing under section 96, as explained by the RDSG, involves the use of very broad criteria which could trigger the sharing of information by a wide range of public bodies … and also the

initiation of intrusive inquiries into a child's wellbeing. In our view, the criteria in sections 23(3), 26(2) and 26(4) by themselves create too low a threshold for disclosure … and for the overriding of duties of confidentiality in relation to sensitive personal information." [97]

"The central problems are:

- *the lack of any requirement to obtain the consent of the child, young person, or his or her parents to the disclosure,*
- *the lack of any requirement to inform them about the possibility of such disclosure at the time when the information is obtained from them,*
- *and the lack of any requirement to inform them about such disclosure after it has taken place.*

Such requirements cannot, of course, be absolute: reasonable exceptions can be made where, for example, the child is unable to give consent, or the circumstances are such that it would be inappropriate for the parents' consent to be sought, or the child's best interests might be harmed. But, without such safeguards, the overriding of confidentiality is likely often to be disproportionate." [100]

"In order to reduce the risk of disproportionate interferences, there is a need for guidance to the information holder on the assessment of proportionality when considering whether information should be provided. In particular, there is a need for guidance on

(a) the circumstances in which consent should be obtained,

(b) those in which such consent can be dispensed with and

(c) whether, if consent is not to be obtained, the affected parties should be informed of the disclosure either before or after it has occurred.

Also relevant is whether the recipient of the information is subject to sufficient safeguards to prevent abuse. … Further, if the guidance is to operate as "law" for the purposes of article 8, the information holder should be required to do more than merely have regard to it." [101]

WAY FORWARD

We are of the view that there are significant difficulties in improving accessibility of the legal rules, and in providing adequate safeguards so that the proportionality of an interference with Article 8 rights can be challenged and assessed, such as would render the information sharing provisions compatible with the Article 8 rights of children, young persons and parents and to prevent disproportionate interferences with those Article 8 rights.

In all the circumstances, and against the background set out above, we have concluded that the appropriate way forward is as set out by Scottish Government in the Consultation of 2012, with which we agreed in our response to the Consultation, namely not to legislate in relation to information sharing, but to rely on existing legal frameworks. The advantages of such an approach include:

- Clarity and accessibility of the legal rules
- Removal of any difficulty with compatibility caused by lowering the threshold.

As we submitted at paragraph 13 of our Supreme Court Intervention, "*If the provisions permitting the sharing of confidential information were struck out, the concept of wellbeing would remain as the criterion for various other matters in the Act. It would, for example, still form the basis of decisions by a named person as to whether it was appropriate to advise, inform or support a child or young person.*"

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