

Briefing: CONFIDENTIALITY, INFORMATION SHARING AND THE CHILDREN AND YOUNG PEOPLE (SCOTLAND) BILL

Key Messages

- Confidentiality is of fundamental importance to children and young people. Children and young people have a right to privacy under the European Convention on Human Rights (ECHR) & United Nations Convention on the Rights of the Child (UNCRC); children have the same rights to confidentiality as adults. The current proposals risk breaching children's right to confidentiality and deterring access to confidential services.
- Sharing information that is *relevant* and *proportionate* about children who are at risk of harm, is fundamental to keeping children safe.
- The Children and Young People (Scotland) Bill proposes a **new information sharing duty** for public bodies and service providers which would introduce a radical change in the existing information sharing provisions.
- The change will involve significantly lowering current accepted information sharing thresholds and broadening the grounds for such information sharing to concerns in all areas of a child's wellbeing, as defined in GIRFEC policy.
- The Scottish Government has not consulted on these new proposals.
- The proposals may result in changed confidentiality arrangements for services, which heavily rely on confidentiality. This may put vulnerable children at risk.
- There are no proposals to tie the information-sharing provisions to consideration of the best interests of the child, nor consideration of the child's views, nor the child's consent. The proposals do not appear to offer a balance between children's rights and the need to share information.

1. Making Rights Real: The Children and Young People (Scotland) Bill

In April 2013, the Children and Young People (Scotland) Bill was lodged in the Scottish Parliament. The Minister for Children and Young People has stated the aspiration of the legislation:

"The Children and Young People Bill is a fundamental step towards putting Scotland at the forefront of services which give children, young people and their families what they need and what they deserve, one that finds better ways to offer better life chances to each and every child in Scotland."¹

The Bill covers five main areas:

- **Embedding the rights of children and young people** through a duty on Scottish Ministers and public bodies to consider the UNCRC and an extension of the investigatory powers of Scotland's Commissioner for Children and Young People
- **Proposed duties on public bodies to work together** to design, plan and deliver jointly on their services and policies to improve children and young people's wellbeing.
- **Legislating for Getting it Right for Every Child (GIRFEC)** to create a single system for planning and delivery. All children and young people have access to a named person and a single Child's Plan is proposed. One of the key aims of the legislation is to embed GIRFEC across children's services.
- **Improving access to early learning and childcare** by increasing flexibility and expanding provision. There will be an increase in annual provision for 3 and 4 year olds, as well as for 'looked after' 2-year olds.
- **Getting it right for looked after children, young people and care leavers** through extending the right to assistance for care leavers up to the age of 25 and providing assistance for kinship carers, defining corporate parenting and legally establishing Scotland's adoption register.

¹ 'A Scotland for Children: A consultation on the Children and Young People's Bill', Ministerial foreword, (2012) <http://www.scotland.gov.uk/Resource/0039/00396537.pdf>

In developing the Bill, the Scottish Government has stated its intention to embed children's rights at the heart of services and service delivery. This commitment to children's rights provides an important opportunity to ensure that all aspects of the proposed legislation fully consider upholding the rights of all children and young people as set out in the UNCRC.

In 2009 the Scottish Government acknowledged the crucial importance of children's rights impact assessments (CRIA) informing policy making and stated it would 'consider a trial of children's rights impact assessment in a section of Scottish Government to see how it can help promote and develop a consideration of children's rights in the policy making process'². More recently, the government asserted its commitment "throughout the rest of 2012... [to] work with partners... to develop a child rights impact assessment model for use within the Scottish Government"³.

Unfortunately, a CRIA has not been conducted on the Children and Young People's Bill. Whilst consultation with children and young people and with organisations working with and representing children has been extensively undertaken as part of the Bill process, **consultations did not cover the specific proposals on information sharing**, which may undermine children and young people's rights to confidentiality and to have access to confidential services and indeed in some instances, their right to be protected from abuse.

This briefing paper specifically explores the proposed information sharing duties as set out in the legislation and considers implications on the rights of children and young people, and on child protection for older children.

2. Why do information sharing and confidentiality matter?

Confidentiality is of fundamental importance to many children and young people who experience difficulties in their lives. The debates surrounding children's right to confidentiality are not new. ChildLine was set up specifically to provide children with a confidential space, after the 1986 child-watch study uncovered the extent of abuse in the UK and the sheer numbers of children who suffered in silence, unable to tell adults or seek help. Children choose to contact ChildLine services, where they communicate at their own pace and retain control of what happens in the majority of cases. Over the years, physical abuse and sexual abuse have consistently been reported in the top five reasons for children contacting ChildLine. In 2011/2012, ChildLine volunteer counsellors carried out 325,471 counselling interactions across the UK where children and young people were asking for help, advice and protection⁴. These figures alone highlight the importance children and young people themselves place on having access to a confidential support service. Fears around lack of confidentiality deter some vulnerable young people from accessing services, leaving them at increased risk of harm.

3. What is the current threshold at which a child's confidentiality may be breached?

At present, information about a child should be shared in circumstances where there are concerns that the child is at risk of 'significant harm'.

The Children's Hearings (Scotland) Act (2011)

Significant harm is the term used in section 38 of the Children's Hearings (Scotland) Act 2011 as the criteria for a Sheriff granting a child protection order (i.e. there must be reasonable grounds for believing that a child is suffering significant harm or will suffer significant harm unless removed to a place of safety).

National Child Protection Guidance 2010

Paragraph 263: *"From a child protection perspective, it is the risk of "significant harm" that is central here: where concerns are raised about the potential significant harm to a child, they should be considered child protection concerns."*

² 'Do the Right Thing' A response to the 2008 concluding observations from the UNCRC, (2009: 10). <http://www.scotland.gov.uk/Resource/Doc/282927/0085645.pdf>

³ 'Do the Right Thing' Progress Report 2012 (2012: 12). <http://www.scotland.gov.uk/Resource/0039/00392997.pdf>

⁴ NSPCC (2012) *Saying the unsayable – what's affecting children in 2012*, p27

Paragraph 287: “Staff should be alert to signs that a child may be experiencing significant harm. When they recognise that a child’s safety is compromised and/or that they are, or are likely to experience, significant harm, they have a responsibility to follow local procedures for reporting and sharing these concerns.”

(see also Child Protection Guidance for Health Professionals, 2013, page 12)

National Guidance – Under-age Sexual Activity, 2010⁵

Paragraph 40: “The needs of each child and young person are the primary consideration when professionals decide upon the relevant and proportionate sharing of information...[C]onfidentiality does not prevent information sharing where there is the risk of significant harm to the young person or others.”

A summary of the current legal framework and policy landscape around confidentiality and information sharing is situated at appendix 2.

4. How will ‘information sharing’ provisions in the Children and Young People (Scotland) Bill impact on this threshold?

The Bill introduces a new legal framework for information sharing related to the wellbeing of a child or young person with and through the Named Person (see Appendix 1). This includes a new duty on local authorities, health boards and other designated authorities⁶ to ‘help the named person in the exercise of any of the named person functions’.

Specifically in relation to information sharing, section 26(1) introduces a duty on health boards, local authorities and other designated authorities (including all those employed or contracted by or volunteering with) who hold information about a child or young person, requiring them to provide information to the child’s Named Person ‘if the information holder considers that it might be relevant to the exercise of any of the named person functions’ [s26 (2)]. The functions of the Named Person as defined in the Bill are:

- a) *Doing such of the following where the named person considers it to be appropriate in order to promote, support or safeguard the wellbeing of the child or young person:*
 - (i) *advising, informing or supporting the child or young person, or a parent of the child or young person,*
 - (ii) *helping the child or young person, or a parent of the child or young person, to access a service or support, or*
 - (iii) *discussing, or raising, a matter about the child or young person with a service provider or relevant authority, and*
- b) *such other functions as are specified by this Act or any other enactment as being 30 functions of a named person in relation to a child or young person.*

There is a corresponding duty at section 26(3) on the ‘Named Person’ to provide to health boards, local authorities or directing authorities any information which the person holds which might be relevant to the exercise of any function of the service provider or relevant authority which affects or may affect the wellbeing of the child or young person. The functions of the service provider or relevant authority are not defined in the bill.

These proposed duties do not make clear the threshold at which information must be shared with and through the Named Person. Rather, the duty to share information is divorced from an assessed threshold of ‘significant harm’ or threat to the wellbeing of the child and invoked at the apparently more subjective level of where information sharing is considered relevant in order to promote, support or safeguard the wellbeing of the young person (as defined using SHANARRI indicators). **Thus, the current proposal might be interpreted as legislating for the sharing of any 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.**

Section 27 of the Bill (Disclosure of Information) also requires clarity. As currently written it appears to simply “give[s] a legal protection for those who provide information under Part 4 of the Act” (Children

⁵ Available at: <http://www.scotland.gov.uk/Resource/Doc/333495/0108880.pdf>

⁶ The duty at section 26 (1) of the Bill is on service providers. Section 30 clarifies that, when used generally, service provider means each health boards, each local authority and each directing authorities. When service provider is used in relation to a child or young person, it means the health board, local authority or directing authority which has the function of providing a named person service to the child or young person.

and Young People Scotland Bill: Explanatory Notes, point 74). Thus provision of information under Part 4 of the bill '*is not to be taken to breach any prohibition or restriction on the disclosure of information*' [s27(1)], even in such cases where information is provided in breach of a duty of confidentiality', as long as in providing the information, the recipient is informed of the breach of duty. In other words, an information provider would simply have to inform the recipient that in sharing the information they have breached a child's confidentiality, in order to be protected. The only apparent protection for the child or young person in relation to their right to privacy, and to be involved, resides in s27(3), where there is a duty on the recipient not to disclose information to any other person. However, if the recipient is required by any enactment, (including this one which contains no threshold at which confidentiality may be breached), they may disclose the information.

Quite apart from a lack of balance between the requirement to share information and the child's right to privacy and involvement, there is also arguably a risk that the proposed new legislative framework on information sharing may lead to disproportionate sharing and subsequently to Named Persons gathering/ struggling to assess increasing amounts of information about increasing numbers of children – not just those at risk. Concerns have been raised about the potential of over-sharing leading to 'white noise' whereby information shared about children at risk of harm may be lost in a maelstrom of inappropriate information.

There is already some evidence that the demands on the role of Named Person are causing problems at a practice level. For example, Edinburgh Primary Head Teachers Association raised concerns about "the workload of the Named Person [being] too onerous given current staffing levels and the other work that has to be carried out in schools". Furthermore, they report that the transfer of very sensitive information between services by email and by other means [has] raised concerns amongst Head Teachers".⁷ Additionally, there is evidence that in some areas, information about children and young people is being shared without assessing needs and risks properly and without making plans⁸.

It is also of great concern that there are no corresponding duties around involving the child or young person, or their families, wherever possible, in decisions to share personal information about their lives, nor in seeking their consent in the sharing of this with others. Whilst this may be addressed in statutory guidance, the provisions in the draft Bill do not appear to offer a balance between children's rights and the need to share information. The purpose of guidance is to aid interpretation of statutory obligations, and the absence of such an 'involvement' duty is a serious omission from the face of the Bill.

5. What do children and young people need in relation to confidentiality and information sharing?

I am really worried about people finding out about my self-harming and suicidal thoughts. I feel really paranoid. I spoke to a mentor recently and they called the police which they were not supposed to do. It was horrible and I don't want that to ever happen again
(ChildLine)

Clients have been concerned about hearing papers going to teachers at school. This has come up a few times, where child protection issues and details about parents have gone to school teachers and young people have wanted to keep their school life separate from their family life. One client had been accepted into a private school on a scholarship and was anxious that if the school knew about her past and on-going difficulties at home, they would not make the funds available
(cl@n childlaw)

"Three things are important to young people when they come to sexual health services: confidentiality, confidentiality and confidentiality.
(Dr Pauline McGough, Clinical Director, Sandyford)

"Many young people need the time and space that [such] confidential services can offer to talk about their problems with someone who can listen and advise without necessarily having to refer"
Scottish Government National Child Protection Guidance 2010

"If we listen to them, we build trust and confidence and when they are ready to go forward, they never retract. Most young people tell, and then pull back. We tell them the truth – we tell them it's unlikely to get a conviction, families fall out and take sides, court will be a nightmare and might do nothing – we tell them this. This is our experience".
(Laurie Mathews, 18 and Under)

⁷ Edinburgh Primary Headteachers' Association - Response 0271. www.scotland.gov.uk/Resource/0040/00406456.pdf

⁸ Care Inspectorate (2013) Child Protection Services: Findings of Joint Inspections 2009 – 2012.

Children and young people in Scotland have not been consulted on the specific proposals around information sharing in the Children and Young People (Scotland) Bill, which potentially have far-reaching implications in respect of their right to confidentiality and arguably, to child protection. Relevant consultations and studies, however, can provide insight into young people's views on confidentiality and information sharing.

Dialogue groups conducted with children and young people as part of a consultation on the Children and Young People Bill found groups expressing concern about confidentiality and information sharing around the Named Person role⁹. Although recognising that information may need to be shared in situations where they are at risk, participants raised concerns that information could be shared without their permission. A number of participants had direct personal experience of information being shared about them between services without their consent, sensitive information about them discussed in front of family members and certain information remaining on their case notes without their permission. The young people involved felt strongly that these breaches of confidentiality were unacceptable. Drawing on personal experience, some participants argued that they had felt judged on past incidents contained in their case files by some professionals.

Several Scottish studies suggest that young people share a common understanding that there is no such thing as complete confidentiality and that where there is risk, professionals should share information to protect them. For example, a ChildLine/ Centre for Learning in Child Protection (CLiCP) study found that whilst young people were clear they would expect confidentiality from trusted professionals such as teachers, there are always be circumstances where confidentiality could not be upheld, for example *'if it is life threatening'* and *'when it's a really big thing – a serious thing like abuse'*¹⁰. Similarly, a 2008 TASC agency study found that young people felt that *'People shouldn't share information unless there is a serious risk to the young person'*¹¹. In both studies, young people were clear that the priority, as in the fundamental values of GIRFEC, is the individual young person and their unique circumstances. Thus, assessing young people's needs – and risk - should take place where possible with young people, with decisions about information sharing flowing from that and with young people remaining involved in the process.

Passing it on detailed children and young people in England's views of the UK Government's draft guidelines for sharing confidential information about them¹². Children in this study felt information should only be shared about them if it would benefit them and if doing so would prevent serious harm to them or prevent serious harm to another person. Throughout the document the imperative children place on practitioner's respecting their need for privacy and being very careful about assessing the benefits and potential drawbacks of information sharing in each individual case is clear. The need for 'balance' was stressed throughout, for example: -

'Professionals should only pass on information if they are on balance sure of the facts of their assessment of the benefits, effects and any likely harm that may come as a result of passing on the information'. Children were also clear that their permission should always be sought where they have capacity to understand, and only passed on without permission if necessary to prevent harm. Additionally, they felt that professionals such as teachers and social workers should only be told the personal information they need to do their job with a child or young person – and should not be regarded as people entitled to know more personal information than this.

There is substantial research evidence detailing the importance young people place on confidentiality. A literature review of fifty-four papers on adolescents' views of helping professionals found 'what I tell them is confidential' and 'they explain things and give me information and advice' were ranked as

⁹ Children and Young People Bill Information Sharing and Named Person Proposals, from *Young Scot/Scottish Youth Parliament consultation with young people*. SYP, 2013

¹⁰ 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>

¹¹ Our Journey: A report on a project exploring the interface between service responses to the needs of gay, lesbian, bisexual and transgender young people and child protection policy and practice. TASC Agency, 2008.

¹² *Passing it on: views of children and young people on the government's guidelines for sharing confidential information about them* (Newcastle upon Tyne: Commission for Social Care Inspection. Office of the Children's Rights Director, 2006).

most important¹³. ChildLine information gives further insight into the nature of children's concerns around confidentiality, when they are seeking support with problems. For example, in the year 2012/2013, volunteer counsellors at ChildLine conducted approximately 3,500 counselling interactions with children and young people where confidentiality was a key concern. Analysis of 400 interactions illustrates three main themes in children's contacts relating to confidentiality, as follows:

- Wanting to fully understand ChildLine's and other services' confidentiality policies before discussing their problems;
- Concerns and trust issues about their details being shared with people whom they do not want knowing about their problems;
- Fears of repercussions of confidentiality being breached, due to negative experiences of this happening in the past.

Crucially, research carried out with children indicates information-sharing may have a deterrent effect on their willingness to use services if they are not completely confident of confidentiality. Research on children's views of an Information-Sharing Index¹⁴, published by the Children's Commissioner for England, highlighted this possibility and recommended that the government takes seriously the following: "The view of a significant minority of respondents [was] that many young people will attempt to avoid being recorded on the database when it is introduced because they believe that it is intrusive". The survey also found that: "resistance to teachers' access was even more widespread across the groups. This appeared to reflect their experiences of their information not being treated confidentially by teachers"¹⁵.

As part of the national child protection reform programme in 2003/4, a consultation with children and young people produced: Protecting children and young people: The Charter (Scottish Executive, 2004¹⁶). The Charter included key messages of 'respect our privacy' and 'think carefully about how you use information about us'

6. What are practitioners expressed needs in relation to confidentiality and sharing personal information about children and their families?

In September 2011, a roundtable event was organised by ChildLine Scotland and the Centre for Learning in Child Protection at the University of Edinburgh to critically explore children's right to confidentiality and the need to share appropriate information with an explicit aim of safeguarding children¹⁷. The event involved thirty participants with specific expertise and insights into confidentiality across health, education, social work, children's hearings and third sector organisations.

"Not enough thought is given to the issue of when to breach confidentiality because we have lost sight of the best interests of the child and confidentiality as fundamental principles."

"Papers are filled in – procedures are in place and people just follow these. The child is rapidly lost. People don't make any active decision about confidentiality."

Professionals at the event highlighted the central importance of confidentiality to children and young people but described systems driven by compulsion to share information, at times with little thought about breach. They also described their concerns about lack of support from managers and a confusing policy maze where differing thresholds of confidentiality between services were poorly understood. Recommendations made by professionals at the event included the need for:

- A strong position statement in GIRFEC on the importance of respecting children's confidentiality as a fundamental principle and the parameters on information sharing.
- Consolidation of the same coherent message with regards to confidentiality across all relevant guidance.
- A discrete section on information sharing within GIRFEC.

¹³ Adolescents' views of helping professionals: a review of the literature. Journal of Adolescence, 30(4), Freake, Barley and Kent, August 2007

¹⁴ The Index does not apply to Scotland.

¹⁵ *I think it's about trust: the views of young people on information sharing* - Children's Commissioner for England, 2007.

¹⁶ <http://www.scotland.gov.uk/Resource/Doc/1181/0008817.pdf>

¹⁷ 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>

- Meaningful involvement of children and young people in decisions around information sharing.
- Multi agency child protection training for professionals with a clear emphasis on confidentiality and information sharing to increase practitioner confidence and support professional judgement. Training should involve practical case examples and case studies to 'make it real' and move it out of the realms of policy rhetoric.
- Time and space within the professional line management structure for practitioners to reflect on cases and make measured responses to children and young people.

Various Scottish studies and consultations echo the above findings, with some evidence that children's services professionals in Scotland can struggle with a lack of clarity in policy guidance and around what fundamental GIRFEC principles such as 'proportionate information sharing' and 'respecting young people's confidentiality' mean in practice. For example, a Scottish Government commissioned study by TASC agency, concluded, '*Professionals are poor at information sharing and do not understand how confidentiality works*'¹⁸.

7. Lack of consultation on new information sharing duties

Crucially, the specific proposals on information sharing in the Children and Young People (Scotland) Bill have not been consulted on, as the new duties covering information sharing were not proposed in the 2012 consultation. Indeed, the consultation stated quite clearly that the duty to co-operate with the Named Person would not require a new legislative framework, as follows:

*"The role of the Named Person depends on the successful sharing of information between services where there are concerns about individual children and young people. Information sharing can be a complex and at times, confusing legal environment for practitioners. 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.**"*¹⁹

The reason for the introduction of new information sharing duties is unclear. The analysis of consultation responses (SG, 2012) did not report concern around the current legislative framework being insufficient to allow information sharing with the named person, in response to questions on Named Person. Some organisations did express concern about information sharing, however these concerns coalesced around issues such as the potential erosion of rights to confidentiality, and impact of information sharing on children's / families' right to privacy. One organisation specifically welcomed the consultation statement that no new powers were needed around information sharing. Nevertheless, the Scottish Government Response to A Scotland for Children: a consultation on a children and young people bill (SG, 2013) noted 'significant concerns' around how the Named Person proposals would work in practice and concluded that in relation to information sharing, '*the existing legal framework for information sharing with regard to the Named Person is insufficient to enable the role to function as envisaged and would not provide professionals with confidence when making decisions as to when information should be shared*'.

8. Achieving balance

'Respecting children and young people's confidentiality and sharing information' are stated key values and principles underlying the Scottish Government's GIRFEC programme. Sharing information that is *relevant and proportionate* about children who are in need of support, or 'at risk' of harm, is a central component of GIRFEC, where professionals across agencies are encouraged to share appropriate information with an explicit aim to safeguard children, whilst also safeguarding children and young people's right to confidentiality. The UNCRC highlights the need for a proportionate response when acting to protect a child where action 'must avoid causing the child undue distress or adding unnecessarily to any harm already suffered'. The National Child Protection Guidance 2010 clearly states there are limits to confidentiality²⁰. In the Guidance, paragraph 93 states: "If a child is

¹⁸ Our Journey: A report on a project exploring the interface between service responses to the needs of gay, lesbian, bisexual and transgender young people and child protection policy and practice. TASC Agency, 2008

¹⁹ 'A Scotland for Children: A consultation on the Children and Young People's Bill' section 120:43, (2012) <http://www.scotland.gov.uk/Resource/0039/00396537.pdf>

²⁰ <http://www.scotland.gov.uk/Resource/Doc/334290/0109279.pdf>

considered to be 'at risk of harm', relevant information must always be shared". However, the Guidance also reflects on the challenges in applying this principle when children and young people access services because they provide confidentiality. As the Guidance recognises:

Many young people need the time and space that such confidential services can offer to talk about their problems with someone who can listen and advise without necessarily having to refer (Scottish Government, 2010:28).

The Guidance states that 'service providers have a responsibility to act to make sure that a child whose safety or welfare is at risk is protected from harm' and service users should be made aware of the need to breach confidentiality when initially in contact with the service (Scottish Government 2010:138). Evidence suggests a key challenge in the interpretation of national guidance may be in recognising young people's need for time and space in building essential trusting relationships with professionals, whilst responding to the outlined 'responsibility to act'.

The Scottish Government has indicated that "the existing legal framework for information sharing with regards to the Named Person is insufficient to enable the role to function as envisaged and would not provide professionals with confidence when making decisions as to when information should be shared"²¹. Nevertheless, there appears to have been no transparent consultation process with professionals around what they require to increase their confidence, so it is questionable whether legislation is a helpful response.

Undoubtedly, there has been substantial progress in some guidance outlining the imperative of balance in information sharing, where confidentiality is crucial to young people accessing services. For example, there is clear evidence from young people's sexual health services across the world that confidentiality is the crucial factor in young people accessing services²². In Scotland, the National Guidance - Under Age Sexual Activity: meeting the needs of children and young people and identifying child protection concerns (SG, 2010) provides guidance for setting up protocols for practitioners around assessing needs and risk when working with young people under 16 who may be at risk of harm through early sexual activity. The guidance establishes an overriding principle that the confidentiality rights of children and young people should be upheld, unless there is a child protection concern. Age and stage are established as crucial factors in assessing risk of harm; thus where a child is sexually active and aged 12 or under, referral is automatic.

Protecting Children and Young People: the responsibility of all doctors (General Medical Council, 2012) is underpinned by eight core principles which clearly establish children and young people's right to be protected from abuse; the doctor's duty to act on concerns they have about young people's safety or welfare; and also the right of children, young people and their families to confidential medical care and advice, where this right does not prevent doctors from sharing information if necessary to protect children and young people from abuse or neglect. Section 43 provides guidance around sharing information about more 'minor concerns' which may be part of a bigger picture, as follows:

"Risks to children's or young people's safety and welfare often become apparent only when a number of people share what seem to be minor concerns. This may include people from different agencies. If a child's or young person's condition or behaviour leads you to consider abuse or neglect as one possible explanation, but you do not think that they are at risk of significant harm, you should discuss your concerns with your named or designated professional or lead clinician or, if they are not available, an experienced colleague. If possible, you should do this without revealing the identity of the child or young person".

Despite apparent differences in thresholds at which information must be shared across guidance, the threshold of "where there is a child protection concern" i.e. a risk of significant harm, is the commonly understood threshold at which confidentiality **must** be breached. Guidance generally highlights that sharing information should take place, wherever possible, with the child's consent, but stresses instances where consent cannot and should not be sought, where this may put a child at risk. Guidance rarely - if at all - illustrates potential risks of inappropriate and/ or 'disproportionate' information sharing to children and young people and to child protection.

²¹ Children and Young People (Scotland) Bill, Policy Memorandum, pg. 10 Scottish Government 2013
[http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20\(Scotland\)%20Bill/b27s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd-pm.pdf)

²² Dehne, K.L. & Riedner, G. (2005) Sexually transmitted infection among adolescents: the need for adequate health services. World Health Organisation. Available at: <http://whqlibdoc.who.int/publications/2005/9241562889.pdf>

The Scottish Government has pointed to a complex and confusing *legislative* environment within which information sharing takes place. There is some evidence, however, that it is at the policy and practice level where the complexity and confusion for practitioners and indeed, for young people, lies.

9. Conclusion

Against the background set out above, concerns arise that, should the current proposals for information sharing be implemented in legislation:

- children and young people will be less likely to engage fully with confidential services
- professionals will be likely to share more information than is necessary and proportionate
- important information will be lost amongst large quantities of information being shared
- children and their families will not be consulted fully on what information should be shared and with whom
- the basis on which decisions about children are taken risks being flawed and lacking in transparency

Given the complexity of this issue, it is important that as many organisations as possible highlight the potential conflict between the information-sharing provisions in the Bill, and children's right to privacy and confidentiality, to ensure that these matters are given full consideration by the Education and Culture Committee during Stage One.

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26 Information sharing

- (1) A service provider or relevant authority **must provide to the service provider** in relation to a child or young person any information which the person holds which falls within subsection (2).
- (2) Information falls within this subsection if the information holder considers that—
 - (a) it **might be relevant** to the exercise of the named person functions in relation to the child or young person,
 - (b) it ought to be provided for that purpose, and
 - (c) its provision to the service provider in relation to the child or young person would not prejudice the conduct of any criminal investigation or the prosecution of any offence. 30
- (3) The service provider in relation to a child or young person must provide to a service provider or relevant authority any information which the person holds which falls within subsection (4).
- (4) Information falls within this subsection if the information holder considers that—
 - (a) it might be relevant to the exercise of any function of the service provider or relevant authority which affects or may affect the wellbeing of the child or young person,
 - (b) it ought to be provided for that purpose, and
 - (c) its provision to the service provider or relevant authority would not prejudice the conduct of any criminal investigation or the prosecution of any offence.
- (5) The service provider in relation to a child or young person may provide to a service provider or relevant authority any information which the person holds which falls within subsection (6).
- (6) Information falls within this subsection if the information holder considers that its provision to the service provider or relevant authority is necessary or expedient for the purposes of the exercise of any of the named person functions.
- (7) References in this section to a service provider or a relevant authority include any person exercising a function on behalf of a service provider or relevant authority.

27 Disclosure of information

- (1) The provision of information under this Part is not to be taken to breach any prohibition or restriction on the disclosure of information.
- (2) Subsection (3) applies—
 - (a) where by virtue of subsection (1), a person provides information in breach of a duty of confidentiality, and
 - (b) in providing the information, the person informs the recipient of the breach of duty.
- (3) The recipient is not to provide the information to any other person, unless the provision of information is permitted or required by virtue of any enactment (including this Part) or rule of law.

Children and Young People (Scotland) Bill Part 4—Provision of named persons

Appendix 2

Current legal framework, confidentiality and information sharing

The law in Scotland relating to confidentiality and information sharing is to be found in both common law and legislation.

At common law, children under 16 who give information in confidence, are owed the same legal duty of confidence as adults. Confidentiality can lawfully be breached only in limited circumstances, which are generally understood as: where there is a legal obligation to breach, where there is a public duty to breach and where the person owed the duty consents to a breach of confidentiality.

The United Nations Convention on the Rights of the Child (UNCRC) 1989 was ratified by the UK government in 1991. Whilst the UNCRC is 'indivisible' and all articles thereof should be interpreted by reference to article 3, which requires that the best interests of the child should be the primary consideration in all actions affecting that child, Articles 12 and 16 are particularly pertinent when considering confidentiality and information sharing:

- **UNCRC Article 12**
States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
 - Article 12.2 stresses that this be embedded into legal processes:
12.2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
- **UNCRC Article 16**
No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, or to unlawful attacks on his or her honour and reputation.

The child has the right to the protection of the law against such interference or attacks.

This also chimes with the concept of the 'evolving capacities' of the child embodied in articles 5 and 12 of the Convention. This recognises the changing relationships between children and adults as they grow up and focuses on capacity and children's increasing autonomy rather than age alone. It also gives the State a role as facilitator in helping to achieve appropriate protection for the child and in encouraging their participation in decisions that affect them.

Section 2.4 and 2.4 (a) Legal Capacity Act (Scotland), 1991 If a child is deemed to have capacity they have the same rights as an adult; for example, they can consent to medical treatment and instruct a solicitor. Professional codes of conduct and guidance may invoke a legal duty. For example, a duty of confidentiality exists between a doctor and a patient. A breach of confidentiality could lead to a criminal investigation and professional disciplinary action. However, there are statutes that would override a duty of confidentiality; for example, information may be shared without consent if it is: in the public interest, in the best interests of the child or is required by law (GMC, 2007).

The Human Rights Act 1998 incorporated most of the European Convention on Human Rights (ECHR) into domestic law in the UK.

Article 8 of ECHR protects the private life of individuals against arbitrary interference by public authorities and private organisations, covering the four distinct areas of private life, family life, home and correspondence. Article 8 is a qualified right, meaning that, in certain circumstances, public authorities can interfere with the private and family life of an individual. Such interference must be proportionate, in accordance with law and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others. It is important to note that Article 8 has been and continues to be dynamically interpreted in an expansive way: the broad nature of the ECHR provisions allows for their adaptation in a way which takes account of the specific needs and rights of the child.

The Data Protection Act 1998 governs the processing of personal data. It requires that "personal data shall be processed fairly and lawfully..." (First Data Protection Principle, schedule1). According to the Information Commissioner's Office (ICO) Guide to Data Protection, processing may also be

unlawful if it results in a breach of a duty of confidence or a breach of the Human Rights Act 1998 (para 32). In a recent statement, dated 28 March 2013, the ICO has given the following advice: “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.”

The Children’s Hearings (Scotland) Act 2011, section 178 permits non-disclosure to a person of “any information about the child to whom the hearing relates...if disclosure of that information to that person would be likely to cause significant harm to the child.” A request for non-disclosure may be made by the child, as well as by others.

Policy and legislative landscape around confidentiality and information sharing²³

The Children’s Charter (SG, 2004)

As part of the National Child Protection Reform Programme in Scotland, a consultation with children and young people produced: *Protecting children and young people: The Charter* (Scottish Executive, 2004). The Charter included key messages of ‘respect our privacy’ and ‘think carefully about how you use information about us’.

Protecting Vulnerable Groups – Scottish Vetting and Barring Scheme (SE, May 2006). Proposals 18 - 20 in the draft bill were around information sharing, regarding information shared between central barring unit, public authority’s employers, police and regulatory bodies. Lack of clarity in the proposals as to the extent of information sharing powers being proposed led to many responding organisations calling for clarity and more detail in proposals around information sharing.

Protection of Vulnerable Groups (Scotland) Bill (SG, August 2006) as introduced included substantial proposals (Part 3) around information sharing, introducing mandatory information sharing where a child is at risk of harm. Some responses to the Education Committee’s call for written evidence included concern that the bill effectively introduced a new set of proposals on information sharing which had not been consulted on in the draft. Many organisations expressed concern about the potential impact of mandatory information sharing on young people’s right to confidentiality and on child protection. Notable evidence included that from Scotland’s Commissioner for Children and Young People. Part 3 of PVG did not go past stage 1; the stage 1 report recommended Ministers produce a Code of Practice on information sharing.

Getting it right for every child: proposals for action (SE, 2005)

Proposals included a duty to be alert to needs of children and a duty to co-operate in meeting the needs of children. Many respondents highlighted need for great deal more clarity in various aspects of the proposal, including information sharing.

Children and young people participating in consultation focus groups organised by Children in Scotland agreed that organisations need to share information with each other, but only within certain conditions. The most important of these was that children and young people should be told who will be able to have access to any information they provide. Indeed, a number of the children and young people who participated in the events felt strongly that information should only be shared between professionals and organisations with their prior permission.

Children’s Services Bill (August, 2006)

The draft Children’s Services (Scotland) Bill (SG, 2006), intended to support the Getting It Right For Every Child programme to change children’s services, proposed duties on relevant agencies to ‘co-operate with each other’, where reference to co-operation included ‘exchanging information’. One of the six common themes emerging from the consultation was around the need for clarity around information sharing proposals, ‘with particular concerns [being expressed] that Part 1 duties could lead to over sharing of information’. (SG; 2007)

Sharing Information When a Child is in Need of Protection: a Draft Code of Practice (SG, April 2007). The foreword to the draft code set information sharing in the context of GIRFEC, stressing that timely information sharing was central to the GIRFEC programme for changing the way services were

²³ This is not an exhaustive list but rather presents some key developments in legislation, policy and guidance around the area of confidentiality and information sharing, over the last decade.

delivered to children. In order to ensure an equitable approach to information sharing across organisations, the document proposed a 'common set of overarching principles and standards' and 'clear guidance on when and how to share information legally and professionally, about children at risk of significant harm', thus improving professional practice in the notoriously complex area of information sharing. Clear tensions are apparent in the document between the aims of the draft code (to ensure information sharing where a child is felt to be at risk of significant harm) and the aims of GIRFEC, loosely to ensure proportionate information sharing, to allow for timely and effective interventions for children before the point of crisis. Notable responses to the draft code include that of SCRA, which focussed on the issue of the threshold at which information can be shared without consent and wherein the Principle Reporter suggested that the threshold of 'significant harm' set in the code was too high and a threshold of 'harm' more appropriate. Significant harm is the term used in section 57 of the Children (Scotland) Act as the criteria for a sheriff granting a child protection order (i.e. there must be reasonable grounds for the believing that a child is suffering significant harm or will suffer significant harm unless removed to a place of safety). The response also notes a concerning lack of clarity in the draft around important issues relating to the age and maturity of the child being taken into account relation to consent of the child.

Information Sharing and Recording – General Principles and Best Practice Indicators: Discussion document, (SG, 2009). One of a series of discussion documents produced to inform the SG's Review of National Child Protection Guidance, the document sets out key principles around information sharing and recording. The Principles are largely taken from the code of practice, with information sharing set firmly in the context of GIRFEC, as follows:

'Sharing appropriate information is an essential component of child care and child protection activity',

The threshold at which information can be shared without consent is set clearly throughout the discussion document at harm.

There is a clear emphasis on workers having an advanced understanding of this sensitive area; when it is appropriate to seek or share information, how much to share and what to do with it. Key principles stress it is incumbent on agencies to provide clear guidance for professionals to assist them in sharing information. The short section on confidentiality and consent underlines the child's right to privacy as well as the duty of confidentiality all staff have towards children they work with, whilst stressing that sharing information is justifiable as long as the information shared is necessary and proportionate, and emphasising the imperative of informed, explicit consent where possible. There is no reference of age and stage of the child in the short discussion on consent. The child's right to privacy is defined as a *qualified right* which needs to be balanced with the rights and freedoms of others, as follows: **if a child is considered to be at risk of harm, relevant information must always be shared for the protection of the rights and freedoms of others.**

National Guidance Child Protection (SG, 2010). The section on information sharing and recording in part 1 – The Context for Child Protection Section, is an abbreviated, amended version of the discussion document. The threshold for sharing information without consent is set at significant harm. However, harm is also used in the document as the threshold at which information must be shared. Guidance acknowledges tension between the need to share information in order to protect children and children's use of confidential spaces to disclose.

National Guidance Under Age Sexual Activity: meeting the needs of children and young people and identifying child protection concerns (SG, 2010) provides guidance for setting up protocols for practitioners around assessing needs and risk when working with young people under 16 who may be at risk of harm through early sexual activity. The guidance establishes an overriding principle that the confidentiality rights of children and young people should be upheld, unless there is a child protection concern. Age and stage are established as crucial factors in assessing risk of harm; where a child is aged 12 or under, referral is automatic.

Finding the Balance; Children's right to confidentiality in an age of information sharing (2011). ChildLine/ NSPCC CLiCP report highlights practitioner concerns that the best interests of the child are at times not informing decisions to share information. Recommendations from practitioners include the need for substantial guidance on information sharing in GIRFEC, as well as the need for GIRFEC to be underpinned by 'a presumption of confidentiality' and for comprehensive support and training for practitioners in this area.

State of Children's Rights Report (2012) Identifies confidentiality as a key children's rights issue for the first time since the NGO reporting process began.

Protecting Children and Young People: the responsibility of all doctors (General Medical Council, 2012) is underpinned by 8 core principles which clearly establish children and young people's right to be protected from abuse and the doctors duty to act on concerns they have about young people's safety or welfare and also the right of children, young people and their families to confidential medical care and advice – where this right does not prevent doctors from sharing information if necessary to protect children and young people from abuse or neglect. Section 43 provides guidance around sharing information about more 'minor concerns' which may be part of a bigger picture, as follows:

“Risks to children's or young people's safety and welfare often become apparent only when a number of people share what seem to be minor concerns. This may include people from different agencies. If a child's or young person's condition or behaviour leads you to consider abuse or neglect as one possible explanation, but you do not think that they are at risk of significant harm, you should discuss your concerns with your named or designated professional or lead clinician or, if they are not available, an experienced colleague. If possible, you should do this without revealing the identity of the child or young person”.

Appendix 3

Case Study – Sandyford Sexual and Reproductive Services, NHS Greater Glasgow and Clyde

Sarah presented to a young people's sexual health service with her mum. She had recently had sex for the first time four weeks before. While she had agreed to the sex she had been drinking alcohol before it happened and felt really pressurized as the sexual partner was an 18 years old man. Sarah had told her mum as she now regretted the event and she knew the man had gone on to have sex with several of her friends who were also 14. Mum was very worried and had moved to stay with relatives as she was concerned for her daughter's safety.

The sexual health services highlighted that they thought this was a situation that should be discussed with the police but both the young person and mum were completely resistant. They were offered follow up appointments during which they were supported to gradually share information including the name of the man and gave consent for the service to share this information in a third party/anonymous way.

Through further phone support the young person gave consent for her mum to speak directly with a female officer from the family protection unit to try and allow the incident to be investigated.

Case Study - Eighteen And Under, Dundee²⁴

Mary was 14 years old when she first came to use the services of Eighteen And Under. She used the Drop In Support service and did not wish to share any personal information with us, except for her age. She was provided with a support worker and over the course of 6 months she began to share small pieces of information.

She told her support worker that she had said something to a teacher in school about being abused by someone and the Police had been called and informed. Her parents were also called and informed. She had refused to tell the Police anything and simply said that she had made it all up. Her parent's were extremely angry with her.

The day after her 15th birthday, Mary ran away from home. She called her support worker and said she was going to hitch hike to Glasgow but was persuaded to meet up with her worker. Mary told her worker that she was being abused in her home but said she did not want Police involved. She did not say who was abusing her.

The support worker went through different options with Mary and eventually Mary agreed to her grandparents being called to see if she could stay there for a few days. They agreed and Mary moved in with them telling them that she had been fighting with her mum. When mum was called, she agreed that Mary could stay with her grandparents for a while.

Mary continued to meet and talk with her support worker and continued to disclose more and more information. Eventually she disclosed that it was her older brother who had been sexually abusing her. She thought that her parent's would never believe her and she did not want to talk to the Police. She added that if anyone else asked then she would deny it all.

The support worker explored options with Mary and encouraged Mary to get a sexual health check up. Mary had chlamydia and was treated for this. When Mary turned 16, she was still staying with her grandparents and talking with her support worker. She decided she was ready to tell her grandparents about the abuse and asked the support worker to be there.

When Mary told her grandparents, they immediately called the parents and a huge family row broke out. No one wanted the police involved, everyone took sides and Mary was thrown out of the grandparent's house. We supported Mary to get accommodation.

Mary is now 18 and talking with her support worker about going to the Police. She knows that her family will stand against her but she now feels stronger and more able to deal with things. She is not looking for justice and believes her brother will get away with it but she wants it on record now in case he ever does it to someone else. She continues to get ongoing support from us.

²⁴ Eighteen And Under is a registered charity based in Dundee that offers confidential support and information to any young person, aged 18 and under, who has experienced sexual, physical or emotional abuse. The young people have consented to the use of part of their story and all identifying details have been removed.