
Stage 3 Briefing: Children and Young People (Scotland) Bill

Information Sharing Provisions Amendments 165 to 171: Sections 26, 28 & 38

The amendments proposed by Liam McArthur MSP will enable the correct balance to be struck between the need to share confidential information with the child's **right to privacy** under Article 16 UNCRC and Article 8 ECHR, by placing a requirement on the information holder to seek informed and explicit consent from the child (or their parent if the child lacks capacity) where the information to be shared is confidential.

Background

We have been involved in many discussions over the last few months, with Scottish Government representatives and those from the voluntary and public sectors, about issues around information sharing. We were supportive of the Scottish Government position taken in the initial Consultation before introduction of the Bill, namely that there was no need to legislate on this matter.

However, given that there is now an intention to legislate, we are pleased that some of the concerns expressed by ourselves and others were heard, and we welcome many of the amendments moved by the Minister at stage 2. These have had the effect of protecting the rights of children to some extent on the face of the Bill. In particular, section 26 now explicitly contains provisions relating to:

- Proportionate & relevant information sharing
- Regard for the views of the child, taking account of the child's age and maturity

BUT no provision is made within the Bill for obtaining the consent of the child to share information.

What is Confidential Information?

"Information that is considered confidential is usually of some sensitivity; is neither lawfully in the public domain nor readily available from another public source; and is shared in a relationship, where the person giving the information understood that it would not be shared with others".¹

¹ Perth and Kinross CPC - Practitioner's Guide to Information Sharing, Confidentiality and Consent in Child Protection <http://www.pk.gov.uk/CHttpHandler.ashx?id=19726&p=0> See also "Common Law and Statutory Obligations of Confidence", Scottish Government, 2004 <http://www.scotland.gov.uk/Publications/2004/10/20158/45774>

Current Legal Framework:

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:

- where the person owed the duty consents to a breach of confidentiality.
- where there is a public duty to breach
- where there is a legal obligation to breach

United Nations Convention on the Rights of the Child (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.

Human Rights Act 1998 incorporated most of the European Convention on Human Rights (ECHR) into domestic law in the UK: Article 8 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. The European Court of Human Rights has said this about confidential information and the preservation of confidence in confidential services, in this case health:

“... [T]he 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...”²

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 letter, 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 ICO has also advised that “[W]here circumstances exist such that consent may not be appropriate, for example where an assessment under the SHANARRI principles raises concerns, the Act provides conditions to allow sharing of this information, such as ‘for the exercise of any other functions of a public nature exercised in the public interest by any person’ or ‘ in the legitimate interests of the data controller or the third party to

² Z v Finland [1997] 25 EHRR 371

whom the data are disclosed so long as it is not prejudicial to the child', and procedures should be clear about those circumstances which may necessitate processing without consent."

Purpose & Effect of Amendments 165 to 171

Under reference to the ICO advice, it may not amount to a breach of the Data Protection Act to share information about a child about whom there are wellbeing concerns, without the consent of that child (or their parent, if the child lacks capacity). However, if no attempt is made to seek the child's (or the parent's) consent before sharing confidential information, there is a significant risk that **children and young people will be reluctant to access and engage with confidential services** if they feel that confidential information is likely to be shared without their consent and without protection of their right to confidentiality.³ Their right to privacy is not respected in the absence of a requirement to seek consent.

The amendments proposed by Liam McArthur MSP will enable the correct balance to be struck between the need to share confidential information with the child's **right to privacy** under Article 16 UNCRC and Article 8 ECHR, by placing a requirement on the information holder to seek informed and explicit consent from the child (or their parent if the child lacks capacity) where the information to be shared is confidential.

The amendments proposed include an exception to the requirement to seek consent if "the information holder considers that to seek consent would be likely to adversely affect the wellbeing of the child or young person." Further provision is made for Guidance under section 28 to include "guidance on how an information holder should proceed with the sharing of confidential information under section 26 in the event that consent under section 26(4A)(b) cannot be obtained." Clear guidance on the circumstances in which information should be shared when consent cannot be obtained is essential to support Practitioners and give them the confidence to share information appropriately. Finally, sections 26(8) and 38(3) would be removed. If there is a requirement to seek consent, and the Data Protection Act is not breached in the event of information being shared proportionately where there is a "risk to a child or young person that may lead to harm", then those subsections are unnecessary.

Clan childlaw offers a unique legal advocacy service to children and young people within Edinburgh and the Lothians and Glasgow. We aim to make the law more accessible to children and young people, including the most vulnerable in our society, by providing free, specialist legal advice and representation at a place suitable to them at the time that they need it. Children's rights are central to our work.

³ 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>; BMA Scotland (26 June 2013) evidence submitted to the Education Ctte; Oral evidence of Professor K. Norrie, Col 2690 [Education and Culture Committee, Official Report, 3 September 2013](#)