



Education and Skills Committee

Call for Evidence

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

The Named Person Scheme

The Commissioner's office welcomed the introduction of the [Children and Young People \(Scotland\) Act 2014](#)¹ (CYP Act) which introduced a range of measures to support the Getting It Right For Every Child practice model. The office continues to support the aims of the Named Person service, which will provide children and young people and their parents with a single point of contact if they require advice or information about any matter affecting their wellbeing. This is an important step towards empowering children to realise their rights.

Background

During the passage of the CYP Act we raised significant concerns about its information sharing provisions. [We highlighted](#) the importance of maintaining a balance between the need to share information to ensure that rights such as being kept safe and being able to receive appropriate healthcare, while also ensuring respect for children's rights to privacy as set out in the United Nations Convention on the Rights of the Child (UNCRC) (article 19), European Convention on Human Rights (ECHR) (article 8) and other international treaties².

The Commissioner supports the arguments made by Clan Childlaw in its intervention to the legal challenge to the CYP Act, on which the [Supreme Court](#) delivered its judgment on 28th July 2016.³ Accepting Clan Childlaw's arguments the Court 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)

¹ <http://www.legislation.gov.uk/asp/2014/8/contents>

² [https://www.cypcs.org.uk/ufiles/July-2013-CYP-\(S\)-Bill---Written-Evidence-from-SCCYP-FINAL\(2\).pdf](https://www.cypcs.org.uk/ufiles/July-2013-CYP-(S)-Bill---Written-Evidence-from-SCCYP-FINAL(2).pdf)

³ <https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

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.

Children and young people's rights to privacy are not absolute. The [Information Commissioner's Office \(ICO\) Code of Practice](#) on the sharing of personal data states that "public authorities are permitted to interfere with it if it is lawful and proportionate to do so"⁴. This includes where it is necessary to provide the child or young person with, as stated in [Article 2 of the UNCRC](#), "such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her..."⁵ Information is already shared on this basis in relation to child protection concerns and the Named Person scheme was successfully piloted by Highland Council under existing data protection legislation⁶.

Information Sharing

Most information sharing associated with the Named Person scheme should be done with the consent of the child or their parents, or both, depending on the age of the child and their capacity. Consent should be in the full knowledge of what is being shared and with whom. It should be fully informed, by advice where necessary, with no detriment for refusal.

Many children and young people are likely to have the capacity to consent to information sharing, depending on their individual and developing capacities. Current [data protection legislation](#) assumes that children will have this capacity from around the age of 12⁷ but some will have this capacity at an earlier age. The UN Committee on the Rights of the Child states that any decision on a child's capacity should begin from a [presumption that the child has capacity](#)⁸. However, the onus

⁴ https://ico.org.uk/media/for-organisations/documents/1068/data_sharing_code_of_practice.pdf

⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁶ <http://www.clanchildlaw.org/app/uploads/2017/08/Children-and-Young-People-Information-Sharing-Scotland-Bill.pdf>

⁷ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en (p9)

will be on service providers to improve their consent gathering processes to ensure that robust, informed consent can be obtained from children and young people and their parents.

The current bill

The [Children and Young People \(Information Sharing\) \(Scotland\) Bill](#)⁹ is intended to address the technical deficiencies in the CYP Act relating to information sharing by amending the Act to ensure it is compliant with the [Data Protection Act](#) (DPA) 1998¹⁰ and with the ECHR. The bill as currently drafted does not achieve this.

The bill removes a duty to share information with the Named Person and replaces it with a two stage process: a duty for any practitioner working with a child to consider whether information should be shared followed by a duty to consider whether sharing it would be permissible in terms of the DPA. For information sharing to comply with current data protection legislation, it needs to be proportionate, relevant and appropriate. [We were concerned](#) that the threshold for sharing data proposed by the CYP Act had been lowered to a point where there was a risk of the child's right to privacy might be violated¹¹. The current bill does not add any clarity on this.

Professionals will have to consider not just whether they are able to share information but what they should share. Decisions on what to share and with whom should be considered for each situation, there should not be routine or standard data that is shared. It is important to note that these decisions about whether to share information may be made not just by the Named Person but by practitioners from across the statutory, private and third sectors and all these practitioners must be properly trained and supported to make these decisions.

Code of Practice

The bill also introduces a requirement for Scottish Government to produce a statutory Code of Practice. The government has prepared an [Illustrative Code of Practice](#) to accompany this bill¹². We do not believe that any Code of Practice

⁹ <http://www.parliament.scot/parliamentarybusiness/Bills/105191.aspx>

¹⁰ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

¹¹ <https://www.cypcs.org.uk/ufiles/Named-Person-statement.pdf>

¹² <http://www.parliament.scot/parliamentarybusiness/Bills/105191.aspx>

prepared along the same lines would provide practitioners with the guidance they need to ensure that information sharing is carried out in line with data protection legislation.

The Code of Practice and any accompanying guidance must be grounded in children's rights and provide practical advice to all practitioners working with children and young people. Consent should be at the heart of decisions about information sharing and it must be made clear the sharing of information without consent should be exceptional. The circumstances in which information can be shared should be explicitly detailed. The code and any guidance must be written in language which will be easily understood by all practitioners working with children. This is vitally important not just to prevent information being shared unlawfully but also to provide practitioners with the confidence to share information when it is necessary to protect children's rights. It will also reassure children and their parents and carers that information sharing decisions are being made in a transparent way. Tools such as flowcharts and realistic examples should be used to improve understanding.

As an office, we will continue to scrutinise this bill as it passes through parliament. We will also carefully assess the code of practice and any other accompanying guidance, when published, to ensure that it facilitates practices which are compliant with children's rights.

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