



RESPONSE TO THE CONSULTATION ON DECISION MAKING GUIDANCE FOR FOSTER CARERS

December 2015

CEL CIS is the Centre for Excellence for Looked after Children in Scotland based at the University of Strathclyde. Established in 2011, CEL CIS has been committed to further improving the outcomes and opportunities for Looked after children through a collaborative and facilitative approach that is focused on having the maximum positive impact on their lives.

General comments

This is a valuable information guide for foster carers on Scots law and we recognise the amount of work involved in producing this document. However, there are some areas that we believe require greater clarification: in particular the relevance of GIRFEC and the 2014 Act. The document also requires a thorough proof read prior to publication.

There are some issues throughout the document in the tone used and we feel the language is inappropriate. For example, we are concerned with the title: 'Making decisions about other people's children' (Chapter two). Foster children are a very important part of their fostering family. Some foster carers will identify the children as being 'their children' through the years of love and support they have provided.

We think this document would be strengthened by a stronger children's rights section in the introduction with more explicit reference to the UNCRC 1989. At times in this document, the reader feels that decision making is done *to* children and young people, rather than *with* them. We also think there needs to be some recognition of foster carers who care for disabled children.

The 'Common Myths' are not always explained. Therefore, the reader is left not knowing what the correct answer is (for example, The parent of a child under 16 who is a parent has parental responsibilities and rights with respect to that child's child (pg10)). We are not sure how helpful it is to present myths without clear explanations to dispel the myths.

The document is generally in a question and answer format. For this to work to best effect the question posed should be answered in a clear, direct manner – this answer can then be supported with reference to policies, legislation and guidance which explain why this answer is the case. Readers of the document will want a clear answer first and foremost. Therefore, phrases such as 'it is well within your powers' or 'you can certainly' are not necessarily helpful in providing clarification.

Given the length of the document, it would be helpful for the contents page to be hyperlinked to allow foster carers to access the relevant section. As a word document, it might be seen as inaccessible. A Filofax style resource might be a good idea if funding permits.

Below we have given our comments on a page by page basis, drawing attention to specific areas of concern.

Specific comments

Pg 1 The headings used in the contents page do not match the headings used throughout the document.

In the preamble the guidance states that it is not relevant for children in residential care or children at home with parents. Perhaps it should also state that it is not applicable for children in kinship care.

Chapter One: The Legal

We recommend the following be changed:

‘Chapter Two: Making decisions about other people’s children’

We feel this is not appropriate language and does not support the foster care ethos.

In terms of the contents we feel that there should be a section on Overnight Stays and a link to SG Guidance (2008) on this: <http://www.gov.scot/Publications/2008/01/31131939/0>

Pg 2 The following should be added to the list of relevant legislation:

[Adoption and Children \(Scotland\) Act 2007](#)

This should be included as important legislation especially due to the introduction of Permanence Orders which are relevant for children and young people in foster care

[Education \(Additional Support for Learning\)\(Scotland\) Act 2004 \(amended 2009\)](#)

This is critical legislation for the education of looked after children. The Act sets out in law a presumption that every looked after child has additional support needs *unless* they have been assessed as otherwise.

It may also be helpful to add the [Looked After Children \(Scotland\) Regulations 2009](#).

There is a typo – It should read: ‘Children and Young People (Scotland) Act 2014’

Pg 3 **‘Children in care’** –Within CELCIS we don’t tend to use this term. The legal definition is a ‘looked after’ child. However, some children and young people might prefer ‘in care’. If you choose to use the term ‘children in care’ in this document, we would prefer that this choice be based on discussions with foster carers and relevant young people regarding their chosen term. Throughout the guidance both ‘looked after children’ and ‘children in care’ are used – we would recommend choosing one and sticking to it (our preference would be looked after children).

Who is a Child?

We suggest that there needs to be a very clear sentence saying ‘we consider that you are a child until your 18th birthday’. This is what the law says under the Children (Scotland) Act 1995 and this is the key legislation impacting on looked after children. The UN Convention on the Rights of the Child defines a child as everyone under 18 unless, under the law applicable to the child, majority is attained earlier.

We suggest re-wording this section. The use of 'One' is inconsistent with the rest of the document, and within this section there are slight inaccuracies. For example, a 16 or 17 year old *can* legally drink alcohol with a meal in a pub or restaurant (beer/cider/wine – but not spirits) when bought by an adult and accompanied by an adult. It is the purchasing of alcohol that is illegal. The remainder of the paragraph is potentially very confusing and should be rephrased:

For the purposes of being in care, young people aged over 16 but under 18 can be subject to compulsory supervision orders, or can be accommodated by the local authority if their welfare requires it. These young people are children for these purposes, and have rights as former “looked after children” which can subsist to the age of 25.

We understand the point – but think this would be clarified by defining a child as under the age of 18. Hence, we wouldn't need to justify any consideration for 16 and 17 year olds here. Also children and young people can still be looked after under a CSO younger than 16. The wording suggests a CSO is linked to their age. They can still be looked after children.

Under the Children and Young People (Scotland) Act 2014, there is a power to support care leavers up until their 26th birthday (section 66 (2)(c)(i)). The Scottish Government have been keen to use the 26th birthday to be as clear as possible in all guidance.

Pg 4 UNCRC 1989 - This is an opportunity to highlight Article 12 and also the importance of foster carers supporting children and young people in their evolving capacities to make decisions. The tone of this final sentence seems to relate to the adult-child power relations of where all decisions are made for them in their best interests. We don't think this is intended but perhaps a rephrasing would help to shift the emphasis to decision making *with* children and young people (rather than *to* or *for*).

Pg 5 The layout of the page makes the contents confusing – the sentence preceding the 'important point' box reads: “You should make sure that you know which of the following applies to a child who is being cared for by you, and that you are kept informed of any changes” however, the points in the following box relate to all children subject to an order, and the sentence refers to points 1.1 to 1.6 (which are presented following the 'important point' box).

Pg 7 We would recommend rephrasing the section on permanence orders which currently does not have a very positive tone. For example, 'The local authority always gains the right to decide where the child will live and the parent always loses it' could be re-worked to highlight that there has been a transfer of parental rights when grounds have been established and accepted by the Court.

Pg 10 We recommend including useful links and relevant organisations should be in an Appendix.

Pg 11 The guidance states that a residence order is “sometimes miscalled a section 11 order”. It is not miscalled. We recommend re-phrasing to “sometimes referred to as a section 11 order”.

“...this is why you are in a subordinate position.”

We do not like the choice of words. A foster carer is not in a subordinate position to a parent. We recommend deleting the whole second half of this sentence.

- Pg 12 Section: What is capacity? – The opening sentence states: ‘Put simply, capacity is the understanding to make decisions that have legal consequences.’ However, this isn’t just about legal capacity. This is about capacity to make decisions about everyday life. It is also about capacity to give medical consent. Using the legal capacity Act narrows the focus. It also could be misunderstood that children do not have capacity if under the age of 16 (though we do not think that this is intentional).
- Pg 13 Advocacy – This section is written as if to suggest that parental or carer consent should be sought but time is a factor. This is not the case. The majority of children and young people will have capacity to make a decision with appropriate information about whether or not to use an advocacy service.

Counselling – This section only references schools, however counselling can be offered through a range of settings, including third sector organisations, this should be highlighted (and some useful links to further information should be provided, perhaps in an appendix).

Sexual health services – this section states that ‘a child has the right to access in total confidence’. We would reconsider the word ‘total’ here. There are some safeguards for all children who might be of risk of significant harm. I think reference to SG Guidance on underage sexual activity is relevant (and may be useful for foster carers as well). There also will be local guidance. <http://www.gov.scot/Resource/Doc/333495/0108880.pdf>

We like the language of recognising the evolving capacities of children.

The following statement should be clarified as the tone would not be in keeping a child’s rights perspective (see guidance link above):

“If you become aware that the child has used such a service, you may be required to notify social work, depending on the individual circumstances of the child, particularly if the child is known to be putting themselves at risk. You may not, however, know that they have accessed the service.”

It should be recognised that social workers need to make the assessment about vulnerability and risk of children who are sexually active. Therefore, foster carers should be having a discussion (rather than notifying) with social workers about this.

- P14 A link should be made to the Education (Additional Support for Learning) Act 2004 (amended 2009) in relation to ASL for looked after children and young people and capacity.

Linking back to the section on ‘Who is a Child?’ (P 3), we suggest that the ‘Important Point’ box should clarify from the outset that in the context of medical decisions a young person over the age of 16 is considered to have legal capacity to consent to surgical, medical or dental procedures or treatments (unless there are learning difficulties or other circumstances which restrict capacity).

- P15 Typo: “Qualified medical practitioners do not only doctors, but also nurses, midwives, physiotherapists, clinical psychologists and other medical professionals.” Should read “*are not*”.

- P16 We recommend rewording this section. It is confusing. Perhaps 'sectioning' should not be used here. 'Habilitation' is not a term familiar to most people, should it read 'rehabilitation'? If not some further context (and perhaps quotation marks) is necessary.

Where a child has been subject to a medical treatment order (commonly called sectioning), the meaning of medical treatment is very wide and includes many things including habilitation. (assistance for a person with a disability to develop maximum independence and capability).

- P17 The 'Morning after pill' is an inappropriate term (as it implies it is only effective the following morning, rather than 72 hours). Instead we recommend using the term 'Emergency Contraception'. The pharmacist should have a discussion with the young person about the type of sexual activity and whether it was consensual. Following this discussion, the pharmacist should follow local child protection protocols is required. We are unclear what a child protection assessment would mean to a pharmacist.

- P18 More detail of the child's ability to instruct a solicitor should be included.

The following statement needs to be reconsidered. We think this has been discussed with the Scottish Legal Aid Board.

'However a parent's income will be taken into account by the Scottish Legal Aid Board in civil cases unless the parent is the opponent.'

Since January 2011, the financial resources of those persons with an obligation to aliment a child have to be taken into account, unless it would be unjust or inequitable to do so. There is discretion as to what is unjust or inequitable. I thought looked after children in foster care placements were included in this so parental income would not be taken into account

The point that a child may be losing capacity due to stress is unusual. Adults become stressed in legal proceedings and they are not considered to lose capacity in these circumstances.

- Pg 19 It would be a good idea to expand the ASN section to make clear that every looked after child is assumed to have additional support (for learning) needs, unless an assessment finds otherwise. We recommend that this guidance use the text found in the ASL Act Code of Practice.

Some sections about supporting young people in college and university (some of whom are still in foster care) should also be included.

In the useful link 'The Let's Talk ASN' the description should be amended to include carers as well as parents.

- Pg 20 We feel that there should not be a box that lists 'Common Myths', unless there is clarifying information included to dispel the myths, otherwise this is confusing.

Chapter Two: Making Decisions about Other People's Children

Pg21 We do not feel that the heading for this chapter ('Making Decisions About Other People's Children') is appropriate. As we stated before, foster children are a very important part of the fostering family and this language is distancing.

This chapter opens with quotes from young people. We feel that there should be some information regarding where these quotes are from. There is no indication of how representative these quotes are and we are not sure what they add. We could easily find quotes stating the opposite view. The quotes suggest that foster children think that foster carers should make decisions. There seems to be a missing section on how decision making can be *with* children, rather than *to* (or *for*) children.

Pg 22 States 'This means that the big decisions remain with the parent', the guidance should add 'In cases where they have retained parental rights and responsibilities'. For some children, birth parents no longer have parental rights and the local authority does.

We suggest that the sentence 'The wording of section 5 closely resembles section 1 of the Children (Scotland) Act 1995 about parental responsibility. (see Chapter one 2) The word promote is missing' requires further discussion and/or clarification – what is the significance of the word promote being missing?

The 'important point' box mentions the Child's Plan (which should have capital letters) – We think there needs to be more detail on this in relation to GIRFEC. This is even more important due to the new 2014 legislation.

Pg23 The statement 'You cannot override the parent' should be amended to include 'as long as they still have rights'. Otherwise we are missing a group of children whose birth parents have had their rights revoked.

Typo –section one 3 (should read 'should not *be* necessary')

Pg24 Medical decisions – This seems to be repetitive.

Pg26 'Technically you can make all decisions' this seems to contradict the earlier statements about young people aged 16 and over being able to make their own medical decisions provided they have capacity. It also seems to contradict the sentence on page 27 which reads: 'The more extensive or invasive the proposed assessment is, the less likely that you will be able to make that decision.'

The sentence: 'Where the decisions may have serious or long term consequences, it is unlikely that you will be left to make decisions alone.' Should be followed up with some information on who would be supporting the making of these decisions (the local authority? A social worker? The parents?).

Typo: 'Even if the child does not have the capacity to make a decision they still has a right to a view' should read 'they still *have* a right to a view' – perhaps this should also state that they still have the right to have their views heard and taken into account (in line with page 4 which states: 'It is very clear in the United Nations Convention on the Rights of the Child that the child must be at the heart of all decision making – not just to have a view').

The 'important point' box uses the term 'Delegated authority', but this term is not explained, and it is not used elsewhere in the document. Perhaps it should be explained that this is a term used in other jurisdictions and then defined. This guidance is for people who may not

be familiar with the term and to include it without defining it could confuse the issue that is being sought to be clarified.

- Pg 27 Should read 'set out', rather than 'spell out'?
- Pg 28 States 'Where the parent is present it may be that your presence would not be helpful' (in relation to a foster parent being present with their foster child during a medical examination). We would like to see some discussion of who decides whether this would be 'helpful' or not. Is it up to the child, the parent, the medical professional? Is it decided by all these parties?
- Pg 29 There are some punctuation errors, and some repetition which could be avoided. We would recommend following each question with a brief, direct answer and then to support that answer with reference to relevant policies and guidelines (rather than leading with references to policies and guidance and then getting to the answer).
- Pg 31 We recommend reconsidering the statement: "This means that you are a parent for education, and are equal to the parent". Firstly it doesn't really make sense (being both a parent and equal to a parent?), but more importantly we are not sure that it is accurate. In a conflict of opinion between parent (with PRR) and foster carer, whose opinion would prevail? We would expect a lawyer to have the answer to this. The guidance should also make reference to the role of the local authority. They are the ones with parental rights and responsibilities (as transferred by the Hearing or Court). The guidance should clarify whether it is OK for a foster carer to make decisions without reference to the local authority. The answer is yes, but only up to a point – the guidance should indicate what that point is.
- Pg 33 Distinguish for the reader the difference between each of the powers outlined (e.g. having the power to request an assessment for a coordinated support plan and having the power to write to the education authority and ask for a child to be assessed for a Coordinated Support Plan (CSP)). This may mean describing the points as a series of steps that a foster parent could go through to ensure their foster child gets assessed.
- Pg 34 Obtaining services for the child - Again this chapter opens with a number of quotes from young people – cite where these quotes come from and give an indication of how representative they might be of the views of foster children in general.
- Pg 35 States: 'If you feel there is any risk to the child because of the nature of the service, then you will be required to take the appropriate child protection steps.' An example here of a circumstance which would pose a risk to the child and appropriate child protection steps could help illustrate the point.
- Pg 36 Discipline and House Rules – This sounds very punitive. We would like this section to be rephrased. These quotes appear to be very selective and describe rather negative scenarios. Discipline is not all about punitive measures (like taking a phone or docking money), and it is an interactive process. It is good that the guidance recognises that there may be particular challenges in caring for a foster child, but again the choice of wording is distancing ('a child who is not your own').
- Pg 41 States: 'Where considerable sums are involved this should be part of planning from the start' in relation to money management. Arguably this should be part of planning from the start

regardless of the sums of money involved because running out of money will lead to difficulties regardless of whether the individual started with a large or a small sum.

'There is no reason why you cannot open a bank to manage the child's money' should read 'bank *account* to manage...'

Pg 42 Typo: 'If an account is in the child's name they will be able to make withdrawals before under the age of 16' – remove either 'before' or 'under'

Pg 44 The section on 'pocket money' does not mention the role of the foster carer at all.

The statement 'That is a matter for you to manage' seems an odd one to appear in guidance, particularly as it is not followed up with any suggestions on how to manage this situation.

Pg 45 The sentence: 'It is one of our human rights to have respect for our family lives' should perhaps read 'it is one of our human rights to have our family lives respected'.

Pg 46 The section defining 'contact' should probably indicate that contact in this context typically refers to contact between a child and their birth parents, persons with parental responsibilities, siblings and friends.

Pg 50 As we stated before, we find it confusing to include a box of 'common myths' without including information dispelling the myths.

Pg 52 The sentence: 'The result is that adults need to understand the risks and be alert Looked after children who can be particularly vulnerable' should be rephrased as it currently does not make sense.

Consider rephrasing the sentence: 'If the young person is past their 16th birthday then he or she is an adult and any protection concerns will need to be handled differently' in light of our previous comments of the distinction between an 'adult' and a 'child'.

Pg 56 Please see our previous comments on including 'common myths' without further clarifying information.

Pg 57 Please refer to our previous comments regarding the sentence: 'As the carer of the child you are a parent for the purposes of education'.

Pg 58 The tone of the sentence: 'parental control became well-nigh impossible' does not fit with the rest of the document. Also, when terms such as 'sexting' or 'cyber-bullying' are used there should be some form of definition to accompany them.

Pg 62 The section on 'Sleep overs and friendships' should at least contain some guidance, as well as linking to Scottish Government guidance. The reader will want to know some key points.

Pg 67 As with the other quotes in the document, we would like information on how they were obtained. The quote on this page: "If the police talk to me and I want to tell anyone, I will", seems a little obscure and would require further information on what you intend the reader should take from it.

Information on how to contact Victim Support or Assist should be included.

Pg 69 The sentence 'The child will be eligible for help with legal expenses so do not worry about the cost' should be followed with some information and links on where to get this help.

In the important points box the sentence: 'The child does not need capacity to instruct a criminal lawyer' might need further explanation or some links back to the section on capacity.

The question: 'Where will the interview be held?' is answered simply with: 'It depends on the circumstances' – some typical examples would help readers to understand the process.

The sentence: 'Accepting grounds or pleading guilty has long term consequences and it is not a matter of - we bring children up to be honest' reads strangely and should be rephrased to make the point more clearly. This language isn't appropriate. It also overlooks the childhood history of police involvement (for example in child protection cases), where children can have difficult relationships with authorities. For example, some children will have experienced abuse and neglect and where authorities have been involved, they have been threatened and coerced by those abusing them to 'not tell'.

Chapter 3: Confidentiality and information sharing

Pg 72 We have several concerns about this chapter and the accuracy of the information.

Please see our previous comments about the inclusion of quotes

Please see our previous comments about the inclusion of 'common myths' without appropriate clarifying information. This is incredibly important to clarify. There should also be reference to the Children and Young People (Scotland) Act 2014 with new duties relevant for this section.

Please can this be changed – It is not accurate or fair: "Children in care have less privacy than other children, but they still deserve respect and care for their dignity when information is shared."

Pg 73 The tone of this section is very negative. As it currently stands, a child is a set of risks to a foster carer and their family. We really feel this should be rephrased. Foster carers require information to provide the best possible care for a child.

The placement of the 'important points' box interrupts the flow of the text – the points below the box relate to the text immediately before the box.

Pg 75 Emergency Placement – Missing the word Children: Looked After Children (Scotland) Regulations 2009

Pg 77 Child Protection – There should be reference to the National Child Protection Guidance. I am very surprised that there isn't a consideration of listening to the child, seeking consent to share information, taking a record of the details. Also all foster carers should have access to local child protection procedures (See Appendix one).

The section on 'crime' only discusses instances where the child is a victim of a crime. Perhaps there should be also some discussion of when the child is the perpetrator (with links back to relevant previous sections).

I think this sentence almost undermines a UNCRC approach! I don't think we mean to state that when children can form a view, issues arise! I think this needs rewording. 'Issues can arise when the child reaches an age and stage where they are able to form a view, and later when they are capable of exercising capacity.'

Pg 78 The tone of the 'important point' does not seem to be in keeping with previous 'important points'. 'Having permission means you can stop worrying' seems to miss the point. I think this should be removed.

I don't think this sentence is in keeping with Scottish Government's line on the Named person and GIRFEC: Where a child is accommodated, the role of the named person is rather clearer than with other children.

Chapter 4: Planning

Pg83 The Planning sections need to be updated with the new 2014 Act and the legislation for the Child's Plan. Given the importance of the Child's plan, it is surprising this chapter is very short compared to the others.

I think the 'no right to attend' for a Plan is incorrect when a foster carer is a primary carer for a child.

A foster carer will still be a source of support of a child, even if they have an advocacy worker.

Pg 84 Web links are incorrect.

We would welcome further discussion on the development of this document.

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Appendix One

NATIONAL GUIDANCE FOR CHILD PROTECTION IN SCOTLAND (2010)

INFORMATION-SHARING AND RECORDING

86. As highlighted in the section on [Core principles](#), sharing appropriate information is an essential component of child protection and care activity. To secure the best outcomes for children, practitioners need to understand when it is appropriate to seek or share information, how much information to share and what to do with that information. Practitioners also need to consider from and with whom information can, and should, be sought and/or shared. This applies not only between different agencies, but also within agencies. At the same time, children and their families have a right to know when information about them is being shared. Where possible, their consent should be sought, unless doing so would increase the risk to a child or others, or prejudice any subsequent investigation.

Information-sharing for child protection: general principles

- The safety, welfare and well-being of a child are of central importance when making decisions to lawfully share information with or about them.
- Children have a right to express their views and have them taken into account when decisions are made about what should happen to them.
- The reasons why information needs to be shared and particular actions taken should be communicated openly and honestly with children and, where appropriate, their families.
- In general, information will normally only be shared with the consent of the child (depending on age and maturity). However, where there are concerns that seeking consent would increase the risk to a child or others or prejudice any subsequent investigation, information may need to be shared **without consent**.
- At all times, information shared should be relevant, necessary and proportionate to the circumstances of the child, and limited to those who need to know.
- When gathering information about possible risks to a child, information should be sought from all relevant sources, including services that may be involved with other family members. Relevant historical information should also be taken into account.
- When information is shared, a record should be made of when it was shared, with whom, for what purpose, in what form and whether it was disclosed with or without informed consent. Similarly, any decision *not* to share information should also be recorded.
- Agencies should provide clear guidance for practitioners on sharing information. This should include advice on sharing information about adults who may pose a risk to children, dealing with disputes over information-sharing and clear policies on whistle-blowing.

87. Local areas should ensure there are robust information-sharing protocols in place and that practitioners understand their responsibilities in relation to the sharing, storing and retrieving of information. Local data-sharing partnerships and others responsible for providing guidance/decisions about information-sharing should be involved in producing these protocols.

