



Response to the Scottish Parliament's Education and Skills Committee call for views on the Children and Young People (Information Sharing) (Scotland) Bill. – August 2017

CEL CIS (Centre for excellence for looked after children in Scotland), based at the University of Strathclyde in Glasgow, is committed to making positive and lasting improvements in the wellbeing of Scotland's children living in and on the edges of care.

We welcome the opportunity to submit our views in relation to the Children and Young People (Information Sharing) (Scotland) Bill (the Bill). We are fully supportive of the aspirations of the Scottish Government, to bring consistency, clarity and coherence to the practice of sharing information about children's and young people's wellbeing across Scotland. This is because, if fundamental elements of the [Getting It Right For Every Child](#) (GIRFEC) approach (namely the Named Person Service and Child's Plans) are to be implemented effectively, the complex issues inherent to information sharing need to be articulated and addressed head on. Unfortunately the Bill, and more importantly the draft Code of Practice, do not achieve this, putting at risk the Scottish Government's wider GIRFEC agenda. And, as further legislation is unlikely to facilitate improvement in the day-to-day practice of professionals, the priority must be on the Code of Practice. This Code should be comprehensive and detailed guidance, setting out the Government's expectations, within the boundaries of existing legislation, of how professionals should collect, store and share information across a variety of scenarios. We acknowledge that the process of preparing such guidance will be difficult, touching as it does on fundamental questions about the relationship between individuals and the state. It is likely to provoke robust debate both among and between professionals and the general public. But it is precisely that debate, driven and structured by the development of the guidance, which is needed, if a move to more preventative models of service delivery are to be realised in Scotland.

Should the Parliament agree to the general principles of this Bill?

The Bill and accompanying documentation do not explicitly state the general principles behind them, but from the material available we infer that these are (a) the importance of consent, and (b) facilitating appropriate and safe information sharing, with a view to getting it right for every child. On this basis, we believe Parliament should agree to the general principles of the Bill (and its accompanying documentation).

However, while the Bill and Code of Practice do underscore the importance of consent, they do not provide the clarity many families and professionals are seeking in relation to the circumstances when consent to share personal information in relation to wellbeing will be sought, and when information will be shared by professionals even without consent. The [ruling of the Supreme Court](#) on 28th July 2016 found an unacceptable lack of clarity in

relation to safeguards around information sharing, and the relationship of information sharing provisions in Parts 4 and 5 of the [Children and Young People \(Scotland\) Act 2014](#) (the 2014 Act) and the [Data Protection Act 1998](#) (the DPA). The judges concluded that sharing information under such provisions could, potentially, interfere with Article 8 of the [European Convention of Human Rights](#). To rectify this, they called primarily for clarity in relation to safeguards around information sharing, and necessary changes to Parts 4 and 5. Not the introduction of new law.

In relation to the Bill's principle of achieving full and effective implementation of GIRFEC, we agree this is of paramount importance, and central to making Scotland the best place in the world to grow up. Realisation of what the policy promises would contribute much to improving the lives of children and families in all parts of society. The implementation of the statutory Named Person Service for all children and families is an essential component of GIRFEC, as is the statutory Child's Plan. Appropriate and lawful information sharing to promote, support and safeguard wellbeing is fundamental to each of these provisions. But to minimise further confusion and conflict over the boundaries of individual privacy, consent and professional's obligations to act in the best interests of the child, detailed guidance must be developed.

Lawful information sharing

The DPA promotes lawful and proportionate information sharing, and protects the rights of individuals to have their personal information processed fairly. Given the GIRFEC approach is an effort to secure earlier intervention (and hopefully the prevention of harm for children), personal information¹ to promote, support and safeguard wellbeing will need to be shared before a situation reaches crisis point. Advice issued by the Information Commissioner's Office in 2013 stated that:

*"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... If there is any doubt about the wellbeing of the child and the decision is to share, the Data Protection Act should not be viewed as a barrier to proportionate sharing."*²

Furthermore, in a 2016 letter to public bodies in Scotland, the Information Commissioner's Office noted:

*"[...] compliance with the requirements for the sharing of personal data as set out in the DPA is likely to ensure that the sharing of personal data in the child welfare sector will be in accordance with the Article 8 rights of the individuals concerned."*³

The conditions for processing information are set out in Schedules 2 and 3 to the DPA; at least one of which must be met for information sharing to be lawful. The first of the conditions clarifies that sensitive, personal information can always be processed (shared) with consent. However, an individual's consent to information sharing is not required if certain other conditions are met, including:

¹ Personal data means data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. It includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual. (Information Commissioner's Office (2017) [The Guide to Data Protection](#), ICO)

² Information Commissioner's Office (2013) '[Information Sharing Between Services in Respect of Children and Young People](#)'

³ Information Commissioner's Office (2016) '[The Children & Young People \(Scotland\) Act 2014](#)'

- to protect the vital interest of an individual (this condition only applies in cases of life or death);
- in relation to legal proceedings;
- for exercising statutory or governmental functions; or
- for medical purposes and undertaken by a health professional or someone subject to an equivalent duty of confidentiality.⁴

Importantly, any personal information shared, under whatever circumstances, must be done in line with the principles set out in Schedule 1 of the DPA. Namely that the information shared must be necessary and proportionate, relevant, adequate, accurate, timely, secure, and recorded.⁵

Furthermore, where information will be shared by professionals regardless of the availability of consent from children, young people or parents (such as in instances where it is necessary to protect the life of an individual), seeking consent itself could be deemed unfair. In such circumstances, if consent were withheld it would make no difference to whether the information was actually shared. This is not to say that relevant information should be shared in secret, but rather that in certain circumstances individuals will only need to be informed of the sharing. Transparency of professional's decisions and actions, underpinned by legally compliant and robust recording, is always critical, even where consent is not required.

Dispelling confusion

In the course of our work with practitioners across the children's services sector, including those from Named Person Services and others who may share information with them, we are increasingly aware of anxiety and confusion over what constitutes 'legal' and appropriate practice in relation to the sharing of information about a child or young person. We are concerned that without accessible, explicit guidance, recent progress in improving information sharing will be lost. With high-profile media attention on the subject, such as that surrounding the 'No 2 Named Person' campaign, and in the absence of clear guidelines, professionals are likely to adopt risk-averse positions around information sharing, preoccupied with concerns about breaching the confidentiality of parents and children. A long and harrowing series of Fatal Accident Inquiries and Serious Case Reviews have shown a consistent failing of the system of appropriate, proportionate information sharing, within the bounds of the law, at earlier opportunities. Those incidents do not provide reason to lower thresholds for information sharing (as the original information sharing provisions of Part 4 & 5 risked doing), nor do they demand further legislation now. What is required is a broad programme of activities, centred on the development of clear and comprehensive guidance, which enables the various different professionals working with children to understand their obligations, both in terms of protecting the information of children and families, and also protecting children and families by safe and proportionate information sharing with others. The sharing of information is critical to promoting, supporting or safeguarding a child or young person's wellbeing. Current law does not preclude it. However, if professionals are confused about how to handle personal information, and consequently 'shy away' from sharing it in certain circumstances, at best the GIRFEC approach will never become reality, and at worst many future inquiries will

⁴ Information Commissioner's Office (2017) [The Guide to Data Protection](#), ICO

⁵ HM Government (2015) '[Information Sharing – advice for practitioners providing safeguarding services to children, young people, parents and carers](#)'

conclude that opportunities were missed to intervene, putting the lives of children or others at risk.

It is important to reiterate here that, regardless of the legal challenges directed towards the Children and Young People (Scotland) Act 2014, there has been no change to the threshold for information sharing in instances where there are concerns about risk of significant harm (under the Children's Hearings (Scotland) Act 2011 and [National Guidance for Child Protection in Scotland](#), 2014), or where necessary to promote, support and safeguard the wellbeing of looked after children and care leavers. As outlined above, information can be lawfully shared for the purposes of "exercising statutory or governmental functions" including those relating to looked after children and care leavers. Various public sector bodies have specific legal duties and responsibilities, spread across a range of legislation, to share information about these children and young people, in order to facilitate the provision of a joined-up, holistic, high-quality support. For example, under Part 3 of the [Looked After Children \(Scotland\) Regulations 2009](#), a Local Authority must notify the relevant Health Board when a child become looks after, regardless of whether the child or their family gives consent. This is necessary to obtain an assessment of the child's health history and current state of health and development to ensure appropriate plans are made to meet the child's needs. In all cases, the individual child or young person, their unique circumstances, and the strengths, needs and risks of the situation should guide decisions to share information, which should be done in a transparent way. Similarly, information about children and families may be shared with carers or potential adopters, so that they have a clearer understanding of issues or behaviours experienced by the child, and can then provide the best form of support.

The proposed Bill itself does not alter any of the above, but it may, inadvertently, do so by further adding to the confusion and anxiety among professionals. No legislation is likely to address that confusion; we believe only the development of clear and comprehensive guidance provides the opportunity for establishing clarity around lawful information sharing.

What improvements could be made to the Bill's provisions?

Code of Practice

The most significant provision of the Bill is Section 26B, the introduction of a duty on Scottish Ministers to introduce a code of practice in relation to provision of information. It is through the code of practice that clarity over issues of consent and safeguards around information sharing will be achieved by practitioners on a day to day basis. The [illustrative draft code of practice](#) provided alongside this consultation requires significant improvement if the aims of the Bill are to be realised. The code of practice must be a useful and clear guide to those working to support children and their families. In its present form, the illustrative draft is largely inaccessible to the majority of practitioners. The use of technical, legal language and lack of any case studies or practice examples contribute to this.

While we acknowledge the complexity around this area of law, for the Code of Practice to be useful it must provide some guidance. Unfortunately the current draft simply restates complex, opaque legal terms, without explaining the nuance or differences; examples include key phrases like 'consent', 'explicit consent' and consent that is 'active and informed'. Information sharing does and should continue to rely heavily on professional judgement, bounded and guided by the law. But if the Scottish Government wishes to

achieve its policy objectives (as set out in the Bill's accompanying documentation) it is necessary to provide much more detailed guidance. The current draft requires a high level of practitioner discretion in relation to the intricacies of deciding to share information and the navigation of numerous caveats and qualifications. For example, when determining when one 'cannot be expected to obtain consent', or when 'consent is being unreasonably withheld', or when it would 'take too long' to inform children, young people and/or parents that you plan to share information. There are no hard and fast rules when it comes to any of these areas, and professional judgement will need to be exercised in each and every individual case, but if safe and appropriate information sharing is to be promoted, and a risk-averse culture avoided, practitioners require clear examples (across the range of children's service settings) to bring these highly complex technical terms and competing considerations to life. And critical among these are robust examples of what constitutes wellbeing concerns over which consent must be sought before sharing, and those which should be shared when consent is absent or not required.

Rather than enabling and empowering appropriate information sharing, the draft Code of Practice currently focuses predominately on processes which should be carried out each time information is shared, giving the impression of a bureaucratic and onerous system, rather than a rigorous one. This is not to say such considerations are unimportant, but the level of technical, process detail in the draft, in the absence of more explanatory, practice orientated material, leaves it inaccessible, and unlikely to be used by practitioners on a day to day basis, when confronted with complex situations.

Additionally, some of the language and emphasis in the draft appears intimidating, for example, the bold type of the word 'must' in paragraph 4. Information sharing is already a source of anxiety for practitioners, and the code of practice should be sensitive to this. Responsibilities of individual practitioners, and those of whole organisations and services should be clearly articulated. If procedures around information sharing are impenetrable, and the consequences of doing so incorrectly are perceived to be severe, practitioners will opt not to share concerns, which will threaten the implementation of GIRFEC and, more importantly, potentially the wellbeing of children. The draft articulates the legislative context and considerations when deciding whether to share information in the 'Relevant Law' section, which may be a useful appendix for reference, but the code of practice itself should be much more user-friendly and accessible. It must speak clearly to practitioners at many levels from many disciplines. It must be straightforward and easy to use, and enable appropriate yet confident practice.

There are excellent examples of practitioner guidance on information sharing in existence, for example that produced by Perth & Kinross Child Protection Committee,⁶ cited as a good practice example on Scottish Government's GIRFEC information sharing [webpage](#). This example contains clear information about how to decide to share information, how and when to seek consent, what to discuss with line managers, and summarises the process in a simple flowchart. The guidance is written in an enabling style and would likely facilitate confident, effective, appropriate practice. We recommend using the learning from the development of this type of resource in redeveloping the code of practice.

Children/young people's views

We are concerned to note provisions requiring the responsible authority to 'ascertain and have regard to the views of the child or young person' when considering the sharing of

⁶ Child Protection Perth & Kinross (2016) [A Practitioner's Guide: Information Sharing, Confidentiality and Consent to Support Children and Young People's Wellbeing](#)

information (which are present in section 26(5) of the Children and Young People (Scotland) Act 2014) do not feature in the [Illustrative effect of the Bill on the Children and Young People \(Scotland\) Act 2014](#). Section 33(6)(b) in Part 5 of the Illustrative effect of the Bill provides for ascertaining and having regard to the views of the child and their parents when deciding whether a child or young person requires a child's plan, but a similar provision is not contained within the proposed Part 4.

Please provide evidence on any aspect of this Bill, including comment on the approach being taken by the Scottish Government to address the Supreme Court decision, including how you consider the approach will work in practice.

Training

We welcome the attention to the necessity of training for practitioners to understand and gain confidence in the new provisions. We are concerned that estimated costs within the [Bill's Financial Memorandum](#) are insufficient to meet the needs of the range of practitioners delivering the named person role, or who will have significant contact with the named person, or who will be primarily involved with the child's plan.

Costs for 7.5 hours training have been identified as necessary for Health Visitors, Midwives and other relevant Nurse Practitioners, as well as for Head Teachers, Deputy Head Teachers, Principal Teachers, and 2 staff at each grant aided or independent school. This is not sufficient. For the Bill to meet its aim of bringing consistency, clarity and coherence to the practice of sharing information about children's and young people's wellbeing across Scotland, the range of practitioners who require robust training extends far beyond these groups. For example, with the expansion of early learning and childcare hours (and the eligibility of vulnerable two years olds to these provisions), early years centre workers and child minders will require clarity of and confidence in using the new provisions. Of the 26,840 referrals made to the Scottish Children's Reporter Administration in 2016-17, 20,032 were made by the police.⁷ Police Scotland have a critical role in identifying and sharing information to support, promote and safeguard wellbeing, yet their training needs in the new provisions are not mentioned. Social Work practitioners require clarity in their role and responsibilities, and those of others who may be involved earlier in children and families lives. The role and responsibilities of practitioners in the third and/or private sector, and those within services who do not directly work with children (for example the provider of services for parents) also require robust training. For the full and effective implementation of GIRFEC, every practitioner in Scotland who may come into contact with information which could be relevant to the support, promotion and safeguarding of a child's wellbeing must have access to appropriate training and ongoing coaching to ensure their practice is robust. Guidance should be practitioner focussed for each key professional group, and include case studies and examples of 'when to' and 'when not to' share information. New expectations should be integrated into graduate qualifications and mandatory professional development opportunities.

We fully support the roll out of national guidance and training resources. We note plans to develop a programme of training with NHS Education for Scotland, building on the development of existing resources to support the 2014 Act. However, to ensure that training meets the needs of all practitioners and families at a local level, we recommend

⁷ SCRA (2017) [Online Statistics 2016/17](#), SCRA

encouraging and supporting the development of training between a range of key bodies, including the Scottish Social Services Council (SSSC), General Teaching Council Scotland, Education Scotland and parents and community groups. In our experience some of the most complex cases relate to the collection and sharing of information by teachers and schools, and we would encourage this group to be a considered a priority in any training developed.

General Data Protection Regulation

Consideration of any impact of the expansion of the General Data Protection Regulations on the Bill is advised. New requirements come into force on 25th May 2018 and will apply in all areas of the UK.⁸ The Information Commissioner's Office are supporting public bodies and businesses to ensure compliance with any changes, and should be consulted at the earliest opportunity to ensure the provisions of the Bill are not affected.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

CELCIS Contacts:

Lizzie Morton
Policy Associate
lizzie.morton@strath.ac.uk
0141 444 8504

⁸ ICO (2017) [Overview of the General Data Protection Regulation \(GDPR\)](#)