

Education and Culture Committee
Children and Young People (Scotland) Bill

Information Commissioner's Office (Scotland)

1. Given the information sharing provisions of the Children and Young People's Bill ("the Bill"), and as regulator of the Data Protection Act 1998 ("the DPA"), the (UK) Information Commissioner's Office has been following the oral evidence sessions at Stage 1 of the Bill with interest. We were disappointed not to have been invited to give oral evidence to Committee as we would have been able to clarify many of the points raised by Members, witnesses and within written contributions. Instead, and to assist the Committee in the compilation of its Stage 1 report, I would like to take this opportunity to respond in writing to some of these matters.

Legislative Competency

2. A number of contributors have questioned the competency of information sharing aspects of the Bill on the grounds that (a) the proposals may infringe Article 8 rights and (b) data protection is a reserved matter. Compliance with human rights legislation should be considered within the Privacy Impact Assessment which is currently being updated by the Scottish Government but it would be appropriate to give it more detailed consideration with a Children's Rights Impact Assessment as advocated by many parties including SCCYP and the SHRC.
3. With regard to data protection, the Scotland Act 1998 reserves "*The subject-matter of (a) the Data Protection Act 1998, and (b) Council Directive 95/46/EC (protection of individuals with regard to the processing of personal data and on the free movement of such data)*" to Westminster. Whilst in our written evidence we have indicated where the Bill does not comply with the principles of the DPA and must be amended accordingly, the Bill does not in itself modify the DPA. In this regard, it is important to note that paragraph 133 of Schedule 2, Part 1 of The Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999, amended the DPA to specifically include processing necessary for functions conferred on any person by an Act of the Scottish Parliament as a condition for processing under Schedules 2 and 3 of the DPA. In other words, sharing information as required under the provisions of the Bill and in accordance with the data protection principles, is allowed under the DPA.

Section 27

4. Section 27 of the Bill states that "*The provision of information under this Part is not to be taken to breach any prohibition or restriction on the disclosure of information*" and in our written evidence to the Committee, we indicated that we felt this section was strictly unnecessary as legal protection would be given whenever lawful sharing was taking place under the provisions of the Bill in compliance with the data protection principles. At the same time, we recognised

that it may provide some reassurance to those professionals engaged in information sharing.

5. In the light of Professor Norrie's comments regarding the wider implications of this section given in his oral evidence to the Committee on 3 September, we have given this section further consideration and we support his view. As written, the section would override all statutory bars on the disclosure of information, many of which have been enacted in order to give children protection and it may also have implications for the independence of the judiciary where court orders prohibit disclosure. We would therefore urge that the content of this section is reconsidered.

Access to Information by Parents

6. In the oral evidence session held on 10 September, you raised a question regarding parents' right of access to information held by the named person. One of the most important rights accorded under the DPA is an individual's right to request copies of information held about them. In addition, section 66 of the DPA states that, in Scotland, persons under the age of 16 shall be taken to have the capacity to exercise DPA rights if they have a general understanding of what it means to exercise that right and that a person aged 12 or over should be presumed to have that capacity. Taken together, this means that there are a number of scenarios to consider in response to your question.

- 1) *The parent requests copies of information held about **themselves** by the named person*

Under this scenario, the parent should normally be supplied with the information. However, because that information may also reveal something about the child, consideration has to be given to the impact on the child if disclosure took place and any duties of confidentiality owed to the child.

- 2) *The parent requests copies of information about **their child aged under 12***

Under this scenario, it is necessary first to determine if the child has the capacity to understand its rights under the DPA. Where the child has that capacity, then scenario 3 applies. Where the child does not have capacity, the parent should normally be supplied with the information whilst taking into account any duties of confidence to the child or other consequences of disclosing the information.

- 3) *The parent requests copies of information held by the named person about **their child aged 12 or over***

Under this scenario, consent to disclose should be sought from the child. If the child does not have the capacity to understand its rights under the DPA, then scenario 2 applies.

7. The ICO has recently published a Subject Access Code of Practice which provides more detail about responding to Subject Access Requests and includes

further guidance on the disclosure of third-party personal information. In addition, you should be aware that parents have separate rights of access to their child's educational records under The Pupils' Educational Records (Scotland) Regulations 2003 but these Regulations are outwith the jurisdiction of the ICO.

Information Sharing

8. In our written evidence, we stated that it is important to note that the provisions of the Bill should not be interpreted as meaning that all information should be shared between the named person and agencies. We also note that several witnesses are concerned that such an interpretation may be held by some parties. We would therefore reiterate the need to have strong data-sharing protocols adopted by the relevant agencies and it may be appropriate to include a section within Part 4 of the Bill requiring such protocols to be prepared. These protocols should be supported by Regulation and/or guidance as appropriate.
9. Finally, some evidence has been submitted expressing concern over our guidance to practitioners which stated if professionals believe that there is a risk to children which may lead to harm then that information should be shared proportionately. In giving that advice, which has been welcomed in oral evidence by practitioners such as Martin Crewe (17 Sept) and Bill Alexander (24 Sept), we stressed the need to have procedures in place that clarify circumstances which may necessitate processing without consent. In relation to the Bill, we must reiterate the need to ensure that all information sharing takes place in accordance with the data protection principles (as we stated in our written evidence and others have implied, the Bill as currently drafted does not comply with these principles, particularly in relation to the relevancy of information being shared). Whilst guidance may assist practitioners in determining what is relevant, it is still necessary to amend the Bill to ensure its compliance with the DPA.
10. I trust that the above is of assistance to you but please do not hesitate to contact me if you require further clarification of those or any other issues raised during the passage of the Bill.

Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)
Information Commissioner's Office

3 October 2013