

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

Dumfries and Galloway's Children's Services

We welcome the opportunity to be consulted on this important step in Scotland's journey to Getting it right for every child.

Having reviewed the Bill and all the associated documentation, including the illustrative draft Code of Practice, we have the following observations to make:

Language

While we recognise the necessity for formal legal language in the documentation, we are concerned that none of the materials produced so far are in language that is accessible to either the public or our practitioners. The language in the Bill and the Code of Practice varies between "must do" and "could do"; therefore it would be helpful to have clarity in terms of any differentiation in legislation. On that basis we would welcome the provision of examples/case studies to support practitioners in differentiating between "must do" and "could do".

Given the fundamental importance of practitioner judgement in complying with existing information sharing requirements (DPA, Duty of Confidentiality and Article 8), guidance and training must equip staff with the confidence and competence to make informed decisions around information sharing in order to promote, support and safeguard wellbeing.

However, there remains some confusion regarding the differentiation between "promote, support and safeguard" specifically for practitioners and for the processes required regarding the previously articulated advice from the Information Commissioner's Office that consent should not be asked for if information will be shared anyway.

While we welcome the simplicity of "duty to consider" and "power to share", we are left with concerns about the competing priorities of the three point test with regard to: Data Protection Act; Duty of Confidentiality; and Section 8 European Human Rights Convention. We would welcome clarity in the Code of Practice around this issue.

The Supreme Court ruling was very clear that the "3 point test" was not a competing hierarchy and that practitioners need to be fully compliant with the expectations across all three areas of legislation/ requirements.

The challenge for this legislation, in response to the Supreme Court hearing, is to have supporting guidance that simplifies the complex landscape practitioners are required to navigate to ensure they meet all legislative requirements. Due to the fear of breaching rights and legislation, and the potential legal consequences, we are concerned that this further legislation will result in a decrease of information being shared and an increased risk for some children, particularly those who may have vulnerabilities.

Whilst we welcome the Bill and the draft Code of Practice we would still like to see meaningful and transparent guidance that is accessible for all audiences, specifically parents and families. We believe the suite of documents are currently too impenetrable and will not provide the reassurance that practitioners and families now require following the Supreme Court ruling.

Promote, Support and Safeguard

The Bill and supplementary documentation repeatedly refers to the need to “promote, support and safeguard wellbeing” as the driver for action, but there is limited detail as to how the practitioner differentiates the duty to consider sharing against these three tiers of intervention. For example - the judgement process needed to decide that it is appropriate to share information to safeguard a child is different and much less complicated (and legally challenging) than deciding to share information to promote a child’s wellbeing. The differentiation of wellbeing and concern needs will need further clarification to support practitioners when applying ‘promote, support and safeguard’

We still await the practitioner guidance described by the Supreme Court ruling setting out how the “*information holder carries out a scrupulous and informed assessment of proportionality*”.

Draft Code of Practice

The Code of Practice provides a detailed reference of the relevant documentation and legislative backgrounds, but feels light in providing practitioners with a clear and accessible guide to complying with the law. We would welcome a document that was more self-contained, not referring to other codes of practice, and that is clearer in terms of the decision-making process that practitioners need to follow to ensure any information sharing decisions are compliant. With regard to the draft Code of Practice we need to be able to communicate to practitioners through clear and consistent guidance both locally and across Scotland.

Issues of Consent

Despite previous reassurances of consent not being the primary driver it is clear from the Bill, and associated documentation, that consent is now very much at the heart of the legislative changes. Given recent examples from child protection practice, where disguised compliance has been highlighted, it is essential that the issues of consent do not override the primacy of ensuring that children are safeguarded. Given the focus on early intervention, mobilising supports and responding before issues escalate to safeguarding, there are some concerns that when consent is withheld access to support will be harder to proceed through Named Persons.

Again the Supreme Court ruling was very clear about what it expected to see -

101. In order to reduce the risk of disproportionate interferences, there is a need for guidance to the information holder on the assessment of proportionality when considering whether information should be provided. In

particular, there is a need for guidance on (a) the circumstances in which consent should be obtained, (b) those in which such consent can be dispensed with and (c) whether, if consent is not to be obtained, the affected parties should be informed of the disclosure either before or after it has occurred.

Record keeping

The “Duty to Consider” will clearly require a means by which decisions are recorded as to the decision whether to share or not. Are we therefore looking at some form of standardised text – e.g. “In line with current legislation I have considered whether this information should be shared and have concluded...”

It is very positive to note in the Financial Memorandum that a significant amount of support will be offered to practitioners undertaking Named Person functions. We are unsure whether the costings fully reflect the challenges of supporting staff to undertake this training and would be specifically concerned about the percentage of time allocated and also the availability of staff for backfill. We would also want to know when the training will be developed and what opportunities we will have to ensure that NHS Education for Scotland will be able to deliver training that is both accessible and relevant for education staff. The training and its content will be essential in ensuring practitioners are confident to apply the legislative framework set out in the Bill, and to renew confidence to work within the frameworks. Given the significant implications for other services, i.e. not Named Person services, to share information, the Financial Memorandum does not provide any support to other staff groups i.e. Early Learning and Childcare practitioners and Third Sector providers.

Duty of confidentiality

This duty is not applicable across all the practitioner/ professional groups and further guidance will be required to unpick its relevance for certain staff groups. i.e. those groups practitioners whose professional guidance/codes do not operate under a requirement for confidentiality.

What we are specifically looking for is a straightforward one page process, that helps practitioners manage the volume of information that can come to Named Person’s and vice versa. We would also welcome some detail on the duty of confidentiality where a Named Person holds third party information – how do they then decide how this is used to “promote, support and safeguard”.

With regard to the Named Person being an entitlement, but something that families do not have to take up, we would seek clarity as to what this means in terms of information being shared with and by the Named Person and whether there is clarity about how to differentiate existing roles from named person functions. In other words – can we clearly articulate, in a consistent Scotland wide way, what the additionality of having a NP confers and/or equally what would a family lose out on if they decided not to accept the entitlement?

In summary we would like to offer the following response:

- Need for greater clarity in language
- Simplification of guidance would be helpful for practitioners
- Potential for confusion around some of the terms
- Still lack of clarity around the role of consent
- Use of examples/ case studies would be helpful.

And

Finally, we were concerned that the draft illustrative Code of Practice was launched on the government website and the potential for confusion for practitioners, who may have not understood the illustrative nature of the document.