

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

Response to consultation

I am grateful for this opportunity to comment on the CYP (Information Sharing) (Scotland) Bill 2017. I am a social worker, registered with the SSSC. I hold an M.Sc in professional studies and a Diploma in Child Protection (University of London). I wrote and spoke extensively against the implementation of the information recording and sharing powers in the Children and Young People (Scotland) Act of 2014. Despite being dismissed by the architects of the scheme, these concerns were vindicated in the ruling of the Supreme Court which found that implementation of the 'Named Person' provisions of the 2014 Act was incompatible with ECHR and DPA rights of children and families.

The CYP (information sharing) (Scotland) Bill is a response to this Supreme Court ruling. However, I believe that this Bill does not address the problems created by the 2014 Act and its associated national and local guidance and make the following comments:

The Bill seeks to address the breach of ECHR rights to private and family life in the 2014 Act's provisions for a Named Person role (now struck down) which encouraged the gathering, recording and sharing of private information without the consent and sometimes without the knowledge of children or their parents.

Failure to define 'Wellbeing'

The purpose of this was explained as fulfilling the government's intention to promote or safeguard the 'wellbeing' of all children. 'Wellbeing' is undefined in the original Act and also in this Bill. The range of factors cited in guidance as associated with the concept wellbeing are very wide and could include every child in the population as having 'wellbeing' needs or deficits.

The problem with the scheme is much greater than a merely technical one

The Government has attempted to explain that the problems identified by the Supreme Court were merely technical and that the Supreme Court had ruled in favour of the 'Named Person' role. This is quite contrary to the actual judgement which ruled that the scheme was incompatible with ECHR rights and had to be struck down. The Supreme Court did observe that the promotion of wellbeing is a legitimate aim of government but this is not the same as giving their blessing to the legislation. The Supreme Court found that the means by which the Government intended to pursue a legitimate aim were illegitimate. However legitimate an aspiration is, any legislation to achieve the aspirations must itself be lawful.

Lack of reference to need for consent to record private information

Subjects have a right to know about and have access to information that is recorded about them. The new Bill does not address the issue of gathering and recording of information, and of subjects right to know of , nor does the Code of Practice.

Threshold of 'wellbeing' for duty to consider the need to share

This threshold set in the Bill for Named Persons' to have a duty to consider the need to share information about a child is well below that of significant harm and therefore below the legal threshold for non-consensual recording and sharing of information. The Bill does not make this threshold clear nor does it include it in the proposed Code of Practice. Instead the Bill seeks to answer the Supreme Court objections by passing the responsibility of staying within the law down to 'Named Persons' and others. This passing of responsibility down the line to those appointed as 'Named Persons' seems to be an attempt by Government to absolve itself of any breaches of the law that may occur. However this sidestep does not help parents and children, or those appointed as 'Named Persons', or indeed police or other professionals. It is therefore an inadequate response to the Supreme Court ruling. The Code of Practice which will not in any case have the authority of legislation does not assist in this regard.

Failure to require services to respond to parents' and children's request for coordinated response to their needs

The government claimed that the 'Named Person' is intended as a point of contact **for** parents and children if they want to seek help, and was voluntary, but this is nowhere stated in the 2014 Act and nor is this omission rectified in the new Bill. There is **no mention** in the Act or in the new Bill of parents and children having any.

The 2014 Act statement that 'the functions of the 'Named Person' are ((a) doing such of the following **where the named person considers it to be appropriate** in order to **promote, support or safeguard the wellbeing** of the child or young person—

- (i)advising, informing or supporting the child or young person, or a parent of the child or young person,
- (ii)helping the child or young person, or a parent of the child or young person, to access a service or support, or
- (iii)discussing, or raising, a matter about the child or young person with a service provider or relevant authority...'

The functions of the named person have been stated by government to be to provide a single point of contact **for** parents and children to use when they need it. The Act instead described the functions as being a point of contact **about** parents and children with the very broad aim of acting as the named person considers appropriate. There is not even a mention of a right of parents and children to be consulted and have their views taken into account in any decision. As the Act has been publicly justified by government and its

supporters as providing a source of help and support for parents and children when they need it, the lack of any mention of parents or children/young people's rights to request and receive support and help is a major omission which the Bill could and should rectify if the government sincere in its stated intentions.

Failure to address the lowering of thresholds for unasked for intervention

The Bill as presented does not address the ruling that confirmed that the powers of the Named Person represented an arbitrary and unlawful interference by the State in private and family life. Whilst the gathering and recording of information is a statutory duty relating to issues of **significant harm**, the Bill continues to promote the gathering, recording and sharing private and sensitive information about children and members of their immediate and wider families on the basis of **well-being**, a term that is undefined in the 2014 Act and in this Bill. Despite the lack of definition it is clear that the protection and the promotion of 'wellbeing' sets a much lower threshold than that of **significant harm**. Any definition of well-being and who or what might or should be held responsible for the lack of well-being is likely to be disputed by parents and by others, including academics. Well-being is by its nature a subjective term, subject to many different interpretations. Well-being is therefore very open to disagreement between named persons and parents, and indeed between different named persons and between health and social work professionals, and of course between different parents. This will open up wide disparity within and across council areas, and cause confusion about standards, and about accountability when things go wrong.

Confusion about responsibility to act and decide in a child's best interests

The 2014 Act and the new Bill attempt to marry the undefined and broad notion of what constitutes a child's 'wellbeing' to that of a child's 'best interests', and then to child protection requirements. It proposes or assumes that a 'Named Person's understanding and judgement is necessarily superior to that of a child's parents, or of the child her/himself, and sets out an expectation that the state should and can judge how best families should raise their children. Professor Eileen Munro, writing about the Every Child Matters agenda in England and disagreements between parents and professionals, observes that:

In policy debates, there seems to be an assumption that there is some objective measure of what is in a child's best interests and some objective standards of good parenting applicable in all social circumstances. The possibility of rational disagreement between a parent and a professional on what is in the child's best interests at a particular point in their lives is not addressed. (2007, 'Confidentiality in a preventive child welfare system', *Ethics and Social Welfare*, 1 (1), pp. 41-55.

The Bill's failure to offer a definition of 'well-being' and to justify its use as a benchmark for recording and sharing information sets up inevitable conflict between parents and the authorities over matters which are the private business of families about which, as Eileen Munro points out, there can be no assumption about agreed standards of right or wrong.

How long a child may watch tv, their bedtimes, diet, clothing, etc are matters for the judgement of parents. There is no justification for the authorities to expand their powers from statutory duties to protect children to powers to police family life and dictate standards of child rearing, substituting their own necessarily subjective views how children should be raised to best promote their long term welfare. This leaves parents' judgements open to second guessing by others who have different values and standards, and undermines the necessary confidence of children in their parents, and the necessary authority of parents to make decisions about their own children and their family life.

The Supreme Court judgement expressed concern that, during intervention by named persons, parents' failure to co-operate:

will be taken to be evidence of a risk of harm. An assertion of such compulsion, whether express or implied, and an assessment of non-cooperation as evidence of such a risk (The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51)

This was in direct reference to 'very wide scope' of well-being and its associated SHANARRI factors, and the apparent encouragement to use these as standards for enforcing compliance on parents and children. Enforcement on the basis of lower threshold and vague concerns remains a risk while the Bill fails to define wellbeing.

Is the 'Named Person' a child protection measure?

The claim that the 'Named Person' is a child protection measure has been unhelpful. If it is, then the threshold of significant harm must be used. If it is not, then the use of risk assessments and giving services the right to interfere in family life are undermining of parents and families. Blurring of the difference promoting 'well-being' and protecting children from unlawful abuse and harm has led to a regrettable tendency in many if not most areas of Scotland to adopt the lower thresholds of 'well-being' as grounds for compelling parents and children to accept intervention, loss of privacy and loss of authority to make decisions for their own children as *they* consider it to be appropriate in the words of the Act. This has undoubtedly led to difficulties in prioritising and identifying children at serious risk. Opponents of the 'Named Person' have been accused by Government Ministers of putting children at risk of serious harm and even of death. Instead, in the report of a significant case review into the circumstances of a child's death in Fife, the 'Named Person' scheme was held to be partly responsible for creating confusion which led to the failure to protect a child. The Government's insistence on identifying the 'Named Person' role with child protection has caused confusion and harm rather than increased 'wellbeing'.

Failure to take responsibility for the protection of private and family life.

In continuing to insist on the protection or promotion of the undefined concept of wellbeing as the trigger for action by the 'Named Person' the draft Bill repeat the errors of the 2014 Act. The draft Bill and Code of Practice appear to be asking the impossible of 'Named Persons' who are to continue to have promote and safeguard children's 'wellbeing' and insisting information sharing rather than relationship to children and families is the key to

achieving this the Bill puts 'Named Persons' into a very difficult position. The concept of significant harm as the only legal reason for sharing information without consent is not referred to in the Bill as presented. Putting responsibility on 'Named Persons' to ensure that they meet both wellbeing responsibilities and abide by ECHR and DPA provisions is an abrogation of responsibility of government.

There is no safeguard for families in the proposals. The only remedy for an egregious breach of private and family life will be to complain after the fact. Legal action is only open to those with the means to pay for it and, in any case, no post-hoc judgement in favour of the aggrieved parent or child is going to make up for the details of their private lives being made known to others. The Bill leaves the door of family privacy wide open, and does not answer the Supreme Court ruling adequately.

Children are not 'objects of concern' and nor are their families

It has long been recognised, since at least the Cleveland Report by Dame Butler Schloss that children and their families should not be treated 'objects of concern' and yet this legislation treats them as exactly that. Rather than giving parents and children a central role in decisions about their own lives, the Act and the current Bill gives named persons who may not have any more than a passing acquaintance with a child or parent the power to do 'what they consider appropriate' in relation to what they decide and define as 'wellbeing concerns'. This fault has not been rectified by the new Bill. The assumption that 'Named Persons' appointed by 'services' can and should 'as they consider appropriate' decide when and on which matters they should 'inform, advise and support' and also what that advice and information and support should consist of is one that is at odds with the Children (Scotland) Act of 1995 and with the Changing Lives report, and the stated or assumed intentions of Getting it Right for Every Child. This assumption of superior knowledge turns understanding of the importance of person-led decisions and support on its head and instead demands that children and families accept that decisions about their needs are to be made without their consent, request, or their contribution to any identified action by 'services'.

Conclusion

Important relationships of trust between parents and professionals are already damaged by the imposition of the 'Named Person' role. It is important that any legislation acknowledges and addresses rather than tries to sidestep the very clear issues pointed to by the Supreme Court. Unfortunately this Bill and the accompanying Code of Practice are not designed to achieve this and instead seem like an irresponsible attempt to 'dump' onto practitioners the legal problems that the 2014 Act created.

Maggie Mellon

CQSW, MSc, Dip Child Protection

August 2017