The Scottish Parliament
Pàrlamaid na h-Alba

EDUCATION AND SKILLS COMMITTEE

AGENDA

25th Meeting, 2017 (Session 5)

Wednesday 4 October 2017

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **Children and Young People (Information Sharing) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Gillian Fergusson, Depute Rector for Pastoral Care, on behalf of the Scottish Council of Independent Schools;

   Lisa Finnie, President, Scottish Guidance Association;

   Maria Pridden, Classroom Assistant and member of Unison;

   Lorraine McBride, Headteacher and member of EIS; and

   Christine Cavanagh, Network Chair for the Lanarkshire area, National Day Nurseries Association;

   and then from—

   Dr Ken Macdonald, Head of ICO Regions, and Maureen Falconer, Regional Manager, Information Commissioner's Office.

3. **Subordinate legislation:** The Committee will consider the following negative instruments—

   Teachers Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283); and

   The Individual learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288).

4. **Review of evidence (in private):** The Committee will consider the evidence it heard earlier.

5. **Work programme:** The Committee will consider its work programme.

Roz Thomson
Clerk to the Education and Skills Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 85222
Email: Roz.Thomson@parliament.scot

The papers for this meeting are as follows—

Agenda item 2

SPICe briefing paper	ES/S5/17/25/1
Submissions paper	ES/S5/17/25/2

Agenda item 3

Paper by the clerk	ES/S5/17/25/3

Agenda item 5

Paper by the clerk (private paper)	ES/S5/17/25/4 (P)

EDUCATION AND SKILLS COMMITTEE

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

4 October 2017

Introduction

This week the Committee will hear from the following witnesses.

Panel 1

- Gillian Ferguson, Depute Rector for Pastoral Care (at Hutchesons' Grammar School, an independent school in Glasgow) and member of the Scottish Council of Independent Schools (see also the Scottish Council of Independent Schools' written evidence.)
- Lisa Finnie, President of the Scottish Guidance Association (see Scottish Guidance Association's written evidence.)
- Maria Pridden, a classroom assistant and member of Unison (speaking from personal experience and on behalf of Unison – not their education authority. NB Unison has not submitted written evidence.)
- Lorraine McBride, primary school head teacher and member of EIS (speaking from personal experience and on behalf of EIS – not her education authority. See also EIS' written evidence.)
- Christine Cavanagh, Network Chair for the Lanarkshire area, National Day Nurseries Association. NB National Day Nurseries Association has not submitted written evidence.)

Panel 2

- Dr Ken MacDonald, Head of ICO Regions, Information Commissioner's Office. The ICO has submitted evidence.

This paper suggests possible themes for discussion. Further background on the bill is available in SPICe briefing 17/59. Submissions received on the bill are available on the Committee web pages.

The Finance and Constitution Committee have received written submissions on the bill. The Delegated Powers and Law Reform Committee heard from the Cabinet Secretary on 19 September. On 20 September the Committee heard from legal professionals and health professionals. Last week the Committee heard from local authority employees in

education and social work and an academic who teaches social workers. This week the focus is on schools and the information commissioner.

The annex to the paper provides further information on the issue of vicarious liability, which has arisen as a concern in the evidence sessions so far.

THEME 1: CURRENT PRACTICE

GIRFEC has been implemented on a policy basis for a number of years. However, as the Committee heard last week, different local authorities have taken differing approaches to implementing the Named Person Service. Jackie Niccolls (Glasgow social work department) told the Committee that, in Glasgow, Named Person hasn't been implemented in any meaningful way. Similarly, Andrew Keir (GIRFEC manager, North Ayrshire) told the Committee that they use the term Named Person, but haven't implemented the functions contained in the 2014 Act. Jenni Brown, (principal teacher of pupil support, Dumfries and Galloway) said that her local authority was quite far advanced in implementing GIRFEC and have been using the idea behind the named person. They have been sharing information to some extent.

Where Named Person is more advanced on a policy basis, its introduction on a statutory basis may have fewer implications in terms of changes of practice.

In answer to a PQ, (S5W-04871, answered 1 December 2016) Mark McDonald said:

> "The Getting it right for every child (GIRFEC) approach has been national policy since 2010 and as part of their existing work, public authorities in many parts of Scotland already operate a named person approach on a non-statutory basis."

The written submission from the SCIS states that:

> "independent schools are committed to the GIRFEC approach and SCIS has recently issued interim practice guidance to schools."

The Committee may wish to discuss:

- **the degree to which staff are already sharing wellbeing information that falls below the 'child protection' threshold – in both local authority schools and independent schools**
- **their current approach to whether or not to seek consent when sharing information that falls short of 'child protection'**

THEME 2: CLARITY ABOUT WHEN TO SHARE

The central concern of the Supreme Court was that the law lacked essential clarity. The Scottish Government's policy aim is:

> "to bring consistency, clarity and coherence to the practice of sharing information about children and young people's wellbeing across Scotland" (Policy Memorandum, para 23).

However, the legal framework for sharing information is governed by reserved legislation and the ECHR. This framework cannot be changed by the Scottish Parliament. To a large degree therefore, the complexity of data protection law is not something that the Scottish Parliament can address.

In the written submissions and in oral evidence the Committee has heard concerns about the definition of wellbeing. For example, this was raised last week by Andrew Keir (GIRFEC manager, North Ayrshire) who said practitioners might have different ways of interpreting the SHANARRI indicators. He also said that when considering whether to share practitioners do not just look at wellbeing in terms of SHANARRI.

Similarly, in their written submission the SCIS say that wellbeing would benefit from being further defined because:

> "The definition of wellbeing is so broad that different practitioners will interpret this in various ways."

The Committee has heard concerns that, despite the policy intent of encouraging information sharing on wellbeing issues, with a view to assisting families before a crisis situation emerges, the legislation and debates around it may be encouraging defensive practice. This is reflected in the written submissions this week, with the SCIS saying:

> "There is a danger that the draft Code of Practice, rather than facilitating the sharing of information, may have an adverse effect and discourage or intimidate those with the authority to share and dissuade them from doing so."

The Committee may wish to discuss:

- **whether the bill will enable clarity and consistency of practice to be achieved**
- **whether this legislation will improve preventative practice or whether it encourages defensive practice**
- **whether 'wellbeing' needs further statutory definition**
- **what support front line professionals need to assist them in taking a proportionate approach to making and evidencing "consideration" decisions**
- **whether staff and managers of independent schools have access to support and advice that would help them make information sharing decisions**

THEME 3: RESOURCES

The Financial Memorandum estimates costs on local authorities of £219,431. This is for training in relation to the specific changes in the bill, and not for the wider implementation of Named Person. The financial memorandum notes that:

> "Local authorities were provided with £400k in 2015/16 and £9.8m in 2016/17 to support preparation for the commencement of the services covered in parts 4 and 5 of the 2014 Act. Local authorities had confirmed that they were prepared to be compliant with these parts of the 2014 Act on planned commencement in August 2016" (FM para 10).

The training costs on local authorities stemming from this bill will be:

> "a one-off process and subsequent competence development and training will then form part of standard Continued Professional Development, and be absorbed as part of the on-going training requirements on these organisation. Discussions with stakeholders suggest that training related to GIRFEC including named person service, child's plan and information sharing has been mainstreamed already in many parts of educational training." (FM para 14).

The financial memorandum allows for one day's training and backfilling for head teachers, deputy head teachers and principal teachers.

The EIS submission states that there are:

> "growing concerns among EIS members in schools about the viability of Named Person and that of the GIRFEC agenda more widely in practice" and say that: "it is the firm view of the EIS that schools will need additional administrative staff."

For independent schools, the FM estimates costs of £25,200. This is to provide one day's training for two members of staff in each of the 105 independent/grant aided schools. The training will be aimed at those involved with a Child's Plan, those delivering the Named Person role and those who have significant contact with the Named Person. The FM notes that training is currently provided by the SCIS (FM para 25).

The Committee may wish to discuss:

- **the specific resource and workload implications of a creation in this bill of a duty to consider sharing information, for those who will be Named Person and those who will share information with Named Persons**
- **how these differ from the resource implications of the Named Person service generally**
- **what might the administrative impacts be of a 'duty to consider' information sharing (for example requirements to record decisions)**
- **whether they have any comment on the Financial Memorandum statement that:**

  > **"Discussions with stakeholders suggest that training related to GIRFEC including named person service, child's plan and information sharing has been mainstreamed already in many parts of educational training." (FM para 14).**

PANEL 2: INFORMATION COMMISSIONER'S OFFICE

THEME 1: CURRENT PRACTICE

The bill would require various professionals to consider whether they can share information. As the Committee heard last week, many professionals currently share wellbeing information in the course of their work. However there is a strong theme in the evidence received of a lack of clarity about what can be shared below the level of child protection.

Last week the Committee heard about approaches to current information sharing. Jackie Niccolls (Glasgow social work department) thought that a duty to consider would not be very much of a change from current practice, as social workers were always deciding what they could share and this included information sharing below the level of child protection. However others are less clear. On 20 September, Valerie White (a consultant in dental health at NHS Dumfries and Galloway) said:

> "we are clear that we must share child protection concerns, but we are struggling with what to do about a wellbeing concern at the moment"

The Scottish Government website states that:

> "Current data protection principles and privacy laws already permit information sharing when it is necessary to prevent or address a risk to wellbeing."

Following the Supreme Court judgement the ICO issued a letter to health boards, local authorities and Police Scotland which stated that:

> "[consent] should only be sought in circumstances where an individual has real choice over the matter"

but then concluded:

> "The sharing of personal data without the consent of the individual is likely to take place only in very particular and clearly justified circumstances rather than as common practice."
> (ICO letter, 15 September 2016)

The Committee may wish to discuss:

- **whether the information commissioner could clarify the *current* legal requirements that would enable sharing of 'wellbeing' information without consent**
- **the degree to which data protection requirements are currently understood, and applied in the context of sharing information that does not reach the threshold of a child protection concern**

THEME 2: GDPR AND THE DATA PROTECTION BILL

The UK Data Protection Bill [HL] 2017-19 was introduced in the House of Lords on 13 September, and will have its second reading on 10 October.

The Department for Digital, Culture, Media and Sport has published a factsheet on the Data Protection Bill.

While much of the discussion around data protection in the Committee has been in relation to the approach to consent (covered in theme 3 below) it may be helpful to discuss more broadly the degree of change represented by the GDPR and the Data Protection Bill.

Janys Scott (Faculty of Advocates) on 20 September, spoke about data protection legislation as "a rapidly moving area" and "a moving target." Kenny Meechan (Law Society) was of the view that the UK changes merited delay, saying:

> "the parliament is being asked to pass legislation that is compatible primarily with data protection law. I think that you have given yourselves a near impossible task, given that data protection law is in flight at the moment. It might be more sensible to defer detailed discussion of this until such time as the UK Data Protection Bill has been passed at Westminster."

The Committee wrote to the Cabinet Secretary on 21 September requesting a revised illustrative draft code of practice. In his reply, the Cabinet Secretary referred to the UK data protection changes noting that:

> "I am confident that the Bill enables full and proper account to be taken of changes to data protection law which are anticipated as consequences of the General Data Protection Regulation which will become effective on 25 May 2018. It can be adjusted to refer also to the UK Data Protection Bill introduced on 13 September in due course."

However, on the production of a further illustrative draft code he said:

> "That (UK) Bill is still at a very early stage […] so it would be premature at this stage to adjust the draft illustrative Code of Practice in light of it."

The Committee may wish to discuss:

- **the degree to which the UK Data Protection Bill will change the data protection landscape and how this might impact on sharing information in the context of the Named Person Service**
- **whether the ICO would wish to comment on the view of the Law Society that UK level changes may merit delaying the Scottish legislation**

THEME 3: DATA PROTECTION CHANGES AND CONSENT

In its judgment, the Supreme Court identified the central problems with the 2014 Act as the lack of any requirement to:

- seek consent to disclose information
- inform a parent, child or young person that information may be disclosed
- inform them that a disclosure has taken place.

The court was clear that it was not its place to say how the law ought to be amended, but it did suggest, at paragraph 107, that the 2014 Act needs to have:

- clarity about how it relates to the Data Protection Act 1998
- subordinate legislation or binding guidance on
    - when people should be told that information is being shared
    - when consent should be sought.

In the submissions and evidence heard to date there has been a focus on the use of consent as a gateway to information sharing, and the changes that the GDPR makes in this area. The written submission from the ICO states that:

> "The GDPR now explicitly explains that a public authority will not be able to rely on consent as a legal basis for processing in any case where there is a clear imbalance between it and the individual to whom the data relate."

It goes on:

> "if the sharing […] is to be based solely on a consensual model, the matter of imbalance alluded to in the Supreme Court's judgement must be addressed. […] If the sharing is to be based on any of the other conditions for processing it must first be necessary for the public authority's public tasks."

The Faculty of Advocates suggested that the bill be amended to require consideration of whether to seek consent and whether to inform a child, young person or parent that information is being shared. In the DPLR Committee the Cabinet Secretary was asked why consent was not referred to on the face of the bill. He explained that the bill did not seek to change the law on consent and so it was appropriate that such issues were covered in the Code of Practice.

Consent is only one route to information sharing. The Supreme Court said, (at para 50 of their judgement) that under the DPA:

> "information can also be disclosed if its disclosure is necessary for the exercise of a statutory function but not merely because the data controller considers that the information is likely to be relevant to the exercise of that function."

In this the court was referring to the provision in the 2014 Act that required information sharing if it was "likely to be relevant." In the bill, the statutory duty is to consider whether sharing would promote, support or safeguard wellbeing, and if so, whether sharing is permissible within data protection and other law. This may raise an issue of the degree to

which sharing could be considered 'necessary' to the statutory functions of the named person service under the revised legislation.

On 20 September, Kenny Meechan (Law Society) commented that:

> "people have been sharing information because it is reasonably necessary to do that to carry out their functions as part of an education or health authority. That is an established legal test."

The Committee may wish to discuss

- **how GDPR alters the likelihood of being able to rely on consent for information sharing**
- **the extent to which "necessity" is a practical alternative to seeking consent when sharing information about wellbeing**
- **their comment on the suggestion from the Faculty of Advocates that the bill should include a requirement to consider whether to seek consent**

THEME 4: CODES OF PRACTICE

Under s.52A of the Data Protection Act 1998, the information commissioner must lay before the UK parliament a code of practice on data sharing. This must contain:

> "practical guidance in relation to the sharing of personal data in accordance with the requirements of this Act"

Section 52B of the 1998 Act provides for the Code to be approved by the UK Parliament.

The current Code of Practice on data sharing runs to 59 pages and includes:

- factors to consider and conditions for processing (including consent and other conditions) (ch.5)
- a checklist of what to consider when deciding to share (p.47)
- practice examples (although none analogous to the Named Person Service (annex 3)

The Children and Young People (Information Sharing) Bill requires a Code of Practice to be published: "about the provision of information (including the consideration of the provision of information)" and it must in particular, "provide for safeguards application to the provision of information." (s.1(4) of the bill inserting new s.26B into the 2014 Act).

A strong theme in the written submissions and oral evidence has been the need for simple, clear guidance for professionals. However on 20 September Janys Scott (Law Society) told the Committee that the Code of Practice would be: "extremely difficult to draft."

The Committee may wish to discuss:

- **What consideration was given to plain language, use of practical examples, flowcharts etc when developing the Code of Practice on data sharing under the Data Protection Act 1998 Act**
- **How the Code of Practice on data sharing under the Data Protection Act 1998 Act (and its replacement legislation) would differ from the Code of Practice proposed in the Children and Young People (Information Sharing)(Scotland) Bill.**
- **Whether the reserved Code of Practice could be improved in its coverage of data sharing for the purposes of promoting and supporting child wellbeing**
- **How easy will it be to draft a Code of Practice that is simple, user friendly for non-specialists and also provides adequate explanation of the legal framework**

Camilla Kidner
SPICe
28 September 2017

Annexe: Vicarious Liability

The Committee has heard concerns from individual teachers and social workers that they may be liable for their actions as a Named Person, including the way in which they evidence and record their decision making on whether to share information. As background, the following provides a very brief overview of the current law about when employees or employers are liable.

The law
The usual legal position is that an employer can be held liable for the actions of an employee acting in the course of their employment. This situation, among others, is described as vicarious liability. Vicarious liability is an important principle in the law of negligence - where someone can be held liable for loss or harm caused to another through some negligent act or omission.

For vicarious liability to apply, it is important to establish that someone is an employee rather than an independent contractor. It is also important that the negligent event happened when they were acting in the course of their employment. This covers anything that it would be within an employee's job to do, even it they do it in a very careless way.

Section 19(8) of the Children and Young People (Scotland) Act 2014 would appear to change the standard position by making clear that the service provider rather than the named person is responsible for exercising named person functions. However, it will be up to the courts to decide what the overall legal effect of this is

Vicarious liability is shared liability
It is important to stress that, under the principle of vicarious liability, both an employer and employee are liable for a negligent event. It remains possible to take the employee to court rather than the employer. However, usually, an employer will have more resources than an employee and will therefore be more likely to be able to pay any future compensation award.

Again, s.19(8) would appear to alter this, so that the service provider is liable instead of (rather than as well as) the individual.

Disciplinary action
An employer is able to take disciplinary action against an employee in accordance with their disciplinary scheme. This will usually cover failures in carrying out job tasks. It is likely that someone could face disciplinary action if they failed to perform their named person duties in line with their employer's requirements. Personal consequences (such as a warning) can flow from disciplinary action, but there would be no wider liability to service users.

Abigail Bremner
Senior Researcher
Civil Justice
SPICe
25 September 2017

EDUCATION AND SKILLS COMMITTEE

25th Meeting, 2017 (Session 5), Wednesday 4 October 2017

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

Submissions pack

Introduction

1. This paper brings together the submissions from the witnesses for this week's meeting.

Witnesses' submissions

2. The Committee meeting has one panel this week. The links to written evidence from this week's witnesses are provided below.

- Scottish Council of Independent Schools
- EIS
- Scottish Guidance Association
- Information Commissioner's Office

3. The National Day Nurseries Association, who are also on the panel this week, submitted written evidence to the Finance and Constitution Committee. The link to this evidence is provided below.

- National Day Nurseries Association

EDUCATION AND SKILLS COMMITTEE

25th Meeting, 2017 (Session 5), Wednesday, 4 October 2017

Subordinate Legislation

Introduction

1. This paper is to inform the Committee's consideration of two Scottish Statutory Instruments (SSIs) subject to the negative procedure—

   - The Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017
   - The Individual Learning Account (Scotland) Amendment Regulations 2017

2. This Order is subject to the negative procedure. Under the negative procedure, unless the Committee (and later the Parliament) agrees a "motion to annul", the order will come into force. More information on the negative procedure can be found here: http://www.parliament.scot/S5_Delegated_Powers/Flowchart_on_Negative_SSIs.pdf

3. Should it wish to, the deadline for this Committee to report on these instruments is 30 October 2017.

The Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283)

Purpose of the instrument

4. This instrument seeks to update and amend The Teachers' Superannuation (Additional Voluntary Contributions) (Scotland) Regulations 1995.

5. The policy note accompanying the instrument states:

> "The instrument enables members of the reformed Scottish Teachers' Pension Scheme, introduced as a result of the Public Service Pensions Act 2013 and The Teachers' Pension Scheme (Scotland) (No.2) Regulations 2014, to participate in the Scottish Teacher' Additional Voluntary Contributions (STAVC) arrangements. The amendments also provide these members with a range of choices over how they access their STAVC savings provided for in the Taxation of Pensions Act 2014. The changes will ensure that the regulations are clear and will enable all Scottish Teachers' Pension Scheme member types to have access to the full range of choices now available to those in defined contribution pension schemes."

Delegated Powers and Law Reform Committee

6. The Delegated Powers and Law Reform Committee reported on this instrument on 27 September 2017 and noted a minor drafting error.

Action

7. The Committee is invited to consider whether it wishes to raise any points on this instrument.

The Individual Learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288)

Background

8. The purpose of this instrument is to amend the Individual Learning Account (Scotland) Regulations 2011. The Individual Learning Account (ILA) Scotland was a Skills Development Scotland administered grant of up to £200 towards an approved course for individuals who meet residency criteria, are over 16, are not degree educated, who have an earned income of £22,000 a year or less, and who are not in secondary or tertiary education or participating in a number of other SDS programmes.[1]

9. The ILA Scotland was subject to a review undertaken by SDS and the Scottish Government in spring 2016. The review did not result in a report being published. The Scottish Government announced the outcome of the review through an inspired parliamentary question (S5W-08488) in March 2017.

10. The Policy Note accompanying the instrument states:

> "The review formed part of the Scottish Government's aim to enhance the employment prospects of those in work or looking for work; to equip people with the right skills to participate and be successful within our labour market; and to support employers by providing workers with opportunities to improve their work-related skills and qualifications. The Review revealed that the number of people applying for Individual Learning Accounts has declined significantly in recent years, suggesting that the time is right to refocus the offer to suit the current jobs market."

Purpose

11. The policy note also states that the instrument will:

> "[Provide] that grants are directed to training which is for the purpose of equipping a person for employment. Accordingly, to be eligible for an award a person must be in employment or actively seeking employment. In line with a focus on training for employment, the name of the grant will change to "Individual Training Account" and, recognising the changing labour market conditions for graduates, persons holding first degrees or postgraduate qualifications will no longer be excluded from the scheme."

[1] https://www.lifeskillscentres.com/publichtml/index.php/employability/ila-funding

Equality Impact Assessment

12. An Equality Impact Assessment was produced by the Scottish Government to accompany this instrument. The EQIA identified that the key change the instrument would make is that "individuals who are looking to undertake training purely for 'leisure' interest will no longer be funded through the scheme" and highlighted this particularly in respect to individuals over 65.

13. The EQIA concluded that "the policy will not directly or indirectly discriminate on the basis of age, disability, gender, gender re-assignment, sexual orientation or race and belief."

Delegated Powers and Law Reform Committee

14. The Delegated Powers and Law Reform Committee reported on this instrument on 27 September 2017 and noted a minor drafting error.

Action

15. The Committee is invited to consider whether it wishes to raise any points on this instrument.

Clerk to the Committee
29 September 2017