

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

Govan Law Centre

Children's Rights

1. Govan Law Centre supports the extension of children's rights within the Bill to include the right to engage fully with the system which potentially affects their lives. This should include the right to exercise any dispute resolution mechanisms afforded by the Act. These rights should supplement, and not supplant, parental rights in this context.
2. Currently, children with legal capacity have the right to appeal against an exclusion in the Sheriff Court, and to bring a (legally complex) disability discrimination claim to the Additional Support Needs Tribunal but are banned from bringing a case to the same Tribunal about the additional support they require at school.
3. Govan Law Centre believes that the right of appeal belongs to the child, and has historically been held by parents as proxy for their children. We believe that, as the individual who is the subject of the actions to be taken under the legislation, the child should be able to enforce their rights by challenging decisions with which they disagree directly.
4. The Scottish Government's commitment to the United Nations Convention on the Rights of the Child is laudible. However, we note the Scottish Government has not yet taken any steps to comply with the recommendation of the UN Committee on the Rights of the Child to "[e]nsure that children who are able to express their views have the right to appeal ... to special educational need tribunals."¹
5. Scottish Ministers have previously indicated² that they looked favourably on proposals to grant children rights of appeal under the Education (Additional Support for Learning) (Scotland) Act 2004 and this Bill would seem to be an ideal legislative vehicle for that amendment, and to extend the principle to include remedies available in relation to the child's plan.

Remedies

6. Govan Law Centre agrees with the position put forward by the Advisory Group on Additional Support for Learning in recommending a single plan in which each agency is responsible for its contributions. Critically, we agree that this must be supported by accessible, direct and proportionate means of redress. All relevant agencies should be equally accountable under processes of dispute resolution.
7. An effective, independent dispute resolution mechanism must be available in the event of disagreement over the contents or delivery of the child's plan. This could

¹ (CRC/C/GBR/CO/4 20 October 2008)

² Letter from Angela Constance MSP dated 3 August 2011 (Ref: 2011/1008973)

include an extension of the availability of mediation, independent adjudication and the Additional Support Needs Tribunal (for specified categories of dispute).

Privacy

8. The Bill, as drafted, proposes a significant erosion of the right to privacy for children and families with few (if any) safeguards built in. This represents a fundamental redefinition of the way in which information about children is to be treated by agencies and runs the risk of falling outwith the legislative competence of the Scottish Parliament.
9. Govan Law Centre is deeply concerned about the provisions within the Bill concerning the exercise of judgement on whether confidential information about a child ought to be shared and whether that decision is capable of being judicially reviewed. We are concerned with the provision in section 26(6) permitting disclosure when it is expedient as this section is not qualified in any way. Section 27(1) affords a complete exemption from any legal restriction on disclosure, but sub-sections (2) and (3) are special provisions (inconsistent with the broad exemption in paragraph 1) specifying when information may be disclosed in breach of a duty of confidence.
10. There are real concerns about whether these provisions are potentially so wide as to give rise to breaches of Article 8 of the ECHR, which would take the provisions outwith the Scottish Parliament's legislative competence and could, in some instances, render the UK in breach of the Convention. (See para. 17, below).
11. Further, insofar as Section 27 could be seen as an attempt to exercise the rights conferred by Article 5 of the Data Protection Directive³ in that it "determines more precisely the conditions under which the processing of personal data is lawful", or in some other way could be said to be an implied amendment of the Data Protection Act, then the clause is outwith the legislative competence of the Scottish Parliament as data protection is a reserved matter.
12. The Privacy Impact Assessment which accompanied the Bill does not demonstrate an appreciation of the purpose and requirements of data protection legislation (nor, indeed, other aspects of human rights legislation. The legislation is proposing a very significant change from the present situation where data may be shared if there is significant concern for the safety of a child to one where data must be shared if there is any concern regarding the child's wellbeing. This concept is defined in very broad terms which will inevitably leave the matter to subjective interpretation. In any event, should a mild concern regarding any aspect of 'wellbeing' justify acting in breach of an obligation of confidence?
13. The Privacy Impact Assessment does not elaborate on the public interest tests for disclosing confidential information, but merely asserts that the public interest will permit disclosure in the listed cases. The assessment also asserts that there

³ 95/46/EC (cf. Joined Cases C468/10 & C469/10 *ASNEF and FECEMD v Administración del Estad* ECJ 24 Nov 2011)

is a legitimate expectation that information will be shared between professionals. That assertion is unsupported by argument or evidence and should be challenged: do children and parents in Scotland have an expectation that confidential medical information will be shared with the school, the social work dept. and others as a matter of course? Govan Law Centre's experience suggests that, in fact, parents expect confidential information to be kept confidential and shared only with their consent – or in circumstances where there is an imminent and serious risk to the child.

14. The Data Protection Act 1998 requires that data processing be both lawful and fair and sets out a number of criteria to determine whether processing complies with these requirements. It is entirely possible that processing might be legitimised under the Bill, but still be classed as unfair. The requirements of fair and lawful processing have to be satisfied in the context of individual acts of processing. The discretion and powers proposed in the Bill are too wide to satisfy this requirement in all cases, and thus do not provide a panacea to practitioners who share confidential data. The Privacy Impact Assessment's section on fairness refers entirely to confidentiality. It makes no reference to fairness as a duty to the data subject and the proportionality issues that arise thereby.⁴ "Fairness" is essentially about individuals not being misled when information is obtained. The issue of fair processing is of pivotal importance, but this fact is not recognised in the assessment.
15. The assessment refers to the first data protection principle. However, most of the other principles are also of direct relevance and need to be considered especially in view of the proposal that all information relating to a child's 'wellbeing' should be passed to the Named Person. What provisions are to be made regarding further disclosure (the 2nd data protection principle); the period of time for which the data is to be held (the 5th principle) or the technical and procedural security precautions that must be taken (the 8th principle)? There is no reference to the requirement that data must be processed taking account of the rights of the data subject, including provision for subject access by or on behalf of the data subject. This is likely to be of considerable significance in respect of requests being made by parents for access to data on behalf of a child, particularly in light of the exceptionally broad definition given to the term "parent" in education legislation.
16. Sections 1.3 and 1.4 of the Privacy Impact Assessment do state the areas of risk, but there seems to be a suggestion that the impact problem is primarily one of security, which is a fundamental misunderstanding of privacy and data protection.
17. Section 2 of the assessment is superficial in its references to privacy risk – it is not at all clear that there is an understanding of privacy, its nature and significance. This is compounded by the reference in section 2.8 to "the eight data sharing principles of the Data Protection Act 1998." This description amounts to a serious and fundamental misunderstanding of data protection. The

⁴ Cf. *Johnson v Medical Defence Union* [2007] EWCA Civ 262 per Buxton LJ at para 62 and *Common Services Agency v. Scottish Information Commissioner* (2008 UKHL 47)

Principles apply to all aspects of data processing and are not there primarily to facilitate data sharing.

18. The risks specified in section 3 and the risk register are overwhelmingly about security matters except for the first item which concerns diminution of trust threatening effective social work. Nowhere is there any consideration of the notion that privacy is about private 'space' to allow the development of the personality of the individual. The European Court of Human Rights has determined that "...the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."⁵ Data protection is not the same as privacy; nevertheless, the Privacy Impact Assessment is flawed and incomplete without having a proper understanding of the right to private life, nor can compliance with the fairness principle be properly addressed without understanding the nature of and the need for privacy. There are, of course, circumstances where a child's right to privacy needs to be overridden in an effort to protect them from harm but the starting position must still be that the child has a right to a private life. As presently drafted, this Bill falls far short of that position by permitting and encouraging routine data sharing on all children.
19. Govan Law Centre's comments on privacy draw heavily on advice received by us from Professor Ian Lloyd of the Faculty of Law at University of Southampton, to whom we are very grateful for his time and expertise.

Govan Law Centre
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⁵ Von Hannover v. Germany (no. 2) (Applications nos. 40660/08 and 60641/08)