

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

Response to the call for evidence

by

Alistair Sloan

Introduction

- [1] This is a formal response to the call for evidence by the Education and Skills Committee of the Scottish Parliament in respect of the *Children and Young People (Information Sharing) (Scotland) Bill* (“the Bill”). I am a practicing solicitor in Glasgow and have a particular interest in information law, including data protection and privacy.
- [2] The Bill has been brought forward by the Scottish Government in response to the decision of the United Kingdom Supreme Court in *Christian Institute and others v The Lord Advocate*. It is well known that the Supreme Court considered a number of challenges to the *Children and Young People (Scotland) Act 2014* (“the 2014 Act”) and held that the information sharing provisions within the 2014 Act were beyond the scope of the powers of the Scottish Parliament. Ministers have brought this Bill forward to bring those provisions within the legislative competence of the Scottish Parliament.

General Principles of the Bill

- [3] The Bill is to be welcomed. In my submission it addresses those issues around the information sharing provisions in the 2014 Act which were successfully challenged in the Supreme Court. The Bill will, no doubt, not go far enough for some who continue to object to the principle of a named person. However, that is not something that can be scrutinised in the context of this particular Bill and is therefore not something that I proffer any views on; in any event, it is outside of my area of knowledge.
- [4] In light of the purpose of the Bill, it is my view that the Committee and the Parliament ought to support the general principles of this Bill. It will allow the necessary changes to be made to the 2014 Act to ensure that individuals’ fundamental rights to privacy and data protection are respected and upheld.

The Decision of the UK Supreme Court

- [5] As mentioned above, the need for this legislation has arisen as a result of a successful challenge to the information sharing provisions within the 2014 Act in the Supreme Court. The Court held that those information sharing provisions were incompatible with Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”), and also EU law (insofar as it overlapped with Article 8 of the ECHR).
- [6] At Paragraph [83] of its judgment, the Supreme Court found that there were “serious difficulties in accessing the relevant legal rules when one has to read together and cross refer between Part 4 of the Act and the DPA and work out the relative priority of their provisions.” This followed a very detailed analysis of the relationship between the 2014 Act and the Data Protection Act 1998 (“the DPA”) by the Court. There is a great deal of ambiguity around which legislative regime takes precedence.
- [7] Furthermore, at Paragraph [84] of its judgment, the Court identified a matter that was of greater concern to it. Specifically, that was to do with there being a “lack of safeguards

which would enable the proportionality of an interference with Article 8 rights to be adequately examined.”

- [8] In short, it is these two issues that the Bill must address in order to rectify the information sharing provisions of the 2014 Act and to bring them within the legislative competence of the Scottish Parliament.

Interaction between the Data Protection Act 1998 and Article 8 of the ECHR

- [9] The DPA is the domestic vehicle through which the United Kingdom has implemented Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“the 1995 Directive”). The DPA is, by its very nature, an Act which requires data controllers to perform a balancing exercise and builds in safeguards to ensure that the fundamental rights and freedoms are protected. The DPA is an often-misunderstood piece of legislation; it is not about stopping the use of personal data. Instead, the Act is about giving data controllers a framework in which they can legitimately make use of individuals’ personal data while ensuring respect for that personal data by preventing data controllers from abusing and otherwise unfairly using it.
- [10] Article 8 of the ECHR is an important aspect of the right to privacy and data protection. The relevance of the ECHR is recognised within the 1995 Directive. The 1995 Directive makes reference to the ECHR in Recitals (1) and (10). Recital (10) makes specific reference to Article 8 of the ECHR. Recital (10) of the Directive provides:

“Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community”

- [11] The right to privacy and the right to protection of personal data are both closely linked to one another, but it would be erroneous to consider them to be mirrors of one another. The 1995 Directive seeks to provide a high level of protection. The scope of data protection law is greater than that of Article 8. It would not be possible to keep this submission brief, and to also go through the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. In this regard I would commend to the Committee an article published in 2013 within the International Privacy Law Journal by Juliane Kokutt and Christoph Sobotta entitled “The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR”.¹

Interaction between the Children and Young People (Scotland) Act 2014 and the Data Protection Act 1998

- [12] As noted at paragraph [6] above, the 2014 Act is drafted in a way which creates a significant degree of ambiguity. The current provisions do not enable those who have to work under the legislation, nor those individuals who are directly affected by the legislation, to know exactly what is permitted by the 2014 Act; it lacks legal certainty. This lack of legal certainty is a key

¹ International Data Privacy Law, 2013, Vol. 3, No. 4, pages 222-228 (Oxford University Press)

issue that must be addressed to ensure compliance with the ECHR. On the one hand it appears that the Act does not allow information to be disclosed where it would breach the DPA; however, when reading the DPA there exists the possibility of the 2014 Act allowing information to be disclosed where it would breach the requirements of the DPA. Certainty is needed as to which legal regime takes precedence.

- [13] The fundamental nature of data protection is set out in the recitals to the 1995 Directive where it is provided (in Recital 2) that “data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals”. In other words, data-processing systems must take due account of the rights of individuals as well as the rights and needs of public bodies and businesses to collect, store, use and disseminate personal data.
- [14] The recitals are an instructive source when interpreting the 1995 Directive, and in turn the DPA. When interpreting EU law it is necessary to adopt a purposive approach to interpretation and the recitals can assist with understanding the purpose and intent of the legislative provisions. However, the recitals do not dislodge the operative provisions of the instrument. It is clear from the second recital that data-processing systems need to respect individuals’ right to privacy as well as contributing to social progress and the well-being of individuals. The 1995 Directive allows for processing of personal data where the processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1). The requirement in Article 7(f) has been replicated in Schedule 2 to the DPA, in particular the sixth condition therein.
- [15] Undoubtedly, it is a legitimate interest of a data controller to promote the well-being of individuals; that much is clear from the recitals to the 1995 Directive and the Supreme Court’s Judgment (at para [91]). However, when processing personal data to meet that legitimate interest, it is necessary that the data controller first considers whether their legitimate interest is overridden by the data subject’s fundamental right to have their personal data protected. If it is so overridden, then their legitimate interest takes second place to the data subject’s fundamental rights.
- [16] Neither the DPA, nor the 1995 Directive which underpins it, prevent the disclosure of personal data where it is necessary to protect a child. Data controllers are already able to disclose personal data concerning children where there is, for example, a real risk that they will suffer from abuse at home. It also allows medical information to be shared in circumstances where it is not possible to obtain the child’s consent (or where the child is too young to consent, that of a parent) in an emergency. For example, a child’s GP would be able to provide information to an A&E department concerning a child’s health, where a child required emergency surgery. Furthermore, an A&E department could disclose a child’s health information to the relevant authorities where they consider that the injury the child has presented with is non-accidental in nature. These are just a few examples of the sort of processing that is legitimate in terms of the DPA.
- [17] Data controllers ought to be well used to balancing how they process information about children and young people against their fundamental rights and freedoms. Not everybody gets it right, and indeed some will be better at getting it right than others. The DPA provides remedies to individuals whose personal data is unlawfully processed (in particular, the right to compensation and the right to, in certain circumstances, prevent or stop processing) and

also provides enforcement powers to the Information Commissioner to take action against errant data controllers.

- [18] What this Bill must do is ensure that it is clear to those acting as “named persons” that they do not have an unfettered discretion to disclose a child’s personal information; that when deciding to do so, they must take into account the principles behind the DPA, Article 8 of the ECHR and the 2014 Act. One of the legitimate concerns of those who have thus far been opposed to the 2014 Act is that the fundamental rights and freedom of children and young people would be at risk. Of course, it may well have been the case that information would have continued to have been processed lawfully in terms of the DPA, but the current provisions of the 2014 Act are sufficiently vague so as to give credence to those concerns. This was clearly recognised by the Supreme Court.
- [19] Section 1(4) of the Bill will introduce a new Section 26A into the 2014 Act. This new section would make it abundantly clear that the 2014 Act does not take precedence over the provisions of the DPA by stating that information “may not be provided” where to do so would breach the DPA. This will be supplemented by clear requirements in sections 23 and 26 of the 2014 Act for consideration to be given as to whether the information could be shared in accordance with the provisions of the DPA. These provisions, in my view, clearly address issues identified by the Supreme Court around the ambiguity of the 2014 Act.

Safeguards and Proportionality

- [20] As explained at Paragraph [80] of the Supreme Court’s judgment it is necessary to have safeguards in place which enable the proportionality of the interference to the examined adequately. This was also held by the Supreme Court in the case of *R(T) v Chief Constable of Greater Manchester Police* [2015] AC 49.
- [21] It is my view that by giving the DPA supremacy over the provisions in the 2014 Act, it addresses the issue identified by the Supreme Court around the lack of safeguards. This view is reached by having regard to the interaction between the ECHR and the 1995 Directive, as well as the inherent balancing exercises built into the 1995 Directive and the DPA. As noted in paragraph [15] above, the 1995 Directive provides that where a data subject’s fundamental rights and freedoms to have their personal data protected overrides the legitimate interests of a data controller; then the data subject’s fundamental rights take precedence over the data controllers legitimate interests.
- [22] It is clear from the Supreme Court’s judgment that Article 8 weighed heavily in the Justices’ decision. Article 8 is one of the Articles given domestic effect through the Human Rights Act 1998. All public authorities must act compatibly with a convention right and it is unlawful for them not to do so (Section 6(1) of the Human Rights Act 1998). Therefore, any public authority will have to have due regard to Article 8 of the ECHR when acting under Parts 4 and 5 of the 2014 Act.
- [23] In my view the Human Rights Act 1998 would patently fall within the “any other enactment” wording contained within the proposed Sections 23(3)(b), 26(1)(b), 26(2)(b), 26A(a) and 40A(a). As Article 8 of the ECHR is one of the convention rights given effect to by Part 1 of and Schedule 1 to the Human Rights Act 1998. Furthermore, the express reference to Article 8 of the ECHR within Recital (10) of the 1995 Directive results in having to consider Article 8 when interpreting the 1995 Directive (and by extension the DPA). However, I think that this can be made clearer and I discuss this in more detail in paragraph [42] of this submission.

[24] In my view, the amending provisions sufficiently address the issues identified by the Supreme Court in its judgment. They provide the necessary framework to provide sufficient certainty to named persons as well as parents and children and young people in addition to ensuring that fundamental rights are protected.

The General Data Protection Regulation

[25] The 1995 Directive and the DPA are on borrowed time. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, or “GDPR”) will apply from 25 May 2018 in all Member States across the European Union. Plans for new domestic legislation were confirmed in the Queen’s Speech, delivered by Her Majesty in June, which included reference to new legislation on data protection.

[26] In my view, the Bill adequately provides for the GDPR and also for any domestic legislation relative to the GDPR and on the subject of data protection post-Brexit.

[27] Some aspects of the GDPR, perhaps unusually for an EU Regulation, are not yet clear. This is something that everyone should be aware of as it may well have implications for the way in which the 2014 Act works from 25 May 2018. The Regulation gives Member States some latitude in certain areas. Of relevance to the 2014 Act is the derogation in Article 6(2) of the GDPR. Article 6(2) provides:

“Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.”

Point (c) in Article 6(1) relates to “processing [which] is necessary for compliance with a legal obligation to which the controller is subject;” meanwhile, point (e) relates to “processing [which] is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;”. Recitals 40, 41, 45, 47 and 50 of the GDPR are relevant when considering Article 6(2). In my view, the provisions in paragraphs 2 and 3 of Article 6 do not change the situation from that which is applicable under the current law; therefore, the discussion in paragraphs [50] – [58] of the Supreme Court’s judgment remains of relevance.

[28] Particular attention ought to be paid to Article 17 of the GDPR, interpreted with reference to Recital 65 of the GDPR. Article 17 of the GDPR deals with the right to erasure of personal data (‘the right to be forgotten’) by data controllers; there are various circumstances set out within Article 17 where a data subject has the right to obtain erasure of their personal data. The Committee will note that Article 17(1)(b) provides that there is a right to obtain erasure where “the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing.” I have read the illustrative draft guidance that was published by the Scottish Government alongside the Bill and note the section in paragraphs 7-10 thereof, which deals with the issue of seeking consent.

[29] The Scottish Government’s guidance appears to me to strike the right balance in relation to consent as it applies now and also how it will operate under the GDPR. On a more general note; there is a great deal of misinformation and misunderstanding about consent. Where a

data controller is going to process personal data irrespective of whether they have consent or not; then they must not rely on consent. It would be unfair to seek consent and then to simply ignore a refusal of consent (or a withdrawal of consent at a later date). The problems of relying upon consent can be seen when considering Article 17 of the GDPR, when read alongside Recital 65. For the present purposes, a key part of Recital 65 is:

“That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet.”

This is, in my view, patently relevant to the present purpose. Named Persons may well be relying upon the consent of a child when processing personal data. It is therefore essential that children and young people understand what is involved in the processing. This links in with the definition of consent in Article 4 of the GDPR where it is defined as: “any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her” (my emphasis).

- [30] Agreement cannot be consent unless it is freely given, specific, informed and unambiguous. The requirement that consent be “informed” will place upon named persons a significant burden around ensuring that they properly explain what information they propose to share, why they are proposing to share it and what the positives and disadvantages of sharing (and indeed not sharing) the information would be. If a child or young person agrees to share the information but that agreement was not from an informed position, data controllers will be faced with significant problems when having regard to the terms of Article 17 and Recital 65.
- [31] I note that the Government will be required to consult on the guidance before it finalises the guidance. However, the Committee may wish to consider whether the discussion of consent in paragraphs 7-10 is clear enough. Although my view is that the guidance is technically correct; it may not be clear enough to prevent misunderstandings around the role of consent (especially in the wider context of the GDPR).
- [32] Article 23 of the GDPR provides for Member States, in legislation, to restrict certain specified rights of data subjects. Article 23 requires those restrictions to respect the essence of the fundamental rights and freedoms and is to be a necessary and proportionate measure in a democratic society to safeguard a number of things listed in Article 23. Recital 73 provides that those restrictions be in accordance with the requirements set out in the Charter and in the ECHR. The GDPR will therefore continue the need to have regard to the ECHR, but the comments about the right to data protection and privacy not being synonymous with one another in paragraph [11] above should be kept in mind.

The Scottish Government’s illustrative draft Code of Practice

- [33] At Paragraph [82] of the Supreme Court’s judgment, the Court was concerned that Section 28(1) of the 2014 Act only required specified public authorities to have regard to guidance issued by Scottish Ministers. The Court clearly considered that a requirement to simply “have regard to” was insufficient. The Court contrasted this with Standard Operating Procedures issued by the Metropolitan Police concerning stop and search. The Police’s Standard Operating Procedures “not only gave officers detailed instructions, which were designed to ensure their proportionate use of such power, but also required them to explain to the individual who was to be searched for the reason of the search, to record that reason in writing and make available to the affected individual a copy of that written record” (paragraph [81]).

- [34] The proposed Sections 26B and 40B would introduce a requirement upon the Scottish Ministers to produce a code of practice. The proposed Section 26B(3) of the 2014 provides that a person who is providing information (or considering the provision of information) in exercise of powers conferred upon them under Part 4 of the 2014 Act “must do so in accordance with such a code of practice...issued by the Ministers”.
- [35] A similar obligation is provided for within the proposed Section 40B(3) of the 2014 Act, which requires compliance with any code of practice issued by the Ministers pursuant to the proposed Section 40B of the 2014 Act.
- [36] The illustrative code of practice also makes it clear that the code of practice must be complied with (para 4). Although the Bill does not propose to amend Section 28(1) of the 2014 Act; it is, in my submission, necessary to consider the cumulative effect of the proposed amendments and whether these amount to sufficient safeguards.
- [37] It is difficult to say much on the impact of the code of practice as it is only in draft form at the moment and in theory is subject to change before it is adopted. The requirement in the proposed Sections 26B and 40B of the 2014 Act, for consultation by the Ministers before adopting the code of practice, means that there may well be changes once full consultation has taken place. In my view, the draft code of practice is of limited assistance in assessing whether the Bill is sufficient to rectify the problems identified by the Supreme Court.

Areas for Improvement

- [38] Although I am of the view that the Bill does what it needs to do in order to address those issues identified by the Supreme Court; there aspects of the Bill that could be improved upon.
- [39] The first area where the Bill could be improved upon is around the use the phrase “information holder” in the new section 26 of the 2014 Act. The phrase appears in both subsections (1) and (2); however, it appears to have been given a different definition in each of the two subsections. This may lead to confusion and is something that the Committee may wish to consider whether it would be desirable to amend.
- [40] It may also be of assistance to make reference to the GDPR on the face of the legislation. While the phrase “any directly applicable EU instrument relating to data protection” undoubtedly would include the GDPR; it may assist individuals who are not familiar with the data protection landscape for the regulation to be mentioned within the 2014 Act. This could be achieved by including reference to the GDPR within Sections 32 and 45 of the 2014 Act. It could, perhaps, be something as straightforward as adding the following into Sections 32 and 45 of the 2014 Act:

“any directly applicable EU instrument relating to data protection” includes, but is not limited to, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

- [41] A great many people appear to be wholly unaware of the impending changes to the data protection landscape. The DPA is one of the most viewed pieces of legislation on the legislation.gov.uk website which indicates that there is a high awareness of the DPA. From 25 May 2018 looking to the DPA will be wholly inadequate as the legislative landscape will have changed dramatically. This suggestion is not necessarily aimed at public authorities,

who will be very much aware of the GDPR, but is rather aimed principally at parents and older young people.

- [42] I have concerns about the clarity of the legislation, from the perspective of children and young people, with respect to the ECHR. As I noted in paragraph [24] above, the wording of the legislation is, in my view, sufficient to give legal effect to a need to consider Article 8 of the ECHR. However, I do not consider that it is necessarily clear enough for those who will be affected by the named person provisions. In my submission adding something similar to that suggested in paragraph [40] above into Sections 32 and 45 of the 2014 Act would be of assistance.
- [43] A final suggested improvement from my perspective would be around creating a statutory obligation to create, publish and maintain a guide to the named person scheme (including the information sharing provisions) that is directed towards children and young people. In my submission, it would be important for children and young people to fully understand their legal rights around the information sharing provisions and they would benefit from some form of explanatory guide (especially when considering the requirement under the GDPR for consent to be “informed”). The interaction between the 2014 Act, data protection law and human rights is clearly a complex one; children and young people might not fully appreciate their rights in relation to the scheme from a reading of the legislation. The currently proposed statutory guidance is, of course, not aimed at children and young people and so may not be an appropriate place for them to gain an understanding of matters. I do not consider Section 24 of the 2014 Act, as presently enacted, to be sufficient for this purpose.

Conclusion

- [44] In my view the Parliament ought to support the general principles of the Bill. It appears to me that the Bill adequately addresses the two primary issues identified by the UK Supreme Court. In my view, amending 2014 Act in terms of the provisions within this Bill will likely result in the information sharing provisions being within the scope of the Scottish Parliament’s legislative competence.
- [45] It appears to me that the cumulative effect of the proposed changes puts in place sufficient safeguards around the sharing of information. The Scottish Government has chosen not to amend Section 28(1) of the 2014 Act; however, I do not consider that this alone would be enough to say that the proposed changes are insufficient. The proposed Sections 26A and 40A are, in my submission, crystal clear: information must not be shared if it would be a breach of data protection law or the ECHR. It will therefore be essential for every single person who is exercising powers under Parts 4 and 5 of the 2014 Act to consider whether what they are proposing to do is legitimate in terms of those laws.

Alistair Sloan
Inksters Solicitors
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