Submission of evidence from the Centre for Youth & Criminal Justice in response to the Scottish Parliament’s Education and Skills Committee seeking views on the Children and Young People (Information Sharing) (Scotland) Bill

The Bill amends both Parts 4 and 5 of the 2014 Act by, in particular, replacing various duties to share information with duties:

(a) to consider sharing information where the information would promote, support or safeguard the wellbeing of the child or young person;

(b) to consider whether the information could be shared in accordance with the Data Protection Act 1998, any directly applicable EU law, any other act and with common law; and

(c) a power to share that information where it could promote the wellbeing of the child.

For ease of reference, the Government has published a document which shows how the Children and Young People (Scotland) Act would look with the provisions in the Bill incorporated.

The Bill also places a duty on Ministers to issue a Code of Practice to those exercising functions under Parts 4 and 5 on how they are to go about considering whether information can be shared and how it can be shared.

The Committee is considering, at Stage 1, whether or not the Parliament should agree to the general principles of this Bill and, if so, what improvements could be made to its provisions. Written submissions are invited on these issues.

It is important to note that the Bill does not include provisions that enable Stage 1 scrutiny to revisit the overarching policies established in the Children and Young People Act 2014. Scrutiny is specifically focused on the proposed revised approach to information sharing in relation to the named person service and in relation to child’s plans.

Response

Well-being concerns do not replace child protection procedures and the thresholds are very different. It is important to recognise and consider what if any response is required to well-being concerns; as highlighted by McAra and McVie (2010), system contact in itself can be iatrogenic thus often doing nothing can provide the best outcome for children. This promotes the role and responsibility of parents and guardians in responding to the needs of their children and the state’s role in offering support that would assist them to do so in an informed and collaborative manner. However, this is not to ignore the cumulative impact of well-being concerns such as neglect, which can be very subtle in presentation, subjective and socially contextualised. Research tells us that many of our children involved in offending behaviour are exposed to chronic harmful environments never meet the threshold for statutory involvement. Thus, the benefits to identifying lower level concerns enabling earlier supports from universal services could have significant positive outcomes for children, young people and their families, although this should clearly be provided within a proportionate and appropriately assessed framework with due regard to rights and existing legislation.

The United Nations Convention on the Rights of the Child (UNCRC) clearly states the role of the state in supporting parents and guardians in undertaking their roles and responsibilities to ensure every child has an upbringing providing care and security and is respectful of their rights and individuality. It outlines how parents should fulfil their responsibilities and is clear that the state should provide parents with the
necessary level of support they need to fulfil their role. Parents have legal rights and responsibilities that they have a duty to fulfil to support their child growing up.

Presently the role of the Named Person Service does not appear to be fully understood across the range of statutory and 3rd sector agencies and services as well as the wider public in how it is intended to support parents, as opposed to undermining them. Addressing this would seem to be crucial to the positive implementation and subsequent development of the named person role and intended outcome of this legislation. Reaffirming that the role of the named person is not to interfere with parental rights and responsibilities but to provide support, guidance and information to promote and safeguard the wellbeing of all children under 18 years where required. The role of the named person service and the choice parents and children have as to whether to utilise this support requires to be clearly disseminated across practitioners and the wider public to breakdown existing resistance and misperception of its intended application and outcomes.

Choice

The right to choose whether to engage or not must be fully explained to parents and children as well as the range of possible outcomes from their decision to ensure this is a choice as fully informed as possible. Respect for choice particularly where they choose not to use the offered supports in response to any perceived/ assessed well-being need highlighted is paramount. Any decision not to accept supports offered should not be held as evidence of poor parenting by parents/ carers/ guardians resulting in escalating the concerns through the system as fear of such action will result in enforced engagement/ agreement with perception of no choice and be disempowering, as well as failing to uphold Article 8 of HRA 1998.

This raises important questions for professionals responding to well-being concerns where a child and their parents/ carers/ guardians have declined the involvement of the NPS. How will professionals and agencies be aware of this and what does this mean for the legality of sharing information when the child/ parents/ carers/ guardians have opted out of the NPS? What guidance is available to direct agency processes and responses in such situations where not sharing the well-being concern has a potential negative impact upon the child? An unintended consequence of this may be increased inappropriate referrals to the Scottish Children’s Reporter Administration (SCRA) where the criteria for compulsion is not met, yet agencies are unsure as to how to respond in such situations. Clear guidance as to what actions are required and possible in such situations, legal context and position would be beneficial.

Consent

The gaining of consent would seem paramount in the successful implementation of NPS and collaborative working with children, parents and guardians. Professional understanding of the differences between consent and explicit consent as they relate to personal data and sensitive personal data as defined in the DPA schedule 2 and 3 is critical and the importance of actively seeking such consent should surely be the norm in relation to sharing well-being concerns. The importance placed on this action does not seem fully understood or have filtered into practice in relation to well-being concerns, and provision of examples would be beneficial. A further concern in relation to consent is that agencies could adopt positions that do not actively promote seeking consent in order to expedite processes. This would surely be a failure to adhere to DPA, HRA and UNCRC as this is an opportunity to gather the child’s views and hear their voice. This issue does not appear to have been resolved with the proposed bill and stipulations as to the importance of consent and explicit consent regarding well-being concerns should be specified. Clarity as to where the responsibility for scrutinising the decisions and evidence for sharing or not sharing would also be helpful.

The reading of the Act as proposed with the changes by the Information Sharing Bill do not appear to provide further clarity or an understandable explanation of the links between the Act, DPA and HRA 1998.
For professionals to fully assess and analyse the implications of sharing information they require a detailed knowledge of all three pieces of legislation that is unlikely to be evident at this time, thus support in developing this understanding is required at a national level. This is an opportunity to promote collaborative support alongside children and their families and ensure the right to family life is not unduly restricted or over ruled by process.

Questions from the Information Sharing bill also relate to whom information is shared with. If there is a consideration to share the information but no duty to do so with the NPS, can information be shared with another agency that is deemed more appropriate on the part of the information holder, and may be able to provide direct support without wider dissemination of that information? Or is it a case that if the information holder does not deem that sharing the information with NPS is appropriate, that they would not then share with any other service? Is the NPS a conduit for holding information and how relevant is that when they may not hold all the information? How does that then impact upon the triggering of a Child’s Plan?

The link between children’s rights as directed by the UNCRC and the implementation of the Information Sharing bill and subsequent NPS incorporation of child’s rights is also unclear. Whilst meeting the SHANARRI indicators could be argued to be a means of supporting the implementation of the UNCRC and associated Articles, this is only valid where people are aware of these rights and striving to promote all of them in balance.

Further clarity is required as to the decision making process outlined by the example within the draft practice guidance as follows- when it has been assessed that the sharing of information is not compatible with the DPA and HRA 1998, yet meets the test of promoting, support or safeguard the well-being of child or young person and where further action could be taken to permit the sharing such as gaining consent. This example would relate back to the earlier point regarding the lack of practice in actively seeking consent or explicit consent to expedite processes. It is likely that this will be a fall-back position as opposed to the starting point in this process which fails to promote collaborative working, transparency or rights based approach.

Role and Function of NPS

The ability of the NPS to act as a conduit and central point, which receives and coordinates responses with regard to well-being concerns for a child, now seems in question. How effectively can the NPS carry out its role when they will not become party to all information, as other providers may be unable to meet the criteria of the DPA and HRA to share?

Thresholds, Skills and Knowledge

Concerns regarding the range of skills and knowledge of NPS and their ability to recognise what such well-being needs may indicate persist. It will be important to ensure that training and support provided to NPS develops their understanding of the drivers that are often factors in children involved in offending behaviour. If they fail to grasp the range of factors and experiences, which often drive offending behaviour then responses are unlikely to be effective, proportionate or appropriate. The understanding of the SHANARRI indicators in relation to the wide range of needs a child may present, how these needs interact and can compound each other and that the manner in which a child presents may be masking the real need is vital. The understanding of how well-being concerns present across all systems in which a child interacts and lives is required, not just within one system, and what this means in the context of that child and their situation. Ensuring NPS have the necessary knowledge and skills to fulfil their role and are supported to do so is important.

There is concern that limited understanding coupled with a sense of expectation to act may result in unnecessary or inappropriate responses by NPS that negatively affect children. Training in relation to brain development, adverse childhood experiences and trauma are some areas that would support more
informed, effective and proportionate decisions by NPS. Provision of such knowledge may also support NPS evidence appropriate reasoning for sharing information in order to promote, support or safeguard a child’s well-being.

Critically, ensuring NPS have a full understanding of the necessary legislation in relation to information sharing is paramount. Whilst they will be in most probability receiving information, they then must decide if and with whom they can then share this with, and if consent is not given or gained, how do they proceed? This is particularly relevant in progressing or triggering a child’s plan.

Conclusion

In consideration of the draft code of practice and the proposed Information Sharing Bill further questions are now evident. The measure at the crux of this bill appears to be that professionals must make a decision as to what impact the sharing or not sharing of information will have upon the child and whether sharing information outweights the interference with the right to family and private life under Article 8 HRA and necessary legal criteria met. This in itself creates an ethical dilemma as to how can a professional know the impact of not sharing, as presently the only clear measure for sharing information is the criteria of child protection of which well-being concerns do not meet by their very nature.

In addition, the requirement of professionals across a range of services to possess a detailed understanding of the DPA and schedules 2 and 3, HRA 1998 and interaction with CYPA 2014 is not supported by the draft code of guidance or the suggested changes in legislation. Implicit within the draft code of guidance is the seeking of consent and implicit consent as standard practice as opposed to the current position and the standard of explanation to children, parents/ carers/ guardians as to what is being shared, with whom and why this requires to be far higher than where the bar is currently set. Whilst reflected in the draft code of guidance this is not reflected in the legislation. The ambiguity remains regarding sharing well-being concerns without consent that clearly sit at a far lower threshold than child protection concerns and relate to significant harm. What options are available to professionals and agencies when a child and their family do not give consent to share or have declined involvement with the NPS? There is a significant risk that the NPS as intended will be unable to fulfil its role and function as other service providers and agencies maintain a protectionist position due to lack of confidence in being able to meet the necessary legal thresholds for sharing information. Significant collaborative work across agencies, children, their families and the wider public is required to address these issues and ensconce a sense of confidence in appropriate and proportionate information sharing that is in the best interests of the child and meets all necessary legislation.