THE CHRISTIAN INSTITUTE

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

Response of The Christian Institute to Call for Evidence

Introduction

The Christian Institute is a non-denominational charity established for the promotion of the Christian faith in the UK and elsewhere, and the advancement of education. We are supported by around 4,000 churches and church ministers from almost all the Christian denominations, including 646 in Scotland. We have over 55,000 supporters throughout the UK, including around 6,000 in Scotland.

The Institute was the First Petitioner in the successful judicial review of part 4 of the Children and Young People (Scotland) Act 2014, in which the United Kingdom Supreme Court (UKSC) found that the information sharing provisions in relation to the Named Person scheme were not "in accordance with law", as is required under article 8 ECHR. The UKSC also required safeguards to be provided to deal with the risk that the legislation might result in disproportionate interferences with the article 8 rights of children, young people and their parents.[1]

Summary

Whilst we welcome the Children and Young People (Information Sharing) (Scotland) Bill, in so far as it goes, it is plainly at risk of further legal challenge. Instead of resolving the implications of data protection and human rights legislation on the face of the Bill, this is left to professionals themselves. Parents, children and named persons will be plunged into fear and confusion. The scheme could be mired in further controversy and legal disputes. This is all avoidable.

Background

On 12 February 2014, a week before the Children and Young People (Scotland) Bill was voted on at stage three in Parliament, the Institute's solicitor wrote to the Lord Advocate querying the compatibility of part 4 of the Bill with article 8 ECHR because:

> *"the provisions of part 4 of the Bill would appear to fail the test of being in "accordance with the law" in the sense of having the qualities of accessibility,*

[1] The Christian Institute and others v The Lord Advocate [2016] UKSC 51

> *foreseeability and precision which would provide proper protection against arbitrary and oppressive use of the powers".*[2]

On this basis, the Institute's solicitor questioned whether the provisions were "within the legislative competence of the Scottish Parliament" and urged the Lord Advocate to exercise his discretion under section 33(1) Scotland Act 1998 to refer that question directly to the UKSC. By letter dated 20 March 2014, the Lord Advocate declined to do so, and notified the Presiding Officer accordingly. The Bill then passed for Royal Assent.

The Lord Advocate's failure to make a reference in February 2014 proved costly for the Government. Two years of litigation in the Court of Session and then the Supreme Court could easily have been avoided. Ultimately, the UKSC in July 2016 found the legislation to breach article 8 ECHR on precisely the same basis we notified the Lord Advocate in February 2014. In November 2016, the UKSC awarded us our costs and expenses for each stage of the legal proceedings and in relation to all grounds of our legal action.

At the end of 2016, the Scottish Government held a period of engagement for stakeholders to give their views on what changes should be made to the legislative framework in the light of the UKSC judgment. We responded to the consultation, urging the following:

- The Government should use the opportunity provided to write onto the face of the 2014 Act the right of children, young people and their parents not to accept advice, information, support and help which are offered by named persons.
- The Government should not attempt to revise the information sharing provisions in the 2014 Act but repeal them so that all data sharing is simply governed by the Data Protection Act 1998 ("DPA 1998"). The Government should not seek to straddle these two sets of complex rules (which is a source of confusion).
- The Government should provide for a proper, robust definition of wellbeing with a suitable threshold.
- Any scheme for sharing personal information which is written into the 2014 Act should make the seeking of consent the default position. There should be a presumption (rebuttable in certain limited and prescribed circumstances – by reference to the DPA 1998) that the subject's consent should be sought.
- Any replacement legislation must recognise the important distinction the Supreme Court drew between sensitive and non-sensitive data.

Given the above, we welcome this current opportunity to engage with the Government's attempt to fix the problems highlighted by the UKSC in the judgment.

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

The Bill is the Government's response to the UKSC judgment. It will repeal or rewrite key parts of the 2014 Act and, in so far as it goes, represents a significant watering down of the Named

[2] Letter dated 12 February 2014 from Mr Sam Webster, in-house solicitor at the Institute, to Rt Hon Frank Mulholland QC.

Person legislation, not least in removing the previous duties to share personal information. The extent to which the Bill rewrites key sections of the 2014 Act itself speaks of the magnitude of the changes required by the UKSC.

Regrettably, however, the Bill adopts the narrowest of readings of the UKSC judgment. The UKSC expected that the changes to the Named Person legislation would not involve merely technical changes to the information sharing provisions in the 2014 Act. Having stated that changes would need to be made to the accessibility of the legal rules and to provide safeguards in relation to the information sharing provisions, the UKSC stated:

> *"The reconsideration of the terms of the Act and the RDSG [revised draft statutory guidance] also provides an opportunity to minimise the risk of disproportionate interferences with the article 8 [ECHR] rights of children, young persons and parents. Consideration of these matters will involve policy questions which are the responsibility of the Scottish Ministers and the democratic legislature."* [3] (Emphasis added)

Definition of wellbeing

The UKSC viewed clarification of the notion of "wellbeing" as necessary for the purposes of the 2014 Act. Yet the Bill does not address this. This is surprising given that the promotion of wellbeing is the central purpose of the Named Person legislation and the scope of the named person's functions.

The UKSC was highly critical of the "notably vague" concept of wellbeing in the 2014 Act, which the court noted lacked any definition in the Act.[4] The court also warned that the assessment of wellbeing under the Act:

> *"involves the use of very broad criteria which could trigger the sharing of information by a wide range of public bodies and also the initiation of intrusive inquiries into a child's wellbeing".*[5]

The lack of any robust definition of wellbeing was, in the UKSC's view, the flaw which gave rise to the proportionality issues in the Named Person legislation and so why safeguards are needed. The Government may consider that it can address these issues through guidance. However, this approach is a bit like recalibrating the gears on a bike to address the problem of careering downhill when all along the problem is faulty brakes.

Ultimately, the UKSC's concerns about wellbeing underpinned their judgment. Not addressing those concerns in the legislation will place unreasonable expectations on professionals who are not legally qualified to ensure they exercise the named person functions in an ECHR-

[3] Judgment at paragraph 107

[4] At paragraph 16 the UKSC noted that "wellbeing" is not defined and that the only guidance as to its meaning was provided for in section 96(2) which lists eight factors to which regard is to be had in assessing wellbeing: namely whether the child or young person is or would be "safe, healthy, achieving, nurtured, active, respected, responsible, and included".

[5] Judgment at paragraph 97

compatible manner. For example, the "Illustrative Draft" Code of Practice published alongside the Bill requires the practitioner to consider whether the promotion of wellbeing can be linked to a legitimate aim under article 8(2). The Code also states that even if there is a ground but only "a tenuous link to a legitimate aim, then it will be difficult to demonstrate that the information sharing is lawful".[6] In other words, the guidance rightly suggests that a professional might comply with the letter of the DPA 1998 but still breach article 8 ECHR. The root of the problem is that the notion of wellbeing under the 2014 Act is much broader and all-encompassing that the grounds recognised as legitimate aims under article 8(2).

In the UKSC's view clarification of the notion of wellbeing is needed. The only place this can be done is on the face of 2014 Act, given the vague and broad criteria stated there. Failure to legislate for a clear and robust definition of wellbeing will create uncertainty for professionals as to the scope of their powers, and mean that the legislation will still fail the requirement of being in accordance with law.

Voluntary nature of scheme

Secondly, the Bill completely fails to clarify the "voluntary nature" of the named person service. The UKSC pointedly noted:

> *"[T]here must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered, especially in pursuance of a child's plan for targeted intervention under Part 5; and further, that their failure to co-operate with such a plan 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 could well amount to an interference with the right to respect for family life which would require justification under article 8(2) [ECHR].*
>
> *Given the very wide scope of the concept of "wellbeing" and the SHANARRI factors, this might be difficult.*
>
> *Care should therefore be taken to emphasise the voluntary nature of the advice, information, support and help which are offered under section 19(5)(a)(i) and (ii) and the Guidance should make this clear."*[7]

Whilst the UKSC refers to the Guidance making such matters clear, the court nevertheless made its comment about using reconsideration of the terms of the Act as "an opportunity to minimise the risk of disproportionate interferences with the article 8 rights of children, young persons and parents"[8]. Yet, the Bill leaves sections 19 to 22 of the 2014 Act untouched,

[6] Paragraph 37 Illustrative Draft Code of Practice on information sharing under parts 4 and 5 of the Children and Young People (Scotland) Act 2014
[7] Judgment at paragraph 95
[8] Judgment at paragraph 107

making effective universal provision for the appointment of named persons and for the exercise of their functions.

Given the UKSC's strong comments, and the fact the Policy Memorandum published alongside the 2017 Bill reflects these directions from the court, we are at a loss to understand why the matter is not dealt with on the face of the Bill.[9]

Indeed, it would appear that amendment to section 19 of the 2014 Act, reflecting the court's comments at paragraph 95 of its judgment, is now required, given the changes to the information sharing provisions in the 2014 Act which now explicitly refer to the powers in the DPA 1998. This is because the conditions for processing personal data in schedules 2 and 3 of the DPA 1998 include when "the processing is necessary…for the exercise of any *functions* conferred on any person by or under any *enactment*". But if section 19 of the 2014 Act does not clearly set out the parameters of the named person functions in providing advice, support and help, then the information sharing provisions are uncertain. This raises concerns about whether they can be read at face value (and are therefore in accordance with law, as required by article 8). The Government has omitted to take account of the fact that the information sharing provisions do not operate in a vacuum.

We would urge the Government to add an additional subsection to section 19 of the 2014 Act, reflecting the wording of the Policy Memorandum, making it clear that use of the named person service is entirely voluntary and that the exercise of the named person functions does not impose an obligation on children, young people or parents. Along a similar vein, section 19(5) of the 2014 Act should also be amended to constrain the functions of the named person by reference to "where the named person considers it to be appropriate and **necessary** in order to promote" wellbeing. This reflects the language of the DPA 1998.

In accordance with law

The amendments to the information sharing provisions in the 2017 Act are welcome in that they remove the previous duty to share information. But overall we not think they are sufficient to render the provisions "in accordance with the law" or to address all the criticisms highlighted by the UKSC.

Although the changes proposed in the Bill may, unlike the original provisions of the 2014 Act, be read more easily alongside the DPA, the fact the named person or service provider would still have to read the 2014 Act in one hand, and several other sources of data protection law in the other, means that the changes cannot be said to be in accordance with the principles of legal certainty or the requirement to be in accordance with law.

The Bill also fails to clarify, as the UKSC expected any post judgment legislation to do, the relationship between the information sharing provision under part 4 of the 2014 Act and the

[9] The Policy Memorandum published in June 2017 states "Children and young people, and their parents, can accept or reject advice, information, support and help offered by a named person under part 4 of the 2014 Act…This freedom of choice must be made clear to them. Refusal to accept advice or services offered or refusal to co-operate with a child's plan is not in itself to be taken as evidence of a risk of harm".

requirements imposed by the DPA 1998. The UKSC was particularly concerned about the "logical puzzle" created by the information sharing provisions when read with section 35 DPA which provides that "personal data are except from the non-disclosure provisions where the disclosure is required by or under any enactment". The Scottish Government may think that it has resolved this problem by removing the *duty* to share data which existed in the 2014 Act. However, the revised wording still lacks clarity as to precisely what the intended relationship is between the DPA and the information sharing provisions of the 2014 Act, in particular whether section 35(1) DPA 1998 means that the DPA provisions do or do not take precedence over the information sharing provision of the 2014 Act.

Further amendments should be made to the Bill to ensure that the new wording in sections 23 and 26 of the 2014 Act more fully reflect the wording in the conditions for data sharing in schedules 2 and 3 DPA 1998. Essentially, this could be done by amending the wording in the Bill so that the purported powers to share in sections 23 and 26 arise not when the service provider considers "in its opinion" that sharing "could" promote wellbeing, but simply when "it is necessary to promote wellbeing". This amendment would be legislatively modest but its effect would be significant. The wording of the information sharing provisions would then dovetail with the working and standards not only of the DPA 1998 but also EU standards expressed in the Data Protection Directive and the General Data Protection Regulation ("GDPR") which replaces the Directive in May 2018. More importantly, such an amendment would move from a wholly subjective test to an objective test, which means that the exercise of any decision to share information can properly be subject to scrutiny and review both by the Information Commissioner and the courts.

The Bill requires compliance with "any directly *applicable* EU instrument relating to data protection". This should cover the GDPR. However, it doesn't appear to cover other EU laws which might be directly *effective* (as opposed to applicable) e.g. provisions of EU treaties and the Charter of Fundamental Rights. If, on the other hand, the Bill is not using the phrase "directly applicable" in the terms in which it is understood within EU law, then this should be made clear in the Bill.

Finally, none of the proposed amendments of the 2014 Act refer to the higher protection afforded to sensitive (as opposed to non-sensitive) data, a distinction reflected in the *Data Protection Directive* and the GDPR. The Government may intend to deal with this distinction in the proposed Code of Practice on information sharing, but sight should not be lost of the fact this distinction was an overarching observation made by the UKSC in their judgment.[10]

Further judicial review

On the basis of the above, we consider that the Bill is a good place to start, but is not yet sufficient to meet the criticisms of the UKSC and therefore to put the Bill beyond the scope of further successful judicial review.

[10] E.g. Paragraph 83 of the Judgment.

If modifications are not made to the Bill in Parliament, we will be urging the Lord Advocate to refer to the UKSC the question of whether the Bill is within the legislative competence of the Scottish Parliament, as we did in February 2014. Failing that, we reserve our position in relation to further legal action.

We wish to be considered to give oral evidence to the Committee.

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