Introduction to CARE

CARE (Christian Action Research and Education) is a well-established mainstream Christian charity providing resources and helping to bring Christian insight and experience to matters of public policy and practical caring initiatives across the UK. CARE was a Petitioner in the Judicial Review of the Children and Young People (Scotland) Act 2014 (the 2014 Act). Following the UK Supreme Court’s (UKSC) judgement, CARE has met with the Scottish Government and participated as a member of the GIRFEC Third Sector Stakeholder Group. Our objective has been to engage constructively with the Scottish Government to help it to rectify the shortcomings of the 2014 Act. We would be pleased to give oral evidence on Children and Young People (Information Sharing) (Scotland) Bill (the Bill).

The Children and Young People (Scotland) Act 2014

CARE understands the Scottish Government’s motivation which led to the 2014 Act. We have sympathy with the desire to intervene early to prevent a deteriorating situation resulting in the need for child protection measures and recognise the potential benefit for families in having access to a single point of contact in order to avoid needless repetition of information and to co-ordinate service provision. These aims underpin the creation of the Named Person role. However, such a position of authority and any interventions associated with it, must be proportionate to the circumstances of the child, respectful of parental rights, cognisant of family autonomy and responsive to the wishes of the child and his/her parents.

The 2014 Act is problematic because it establishes the Named Person service on a universal basis (except for children aged 16-18 who are in the armed forces). Additionally, as originally drafted it required the sharing of information if a wellbeing concern existed which in many cases would have been in contradiction to professional duties of confidentiality, human rights and data protection law. Furthermore, the 2014 Act fails to define wellbeing, but rather promotes a very broad and aspirational understanding of this term. In so doing, it increases the likelihood of disproportionate interference with the right to private and family life. It facilitates intrusion by state officials into the lives of ordinary families on the basis of subjective assessments where no welfare grounds exist to justify such interventions.

In 2013, CARE provided written evidence to the Education and Culture Committee in which we highlighted the fact that the UN Convention on the Rights of the Child (UNCRC) recognises the role of parents.¹ We suggested that “children’s rights should not be viewed in isolation from parental rights and the family context”. Citing the Preamble and Articles 3, 5 and 29 of the UNCRC, we stated that the Convention indicates “the central role of parents in the raising of children and the duty of State Parties to respect the rights of, and support, parents in this role”. Specifically, we expressed the concern that the proposal to introduce a Named Person for every child in Scotland might erode the rights and the important role of parents and civil liberties would be infringed.

In 2016, the UKSC identified a number of issues with the 2014 Act.²

¹ CARE’s written evidence is available at: www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/CAREforScotland.pdf
² www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf
1. It found that the information sharing provisions were incompatible with Article 8 of the European Convention of Human Rights (ECHR).
2. It concluded that any impression given that parents and children were required to accept advice given by the Named Person would be in breach of Article 8.
3. It noted that wellbeing was not defined and highlighted that clarification of the notion of wellbeing was needed for the purposes of the 2014 Act.
4. It pointed out that the legislation must be clear and easily understood by Named Persons and other professionals it affects.
5. It pointed out that there were policy issues which the Scottish Government and the Scottish Parliament would need to consider.

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

The Scottish Government has adopted a *de minimis approach* to complying with the UKSC’s judgement. By bringing forward this Bill, Ministers seek to address the issues of disproportionate interference in the right to private and family life and the perception of compulsion contained in the 2014 Act. They have failed to address the other matters which were raised during the Judicial Review and which merited comment in the UKSC’s judgement. Most notably, the Scottish Government has:

1. not provided clear and unambiguous sections on the face of the Bill with regard to information sharing which mirror the wording in the Data Protection Act,
2. provided inadequate consideration of the issue of data processing particularly in cases where information is gathered from children without parental knowledge or consent,
3. made no specific reference to the General Data Protection Regulation,
4. failed to amend the universal nature of the Named Person service,
5. provided no definition of wellbeing, and
6. relaunched the GIRFEC policy without significant amendment.

The proposal in the Bill to require Named Persons to *consider* if they should share information does not address all the concerns which CARE has about the Named Person scheme. Although we welcome the introduction of a degree of discretion and discernment into the information sharing regime, we do not consider that the legislation and the accompanying Illustrative draft Code of Practice are sufficiently clear as to the circumstances in which information should or should not be shared. The Bill purports to grant a power to share information, but this power cannot be used without reference to other legislation and, in particular, the Data Protection Act (DPA). This is problematic because the UKSC found that the 2014 Act could not be read at face value and required that changes be made “to improve the accessibility of the legal rules”. Confusion arose because Named Persons were required to compare the provisions of the 2014 Act with those contained in the DPA in order to understand in what circumstances information could legally be shared. However, the DPA itself grants the power to process data in order to exercise functions under any enactment The UKSC stated:

“The relationship between the Act and the DPA is rendered particularly obscure by what we have described as the logical puzzle arising from sections 23(7) and 26(11) when read with section 35(1) of the DPA. It is also necessary to ensure that the requirements of articles 7 and 8 of the Directive are met, so far as information falls within its scope. There are thus very 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.”

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CARE is concerned that the current Bill does not rectify this problem, but makes the situation worse. Named Persons and other professionals will still have to compare and contrast different legislation and guidance. They will need to cross refer the Bill with the DPA, the Code of Practice, the GDPR, the Information Commissioner’s guidance on the GDPR, the 2014 Act and any future data protection legislation passed by the Westminster Parliament. We are unconvinced that practitioners will have the time or legal knowledge to be able to navigate this complex interaction between different statutes and guidance in order to ensure that they do not share information inappropriately and illegally. If the Bill is passed in its current form, it is likely to be open to legal challenge because of this lack of clarity.

In the autumn of 2016 the Scottish Government conducted a stakeholder engagement exercise to consult on what changes it should bring forward to amend the 2014 Act. CARE participated in the GIRFEC Third Sector meeting held on 1st December 2016. At that meeting two options were suggested. The first, which the Scottish Government suggested, was to bring forward replacement legislation to amend the 2014 Act and make the information sharing provisions compatible with human rights and data protection law. The second option, which we suggested, was to repeal the sections of the 2014 Act that relate to information sharing and rely upon the provisions of the DPA.

Consent

CARE welcomes the emphasis is in the Scottish Government’s policy memorandum and the Illustrative draft Code of Practice on the need for Named Persons and other practitioners to work in partnership with families and to obtain consent prior to the sharing of information in most cases. In our view, a clause should be included in the Bill to specify that such consent must be explicit and fully informed, particularly in relation to the sharing of sensitive personal information.

We remain uncertain of processes and procedures in circumstances where consent is not forthcoming and which fall short of the ‘risk of significant harm’ threshold for child protection interventions. Additionally we are concerned that there remains some ambiguity in the Bill regarding the threshold for sharing information without consent. Section 1 (2) (4) and Sections 1 (3) (3) of the Bill state that a service provider can provide information to a Named Person if providing the information could, in its opinion, promote, support or safeguard the wellbeing of the child or young person. This terminology is open to subjective interpretation, especially as the concept of wellbeing contained in the 2014 Act is so broad and remains undefined.

Necessity

At the GIRFEC Third Sector meeting held on 17th May 2017 we emphasised that the DPA requires that a ‘necessity’ test be passed before information can be processed or shared without consent. Schedule 2 of the DPA states that information can be processed without consent when “necessary for the exercise of any functions conferred on any person by or under any enactment.” Whilst paragraphs 37-40 of the Illustrative Draft Code of Practice address the issue of necessity, it is our view that the necessity requirement should be contained on the face of the Bill. In a situation of conflict between statute and guidance, the requirements of the legislation will always take precedence over those of the guidance. In this situation the terminology contained in the Bill differs markedly from that contained in Schedule 2 of the DPA. Under the current proposal, Named Persons will find that they operate in a field of legal ambiguity where conflicting criteria for sharing information and data processing are contained in a variety of legal instruments and guidance.

4 The DPA, Schedule 2, Section 5 (b) at www.legislation.gov.uk/ukpga/1998/29/schedule/2
The failure to address explicitly the implications of the GDPR on the face of the Bill and in guidance is also problematic. At the GIRFEC Third Sector Meeting held on 10th August 2017 it was stated that the Scottish Government is awaiting the publication of the UK Information Commissioner’s guidance on the GDPR before it will be in a position to know exactly how that regulation will apply to the information sharing regime contained in the Bill. In the light of this, CARE suggests that Stage 1 of the Bill process should be delayed until after this guidance has been published in order to allow the Scottish Parliament to have the full picture of the implications of the GDPR before legislating to correct the deficiencies of the 2014 Act.

Wellbeing

The failure of the Scottish Government to define wellbeing in the Bill is particularly problematic and concerning. The UKSC judgement highlighted the fact that wellbeing had not been defined in the 2014 Act. It noted that only the SHANARRI indicators contained in Section 96 (2) of the 2014 Act provide guidance as to how wellbeing should be interpreted and that some of these indicators are “notably vague”. This broad understanding of wellbeing which is contained in the 2014 Act is central to the issues of proportionality that have arisen and the compatibility of the information sharing regime with Article 8 of the ECHR.

The Scottish Government’s promotion of a broad understanding of wellbeing is central to the Getting it Right for Every Child (GIRFEC) policy. The motivation for this approach appears to be because the UN Convention of the Rights of the Child (UNCRC) requires the promotion of the wellbeing of children. Ministers argued in the UKSC that the promotion of wellbeing was a legitimate aim under Article 8 of the ECHR and referred to other international instruments such as the UNCRC. However, the UKSC commented that although the term wellbeing is used in these instruments it is “not one of the aims listed in article 8 (2) of the ECHR” and that it is used in other international instruments such as the UNCRC “possibly not in quite as wide a sense as in the 2014 Act.” Specifically, the UKSC noted that in relation to Article 8 (2) of the ECHR the term wellbeing refers at the most general level to the economic wellbeing of the country. The UKSC went on to state:

“The extent to which an individual intervention is likely to promote the achievement of such a general aim is however very limited. Individual interventions may make a greater contribution towards achieving other legitimate aims, such as the prevention of disorder or crime, or the protection of health or morals, depending on the circumstances. However, the more tenuous the link between the objective pursued by the intervention (e.g. that a child or young person should be “achieving, nurtured, active, respected, responsible and included”) and the achievement of one of the legitimate aims listed in article 8(2), the more difficult it will be to justify a significant interference with the individual’s private and family life.”

The UNCRC does not define the term wellbeing, but does make reference to it on a number of occasions. In its use of the term wellbeing, the UNCRC respects the rights of parents and families as a foundational principle. It makes reference to wellbeing in relation to occasions where state interference is necessary to safeguard the welfare of the child in circumstances of abuse, neglect, family breakdown, moral depravity and criminal activity. The Preamble of the Convention states that the signatory State Parties are:

6 Ibid.
7 www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”

Article 3 (2) states:

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

Article 9 (4) refers to the separation of children from their parent(s) and states that information concerning the whereabouts of the absent member(s) of the family should be provided “unless the provision of the information would be detrimental to the well-being of the child…”.

Article 17 gives recognition to the role of the media and recognises the rights of the child to access information which is beneficial for his/her moral wellbeing. It requires State Parties to develop guidelines to protect children from material which will harm their wellbeing.

Article 40 (4) refers to wellbeing within the context of children who have committed criminal offences. It identifies a number of measures which can be taken and states that children should be “dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

Our contention is that Scottish Government has misunderstood the requirements of the UNCRC. The UNCRC does not promote the aspirational vision and broad understanding wellbeing which is central to the GIRFEC policy. The Scottish Government has incorporated its own broad understanding of wellbeing into the 2014 Act and in so doing has created the circumstances in which Named Persons and other practitioners will find it difficult to ensure that their decision-making is proportionate in all cases.

The Bill has not rectified this misunderstanding of the UNCRC. It fails to provide a clear distinction between welfare and wellbeing. Whereas previously state officials could intervene to protect and safeguard the welfare of children where there is a risk of significant harm, the 2014 Act and the Bill will create a situation where officials are required to intervene to promote, support or safeguard the general and undefined wellbeing of children.

The traditional perspective was reflected in the Children (Scotland) Act 1995 which made the Scottish child protection system compatible with the UNCRC. This suggests that the concept of wellbeing contained in the UNCRC has in the past been understood by the UK Government (and specifically by the Scottish Office) to refer to protecting the welfare of children when there is a risk of significant harm. The Scottish Government’s view seems to be that the ‘wellbeing’ of children includes their ‘welfare’. The difficulty arises in seeking to demarcate a welfare matter from other wellbeing concerns. In such circumstances the sharing of information without consent (and any associated interventions) may be problematic both in terms of data protection law and Article 8 of the ECHR.
Other Factors

Although the Scottish Government has stated that the Named Person scheme is voluntary and that a refusal to accept advice will not, on its own, be evidence of a risk, failure to co-operate with a Named Person remains a factor which may influence child protection decision-making. This may create the impression of compulsion. It is worth noting that the UKSC commented:

“… there 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). 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.”

We suggest that the 2014 Act should be amended to specify the voluntary nature of the scheme. The universal nature of the Named Person service is a key factor to consider. It may be that there should be a formal process to activate the Named Person which requires initiation by the parents or the young person (if aged over 12) concerned. This would result in a better targeted service which would be proportionate and more likely to improve the wellbeing of those children who need extra support by not flooding Named Persons with responsibility to monitor the wellbeing of all the children under their authority.

The universal nature of the Named Person scheme, combined with other responsibilities, raises the prospect of routine harvesting of information on children in order to monitor their wellbeing. There may be pressure to conduct fishing expeditions to identify perceived wellbeing needs. In many cases this will involve subjective judgements based on insufficient information and may be incompatible with the law on data processing. For example, we are aware that some primary schools are conducting wellbeing surveys which children are required to complete without parental consent having been obtained or parents even being informed of the survey. The justification for these surveys is so that schools can track wellbeing in order to satisfy Education Scotland’s inspection requirements. Collecting data through such surveys without parental knowledge is inappropriate. For children aged under 12, the consent of parents would be required in order for such data collection to be compatible with the DPA. We have raised this matter with the Scottish Government.

CARE has raised with the Scottish Government the need for a truly independent complaints apparatus. We suggested that a tribunal should be established with the power to compel public authorities to act to rectify behaviour and compensate victims in cases where Named Persons have acted inappropriately and/or illegally. The present procedure whereby complaints are dealt with internally by the organisation providing the Named Person is insufficient to inspire confidence in the impartiality of the process may raise issues under Article 6 of the ECHR. Although appeals can be made to the Scottish Public Services Ombudsman (SPSO), he has no power to compel public authorities to act on his recommendations. The SPSO should be given the power to compel public authorities to adhere to his recommendations.

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