Comments on Children and Young People (Information Sharing)(Scotland) Bill
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The Draft Bill

Although the draft bill does not change the current law about information sharing and when this is permissible, there is perhaps some merit in emphasising an obligation to consider whether or not information should be shared, and this is in line with the statutory backing for other aspects of GIRFEC in the Children and Young People (Scotland) 2014 Act. I have only two specific comments on the bill as presently drafted:

1. The Supreme Court indicated that a ‘central problem’ in the legislation and guidance as it existed at the time of the case before it was the lack of any requirement to obtain consent. In light of this it might be thought to be beneficial to include a specific reference to the need to obtain consent in the bill, particularly since consent features so prominently in the Data Protection Act 1998 (and in the General Data Protection Regulation (GDPR) which comes into effect next year). This would also make it clear that the first step in considering the sharing of information should be whether it is appropriate to obtain consent to this.

2. Sections 23(3)(b) and 26(2)(b) as amended would require consideration of whether information sharing was permitted (and perhaps use of the word ‘permitted’ might be preferable to ‘could be so provided’ as more accurately reflecting the essential judgement which has to be made). However, section 26A refers to considering whether ‘provision would be in breach of any prohibition or restriction.’ It is not clear that this is designed to suggest a different process to that contemplated in the provisions referred to earlier, so it is not clear why it should be worded differently.

The Guidance

It is appreciated that the guidance is only indicative, but as it stands it is not clear that it provides clear guidance of the type referred to in paragraph 101 of the Supreme Court judgement, particularly, for example in relation to guidance on proportionality. Nor is it clear that it meets the criticism made in the context of information sharing that there is ‘a lack of practical advice in guidance ... and ironically, [a large] volume of complex guidance.’ This last criticism would be best met by comprehensive guidance on information sharing which clearly replaces the guidance which currently exists in a number of different places. Aside from these general points, there are number of other issues which in my view need to be addressed to make the guidance better fit for purpose and to ensure that individual decisions do not infringe the rights of children or their parents under Article 8 of the European Convention on Human Rights (ECHR).

1. The structure of the guidance could be more user friendly. It is not clear why the legislation is separated out from the safeguards section, a better approach would be to incorporate references to legislation as part of a structured treatment of decision-making about sharing information. This might start by emphasising the protection given to personal information and what types of information are protected, discuss consent, how consent should be obtained and evidenced (more important once the GDPR comes into effect), when it is appropriate not to seek consent, when information can be disclosed without consent (which would include a discussion of proportionality), and, finally, the obligations to inform.

2. The guidance should be made more relevant to its context. For example, what does ‘processing’ mean here, which of the principles are most relevant here and what are practical examples of the operation of these principles, e.g. what, exactly, does ‘accurate’

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1 The Christian Institute v The Lord Advocate [2016] UKSC 51, at [100].
mean in this context and how much investigation must there be to establish accuracy? When will processing 'be necessary to comply with your legal obligations'? In paragraph 40, 'legitimate aim' could be explained in a way which is both fuller and more relevant – are issues of national security and the economic well-being of the country likely to arise in the context of GIRFEC? What about practical examples, as noted in the comment quoted above?

3. Although I do not share the views of the Faculty of Advocates about the existence of a law of confidentiality in Scotland,3 the presentation of that law in the guidance is arguably inaccurate. In any event, it is not clear that confidentiality has to be discussed in the guidance as information protected by confidentiality will also be protected under Article 8 of the ECHR and, in considering whether or not disclosure of confidential information can be justified, the courts have adopted the same proportionality test as would be applied under Article 8.4

4. At many points, the guidance could be more clearly and fully expressed, for example, paragraph 31 seems over complex.

5. The guidance should make it clear, as suggested by the Supreme Court, that promoting well-being is not in itself a legitimate aim, and that it, therefore, is not a factor in itself to be taken into account in any weighing of factors in taking a decision on the proportionality of information sharing. This is recognised to some extent in the guidance, though paragraph 40(b)(iv) seems to suggest that it is an aim to be considered (and paragraph 40 moves between ‘aim’ and ‘objective.’). [This is to leave aside another potential issue as to whether the idea of justifying any action on the basis of well-being is in ‘accordance with law’ as required by Article 8 given that it is an indeterminate concept for which there is no statutory definition and some evidence of different approaches being taken in different agencies.5]

6. The guidance could make the relationship between data protection legislation and Article 8 clearer.6

7. Finally, the guide does not mention one of the key justifications for information sharing considered under Article 8, which illustrates how restrictive the approach can be, that is, that sharing must be designed to protect the ‘vital interests’ of the subject of the data.

Conclusion

Although much of this has focussed on comment on the draft guidance, it seems that the Supreme Court’s view was that proper, clear guidance about information sharing, which was binding on practitioners and which was accessible to and usable by them, was necessary to minimise the risk of breaches on individual’s rights. This suggests that the Bill and the draft guidance have to be looked at as a package and the question asked whether, as a package, they do enough to ensure that Article 8 rights are respected and appropriately balanced with concerns for the ‘vital interests’ of children. Based on the detailed comments on the guidance above, I would argue that the answer is no, and that a significant improvement to the guidance is required to reach ‘yes’.

4 See H and L v A Local Authority [2011] EWCA Civ 403.
5 See Coles, E et al, ‘Getting It Right for Every Child: A National Policy Framework to Promote Children’s Well-Being in Scotland, United Kingdom’, (2016) 94 The Millbank Quarterly 334, at 323; Education Scotland, Getting it right for every child: where are we now? (2012), indicating at p8 that ‘Across universal services and other agencies working with children, there is no consistent interpretation of wellbeing’; and Care Inspectorate, Joint inspections of services for children and young people: A report on the findings of inspections 2014-2016 (2016). This is leaving aside the relationship between well-being and, for example, the ‘welfare’ of a child.
6 Directive 95/46/EU on the protection of individuals with regard to the processing of personal data and the free movement of that data, Recital 10.