The Children and Young People (Information Sharing) (Scotland) Bill: Nursing and Midwifery Council submission to the Scottish Parliament Education and Skills Committee call for evidence

About us

1 We are the Nursing and Midwifery Council (NMC), we exist to protect the public by regulating nurses and midwives in the UK. We do this by setting standards of education, training, practice and behaviour so that nurses and midwives can deliver high quality healthcare throughout their careers.

2 We maintain a register of nurses and midwives who meet these standards, and we have clear and transparent processes to investigate nurses and midwives who fall short of our standards.

3 We welcome the opportunity to provide our views to the committee, and are grateful for the engagement from the Scottish Government with us and others as they have developed the proposals. We look forward to continuing to work with the Scottish government and other stakeholders.

The NMC, nurses, midwives and named person requirements

4 Our approaches are UK wide, but mindful of country specific requirements and differing approaches in the four countries of the UK. Our approaches (such as our standards1) are therefore drafted at a high level. Our Code2 of professional standards of practice and behaviour for nurses and midwives, for example, sets out the professional standards that nurses and midwives must uphold in order to become registered to practise in the UK, and to maintain that registration.

5 Our Code is focused around four key themes – prioritise people, practise effectively, preserve safety, and promote professionalism and trust. It includes requirements for nurses and midwives to uphold the laws of the country in which they practise (paragraphs 4.3, 17.2, 17.3 and 20.4). It also sets out requirements around sharing information and confidentiality in line with the law (paragraphs 4.2, 5-5.5, 8.6, 17.2 and 17.3). The Code is also clear that a nurse or midwife must only practise within the limits of their own competence (paragraphs 13-13.5).

6 We recognise that those we regulate may be employed by a provider to deliver the named person services that a provider would have legal requirements to provide. It is for an employer to determine how a nurse or midwife should be deployed in their organisation and within the professional skill set they hold, including in the provision of named person services.

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1 https://www.nmc.org.uk/standards/
2 https://www.nmc.org.uk/standards/code/
If a nurse or midwife fell short of our regulatory requirements this could result in the nurse or midwife being subject to our Fitness to Practise (FtP) processes and may result in us taking regulatory action. This could include falling short of the named person information sharing requirements in Scotland, should they become law.

Our main interest is therefore in making sure that our UK wide regulatory provisions and any named person information sharing provisions in Scotland can operate alongside each other.

Our current position

We have been engaging with the Scottish Government and a number of other stakeholders as the information sharing requirements have been redrafted following Judicial Review. We welcome the publication of the revised legislation and illustrative Code of Practice on information sharing by the Scottish Government. However, we are unable to finalise our view until we can also review the draft guidance in relation to named person services or draft directions in relation to named person services. We await their publication.

We have reviewed the draft legislation and the draft Code of Practice on information sharing against our regulatory requirements, and in particular our Code, to assess whether we believe that they are compatible.

The draft Bill

The new provisions include a duty when a service provider (the people / organisation who would be employing named persons) or relevant authority acquires information in relation to a child or young person. They are required to consider whether providing information in relation to a child or young person could, in the opinion of the information holder, promote, support or safeguard the wellbeing of the child or young person.

Nurses and midwives who are named persons would therefore only be under a duty to consider sharing information, not to share the information. There is a related power to share information if it could promote, support or safeguard the wellbeing of the child or young person. This is a significant change from the pre-Judicial Review legislation which gave named persons a duty to share information.

In addition, the sharing of information is now explicitly made subject to the requirements of the Data Protection Act 1998, with 'future proofing' for the new EU General Data Protection Regulation’s transposition into UK law. And also, through 'any other rule of law', the common law relating to confidentiality. Section 19(8) of the Children and Young Persons Act, which is not amended by the current Bill, also states “Responsibility for the exercise of the named person functions lies with the service provider rather than the named person”. This is likely to be particularly relevant when thinking about the data protection obligations incorporated into the illustrative draft Code of Practice.

http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/cyp-information-sharing-bill-2017
14 We can currently see no conflict between the draft legislation proposed and our own regulatory approaches, notably our Code.

The draft Code of Practice on information sharing

15 The draft Code of Practice is essentially a guide through how the requirements of the Data Protection Act 1998, article 8 of the EU Convention on Human Rights, and the common law of confidentiality would apply to any decision of whether or not to share information. It explains the various approaches to consent, and how the legitimate aim of protecting health or morals could justify the sharing of information without consent.

16 When comparing this with our Code, paragraph 5.4 states that nurses and midwives must “share necessary information with other healthcare professionals and agencies only when the interests of patient safety and public protection override the need for confidentiality.” This section of our Code essentially adopts the same approach of setting out that information could only be shared either with or without consent within the confines of various and appropriate legal safeguards. As such, we can currently see no conflict between the draft Code of Practice proposed and our own regulatory approaches, notably our Code.

Thresholds

17 We note that there is perhaps some discussion to be had over how the lower threshold of “promote, support, or safeguard wellbeing” (which is defined by reference to the indicators of safe, healthy, achieving, nurtured, active, respected, responsible and included) in the Bill might interplay with the Data Protection Act threshold of “necessary to protect the vital interests of the person to whom the information relates” and/or “necessary for the exercise of a [statutory] function”, or “necessary in a democratic society for the protection of health or morals... or prevention of disorder or crime”.

Impact on Fitness to Practise

18 The explicit duty on named persons is only to consider sharing information, in terms which are in essence broadly similar to those in our Code. It is, given the current information available, difficult to see how an allegation that a nurse or midwife didn’t consider sharing information based only on this legislation would be markedly different from current referrals about poor safeguarding or failures to escalate concerns. However, we note that the content of any future draft guidance in relation to named person services or draft directions in relation to named person services could materially affect this.

19 The explicit incorporation of existing information law safeguards into the information sharing powers means that concerns over sharing confidential information, and facing regulatory action as a result, should be significantly lessened.

Our Code and the draft Code

20 The final consideration we have made is to what would happen if there was any conflict between our Code and any future Code of Practice, draft guidance in
relation to named person services or draft directions in relation to named person services. Whereas primary legislation (such as the Children and Young Persons Act) would supersede any requirements in our own series of secondary legislation or supporting standards and guidance, this is less clear if the conflict lay amongst the various Codes and any guidance or directions. All are effectively on an equal regulatory footing. We are therefore unsure how this would sit should there be any conflict between them in the future.