Children and Young People (Information Sharing) (Scotland) Bill – Call for evidence

Introduction

The No to Named Persons (NO2NP) campaign has been opposed to the Scottish Government’s Named Person scheme from the outset, in particular to its extremely broad and intrusive powers to obtain and share private information on children and their families. Our opposition is rooted in both principle and practice: we believe the scheme threatens to undermine the proper role of parents and the privacy of families, and to divert resources that should be focused on child protection. Almost 37,000 people in Scotland have signed our petition opposing the Named Person scheme.

Several of those involved in the NO2NP campaign were also petitioners in the successful legal challenge to the scheme that went to the UK Supreme Court (UKSC) last year.¹ We remain of the view that the Named Person scheme is ill-conceived and that it will sow confusion and create unnecessary bureaucracy. We have ongoing concerns about the statutory duties that Named Persons will have to monitor parenting, and the potential interference in private family life that might arise.

However, for the purposes of this submission our remarks will focus solely on the Children and Young People (Information Sharing) (Scotland) Bill and the Government’s proposed changes to the Named Person scheme following the UKSC’s judgment. Whilst the Government’s enforced climb-down on invasion of privacy is welcome as far as it goes, it is our view that the Bill and its accompanying illustrative Draft Code of Practice do not fully and properly meet the concerns expressed by the UKSC.

As part of engaging constructively with the legislative process, NO2NP would be willing to give oral evidence to the Education and Skills Committee.

Not in accordance with law

The central finding of the UKSC was that the Named Person information sharing provisions were not “in accordance with the law”. The legislation therefore breached the rights of children and families under Article 8 of the European Convention on Human Rights. The ruling from the UKSC constitutes a damning indictment of key aspects of the legislation. It therefore also highlights a serious failure by the Parliament, which clearly failed to properly scrutinise and amend the legislation during its passage in 2013/14.

¹ The Christian Institute and others v The Lord Advocate [2016] UKSC 51
Given the gravity of the problem, statutory guidance is not enough to address this breach of human rights, and so the Scottish Government has had to bring forward amending legislation. The UKSC said: “changes are needed both to improve the accessibility of the legal rules and to provide safeguards so that the proportionality of an interference can be challenged and assessed” (emphasis added).\(^2\)

**It is this ongoing need for safeguards to protect against the dangers of the Named Person scheme to which we draw particular attention.**

The UKSC highlighted the challenge faced by practitioners and others in reading the 2014 Act alongside the Data Protection Act 1998 (DPA) to try to understand the relevant law (“the accessibility of the legal rules”, in the UKSC’s terms). The **Scottish Government’s changes have not resolved this.** It is still unclear how the DPA and the 2014 Act relate to each other. Anybody trying to understand what the law is will have to simultaneously consider the 2014 Act (as amended), the DPA, the Human Rights Act 1998 and the Code of Practice, to say nothing of the new General Data Protection Regulation (GDPR).

This is demanding far too much of busy practitioners, especially the health visitors and teachers who will act as Named Persons. This is a complex area of law. How can practitioners, who are unlikely to have legal qualifications, be expected to negotiate this area with enough certainty to know that they are able to share information when the rules are spread out across at least four pieces of legislation?

The difficulty practitioners will face is demonstrated by the illustrative Code of Practice issued alongside the Bill. Paragraph 19 on page 5, under the heading “Relevant law”, says that the Code of Practice summarises the relevant legal principles, but that “in appropriate cases, it will be necessary to consider the detail of the law”. It then goes on to list data protection law, the common law of confidentiality and human rights law. If a Code of Practice ten pages long can only summarise the relevant legal principles, how much legal knowledge are practitioners going to need to operate safely within the law? How will they avoid decisions which breach the human rights of children and families – the outcome against which the UKSC warns?

On the question of providing safeguards for assessing the proportionality of interference with human rights, the Scottish Government’s solution is to replace the duty to share information with a power to share, and to publish a Code of Practice with which practitioners must comply when exercising their functions. This is a step forward from the impugned 2014 legislation which the Supreme Court declared to be “not law” and said could not come into force. However, the Scottish Government has an opportunity to put proper, clear safeguards on the face of the legislation, and it should do so.

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\(^2\) *Ibid*, para. 107
**Voluntary nature of the Named Person service**

Paragraph 95 of the UKSC judgment expressed concern about parents being led to believe that they had to accept the advice and help etc offered by the Named Person.

It is worth restating that part of the judgment in full:

> Nevertheless, 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.³

The UKSC said it should be made clear that advice from the Named Person is entirely voluntary – something which evidently was not clear in July 2016 when the court handed down its judgment. The court said this could be done in guidance. We note that the Policy Memorandum published alongside the 2017 Bill says:

> "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.”

These statements are clearly a response to paragraph 95 and, again, are welcome in so far as they go. Presumably similar comments are intended to be included in the revised statutory guidance that is to be consulted on at a later stage, though this has not been confirmed.

However, it would be far better – for parents and for practitioners – if these matters were made plain on the face of the legislation itself. This Bill is an opportunity for the Scottish Government to give reassurance to the public who are deeply sceptical, and in many cases hostile, to the entire Named Person scheme. Being able to ‘opt out’ of the scheme, and therefore being sure that personal information is not being shared and actions not taken without the full knowledge and informed consent of parents, is a significant point about which

³ *Ibid*, para. 95
many families are very concerned. If ministers are really committed to their pledge to do more to win over people, unequivocal reassurances on the face of the legislation would be a good start.

We would question whether, in practice, the Named Person provisions will be fully compatible with the European Convention on Human Rights in the absence of a statutory provision about the voluntary nature of the scheme. Guidance is not law, and so it is doubtful that the words about the voluntary nature of the scheme would carry sufficient weight with parents unless it is on the face of the legislation.

In our view, the legislation should include an explicit mechanism by which parents and families can ‘opt out’ of the Named Person scheme. This is what the public wants. If the Named Person is truly a “service”, then no aspect of it should be compulsory. Some parents rejecting the Named Person scheme do not even want a Named Person to be allocated to their child. There should be a process allowing them to register this intention, and it should be respected, particularly with regard to information sharing.

Government training of professionals about their powers under the 2014 Act took place over several years on the basis that the 2014 legislation would come into force as it was. So it is not only the wording of the Act that was impugned and struck down by the UKSC, but also the approach to privacy which it reflected. The Government has so far made no serious efforts to correct the legally inaccurate advice given to Named Persons and other professionals during the period 2013 to 2016. This has created a professional culture of widespread sharing of private information without consent. As a result, a clear opt-out would also serve to remind professionals about the role of consent in data sharing.

Such a mechanism would be entirely in line with what most people would understand by the remarks of the First Minister in March 2016. Asked about this issue by the BBC’s Brian Taylor, she said: “It’s an entitlement not an obligation. If a parent doesn’t want to have anything to do with the Named Person scheme, they don’t have to.”

If a parent is to be genuinely able not to have “anything to do with the Named Person scheme”, they have to be able to opt out of having a Named Person assigned to their child. The legislation should allow for a system that requires a simple request to be made, following which the relevant health or local authority confirms in writing to the parent that nobody will be exercising the information sharing functions, or any other functions of the Named Person, for their child.

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4 Nicola Sturgeon interview with BBC Scotland’s Political Editor Brian Taylor, first broadcast 11 March 2016. See also Scottish Parliament Official Report, 23 March 2016, cols 50-51: “the named person scheme is an entitlement... It is not an obligation... parents are not legally obliged to use the named person service. It is an entitlement rather than an obligation.”
No definition of wellbeing

The UKSC clearly envisaged that the Scottish Government and Parliament would be making more than merely *de minimis* or technical changes to the 2014 Act. The judgment said, at para. 107:

"The reconsideration of the terms of the Act and the RDSG also provides an opportunity to minimise the risk of disproportionate interferences with the article 8 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.” (emphasis added)

The Government must take this opportunity if it is to fully and properly comply with the UKSC ruling, in both wording and spirit.

The key operational threshold of “wellbeing” is the main concept that lies behind the risk of disproportionate interferences with article 8 rights created by the 2014 Act.

It is on the basis of wellbeing that named persons are to exercise their functions, including, crucially, those relating to information sharing. The UKSC observed that the only thing remotely resembling a definition of wellbeing in the 2014 Act is couched in terms of the SHANARRI indicators, some of which, according to the judges, are “notably vague”.

Again, this part of the UKSC ruling is worth quoting:

"Wellbeing” is not defined. The only guidance as to its meaning is provided by section 96(2), which lists eight factors to which regard is to be had when assessing wellbeing. The factors, which are known under the acronym SHANARRI, are that the child or young person is or would be: "safe, healthy, achieving, nurtured, active, respected, responsible, and included”. These factors are not themselves defined, and in some cases are notably vague: for example, that the child or young person is "achieving” and "included”.

The legislation, the policy memorandum and the Code of Practice all fail to address this problem at all. The concept of wellbeing remains too vague for practitioners or families to know where they stand.

The vagueness of the wellbeing threshold at the heart of the Named Person scheme is what makes it so difficult to make proportionate and in accordance with the law. If the Scottish Government lifted the threshold or provided a definition of wellbeing that was not so nebulous, then many of the other issues with the scheme could be resolved.

If the Parliament fails to resolve this issue, there must be a serious risk that individual families will find themselves victims of human rights breaches by professionals left without proper constraints by legislators. There is also, of course, the risk that the new, amended legislation, will again be criticised by the courts.