

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

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

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## Explanatory notes

### Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Children and Young People (Information Sharing) (Scotland) Bill, introduced in the Scottish Parliament on 19 June 2017.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 17–FM);
  - a Policy Memorandum (SP Bill 17–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 17—LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.
5. These Notes are structured as follows:
  - paragraphs 6 to 9 provide a brief overview of the background to why the Bill is needed and of what it does,
  - paragraphs 10 to 28 provide an overview of the other enactments and rules of law which are relevant to information sharing,

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- in order to assist understanding of what the Bill changes, the discussion of section 1 of the Bill contains the following material:
  - paragraphs 29 to 40 provide an explanation of Part 4 of the Children and Young People (Scotland) Act (“the 2014 Act”) as originally enacted,
  - paragraphs 41 and 42 summarise the changes made to that Part by the Bill, and
  - paragraphs 43 to 65 explain the new provisions inserted into Part 4 of the 2014 Act by the Bill in more detail,
- paragraphs 66 to 75 discuss section 2 of the Bill (which deals with Part 5 of the 2014 Act), following the same structure as is used in paragraphs 29 to 65 in relation to Part 4 of that Act.

## The Bill: An overview

6. The Bill is a response to the Supreme Court’s judgment in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51* (in these Notes, “the Christian Institute case”) <sup>1</sup>.

7. In that case, the 2014 Act <sup>2</sup> was subject to challenge as being outside the legislative competence of the Scottish Parliament. The grounds for the challenge were that Part 4 of the 2014 Act (on the provision of named persons) related to reserved matters, that it was incompatible with the European Convention on Human Rights (ECHR) and that it was incompatible with European Union law <sup>3</sup>. The challenge on the first of these grounds did not succeed, but the Supreme Court did allow the challenge in relation to the ECHR. In relation to European Union law, the Court found that there was no incompatibility beyond the incompatibility with the ECHR. Specifically, the Supreme Court found that the information-sharing provisions <sup>4</sup> of Part 4 of the 2014 Act (and guidance issued under that Part)

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<sup>1</sup> A copy of the full judgment and a press summary can be accessed via <https://www.supremecourt.uk/cases/uksc-2015-0216.html>.

<sup>2</sup> Available at <http://www.legislation.gov.uk/asp/2014/8/contents>.

<sup>3</sup> The limits on the legislative competence of the Scottish Parliament are set out in section 29(2) of the Scotland Act 1998 (see <http://www.legislation.gov.uk/ukpga/1998/46/contents>).

<sup>4</sup> The Supreme Court judgment generally refers to sections 23, 26 and 27 of the 2014 Act as the “information-sharing provisions”.

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did not meet the criterion in article 8 of the ECHR of being “in accordance with the law”<sup>5</sup>. This meant that the Scottish Parliament had acted outwith its legislative competence in relation to these provisions and that these provisions were not law.

8. While still contributing to the original aims of the information-sharing provisions of Part 4 of the 2014 by providing a prompt for the sharing of information and a power to do so, the Bill addresses the Supreme Court’s finding by making changes in that Part as follows:

- amending section 23 (communication in relation to movement of children and young people) by removing the existing duty in section 23(2)(b)(ii) for certain information to be shared (and material supplementary to that duty in subsections (3) to (7)). That duty is replaced by a duty to identify information the sharing of which could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the Data Protection Act 1998 and other relevant law. A power to share information if the wellbeing test set out above is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B. The existing duties in section 23(2)(a) and (b)(i) are retained.
- replacing section 26 (information sharing) with a new version of that section. In particular, the duties in sections 26(1) and (3) to share information in certain circumstances are removed. Those duties are replaced by a duty to consider, when new information is acquired, whether the sharing of that information with certain

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<sup>5</sup> The reasons for this are summarised in paragraphs 83 to 85 of the judgment. In brief, the provisions were not in accordance with the law because of “the very serious difficulties in accessing the relevant legal rules” and “the lack of safeguards which would enable the proportionality of an interference with article 8 rights to be examined”. The Court did consider that, but for not being in accordance with the law for these reasons, the 2014 Act would be “capable of being operated in a manner which is compatible with the Convention rights” (paragraph 96 of the judgment). But the Court also expressed concern that the information sharing provisions “may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents” (paragraph 106 of the judgment).

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persons could promote, support or safeguard the wellbeing of the child or young person and a duty to consider whether that information could be shared in compliance with the Data Protection Act 1998 and other relevant law. A power to share information if the wellbeing test set out above is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B.

- repealing section 27 (disclosure of information). This section made additional provision in relation to information shared in breach of a duty of confidentiality, but this provision is no longer necessary as the provisions which permitted the sharing of information in breach of a duty of confidentiality (sections 23(7) and 26(11)) are being removed.
- adding new sections 26A and 26B. Section 26A sets out the limitations that apply in relation to information sharing under Part 4. Section 26B requires the Scottish Ministers to issue a code of practice in relation to information sharing under Part 4. Compliance with the code of practice is mandatory.

9. In addition, within Part 5 of the 2014 Act (which deals with child's plans), the Bill amends section 40 of the 2014 Act and adds new sections 40A and 40B. These changes ensure that the procedures for information sharing under that Part align with those in Part 4.

## Summary of legal context in which 2014 Act operates

10. The disclosure of information about individuals is principally governed by:

- the law relating to data protection, specifically the Data Protection Act 1998<sup>6</sup>,

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<sup>6</sup> The Data Protection Act 1998 is available at <http://www.legislation.gov.uk/ukpga/1998/29/contents>. This Act implemented in the UK Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data). Directive 95/46/EC is available at <http://eur->

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- human rights law, particularly article 8 of the ECHR and the Human Rights Act 1998<sup>7</sup>, and
- the common law of confidentiality.

## Data Protection Act 1998 (“the DPA”)

11. The DPA sets out rules for the processing of personal data (including sensitive personal data). Key definitions in the DPA are as follows:

- “personal data” means data which relate to a living individual who can be identified—
  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual<sup>8</sup>,
- “sensitive personal data” means personal data consisting of information as to—
  - (a) the racial or ethnic origin of the data subject,
  - (b) the data subject’s political opinions,

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[lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&qid=1494868282264&from=EN](http://lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&qid=1494868282264&from=EN). The subject matter of the Data Protection Act 1998 and Directive 95/46/EC is reserved by section B2 of schedule 5 of the Scotland Act 1998. The Directive will be replaced with effect from 25 May 2018 by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>).

<sup>7</sup> The text of the ECHR can be accessed via <http://www.echr.coe.int/pages/home.aspx?p=basictexts> and the Human Rights Act 1998 at <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>8</sup> Section 1(1) of the DPA.

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- (c) the data subject's religious beliefs or other beliefs of a similar nature,
  - (d) whether the data subject is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
  - (e) the data subject's physical or mental health or condition,
  - (f) the data subject's sexual life,
  - (g) the commission or alleged commission by the data subject of any offence, or
  - (h) any proceedings for any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings<sup>9</sup>,
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
    - (a) organisation, adaption or alteration of the information or data,
    - (b) retrieval, consultation or use of the information or data,
    - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
    - (d) alignment, combination, blocking, erasure or destruction of the information or data<sup>10</sup>.

12. Section 1(1) of the DPA also defines various other terms, including “data”, “data subject” and “data controller”. It is expected that much of the information covered by provisions within Parts 4 and 5 of the 2014 Act will be “personal data” and that some of it will be “sensitive personal data”. The “data subject” in relation to such information will often be the child or young person, but may sometimes be another person (or the information may relate to both the child or young person and another person<sup>11</sup>). In

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<sup>9</sup> Section 2 of the DPA.

<sup>10</sup> Section 1(1) of the DPA.

<sup>11</sup> The Guide to Data Protection provides some guidance on what happens in relation to this type of case in some contexts. The Information

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considering how the DPA interacts with the 2014 Act, “data controllers” will be service providers or relevant authorities<sup>12</sup>.

13. The DPA gives data subjects certain rights in relation to their personal data. See, for example, the following sections of the DPA: section 7 (right of access to personal data); section 10 (right to prevent processing likely to cause damage or distress); section 14 (rectification, blocking, erasure and destruction); and section 42 (request for assessment). But section 4 of the DPA also imposes a duty on data controllers to comply with the data protection principles in their handling of personal data.

14. The data protection principles set out in schedule 1 of the DPA are as follows:

- the first principle: personal data shall be processed fairly and lawfully and in particular, shall not be processed unless—
  - (a) at least one of the conditions in schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

The conditions for processing in schedule 2 include (amongst others) that the data subject has given consent to the processing; that the processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract; that the processing is necessary in order to protect the vital interests of the data subject; and that the processing is necessary for the exercise of any functions conferred on any person by or under any enactment. The conditions for processing in schedule 3

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Commissioner’s Office publishes a range of information in relation to data protection, including the Guide to Data Protection and the Data Sharing Code of Practice, all available at <https://ico.org.uk/for-organisations/guidance-index/data-protection-and-privacy-and-electronic-communications/>.

<sup>12</sup> See section 32 (and schedule 2) of the 2014 Act and paragraph 29 below for further explanation of these terms. Note that service providers may include private bodies (for example, the proprietors of independent schools). Although there may be certain differences in the law in relation to the sharing of information by such bodies, the data protection principles apply to all bodies.

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include (amongst others) that the data subject has given explicit consent to the processing of the personal data; and that the processing is necessary for the exercise of any functions conferred on any person by or under any enactment.

The conferral by statute of a power for a data controller to do something in relation to personal data may contribute to the “fairly and lawfully” aspect of the first data protection principle being met. However, conferral of a power may not by itself necessarily be sufficient to ensure that one of the conditions for processing in schedules 2 and 3 of the DPA is satisfied<sup>13</sup>.

Paragraphs 1 to 3 of Part II of schedule 1 of the DPA provide further assistance in relation to the interpretation of the first data protection principle, including material relating to the notification of the data subject about the purposes for which data are intended to be processed.

- the second principle: personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
- the third principle: personal data shall be adequate, relevant and not excessive in relation to the purpose or purpose for which they are processed,
- the fourth principle: personal data shall be accurate and, where necessary, kept up-to-date.
- the fifth principle: personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
- the sixth principle: personal data shall be processed in accordance with the rights of data subjects under this Act.
- the seventh principle: appropriate technical and organisational measures shall be taken against unauthorised or unlawful

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<sup>13</sup> This will depend on the terms in which a power is expressed (see, for a general example of how the terms in which a power or duty is expressed might interact with the conditions for processing in the DPA, the discussion at paragraphs 56 and 57 of the Supreme Court judgment in the *Christian Institute* case).

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processing of personal data and against accidental loss or destruction of, or damage to, personal data.

- the eighth principle: personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

15. Paragraphs 4 to 15 of Part II of schedule 1 of the DPA provide additional material in relation to the interpretation of the second to eighth data protection principles.

16. The duty imposed on data controllers by section 4 of the DPA to comply with the data protection principles is, however, subject to section 27(1) of the DPA. Section 27(1) provides that references to the processing of personal data (for example, in the data protection principles) do not include references to processing which is exempt by virtue of Part IV of the DPA. Section 35(1) of the DPA states that:

“Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.”

17. The “non-disclosure provisions” are defined in section 27(3) of the DPA. They are: the first data protection principle, except to the extent to which it requires compliance with the conditions in schedules 2 and 3 of the DPA; the second, third and fourth data protection principles; and sections 10 (right to prevent processing likely to cause damage or distress) and 14(1) to (3) (rectification, blocking, erasure and destruction). However, section 27(3) also provides that all of these provisions still apply to the extent that compliance with them is consistent with the disclosure in question<sup>14</sup>.

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<sup>14</sup> See paragraph 54 of the Supreme Court judgment in the Christian Institute case for examples of the results this rule produced in relation to certain provisions in Part 4 of the 2014 Act as originally enacted.

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## ECHR and Human Rights Act 1998 (“the HRA”)

18. Public authorities are prohibited by section 6(1) of the HRA from acting in a way that is incompatible with a Convention right<sup>15</sup>. Persons exercising functions under Parts 4 and 5 of the 2014 Act<sup>16</sup> are therefore required to comply with human rights law, including article 8 of the ECHR.

19. Article 8 of the ECHR reads as follows:

- “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”.

20. Article 8(2) permits interferences by public authorities with the exercise of the rights in article 8(1) (such as the disclosure of information of an individual’s personal information by a public authority) in certain circumstances.

21. The first test that needs to be met is that the interference is “in accordance with the law”. The Supreme Court explained this test at paragraphs 79 and 80 of its judgment in the *Christian Institute* case, noting

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<sup>15</sup> Convention rights are defined in section 1 of the HRA, but it is sufficient for current purposes to say that the rights set out in article 8 of the ECHR are included.

<sup>16</sup> In this context, “public authority” includes “any person whose functions include functions of a public nature” (section 6(3)(b) of the HRA). Most of the functions under Parts 4 and 5 of the 2014 Act are conferred on persons or bodies which are clearly public authorities for the purposes of section 6 of the HRA. But functions are also conferred on other persons or bodies – see the definition of “directing authority” in section 32 of the 2014 Act, which includes, for example, the proprietors of independent schools. As the functions conferred on such persons or bodies by Part 4 of the 2014 Act are “functions of a public nature”, such persons or bodies are public authorities for the purposes of section 6 of the HRA (and therefore required to comply with the duty in section 6(1)).

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that to be “in accordance with the law”, a measure “must have some basis in domestic law”, “be accessible to the person concerned” and be “foreseeable as to its effects”<sup>17</sup>. It went on to note that “These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct” and “Secondly, it must be sufficiently precise to give legal protection against arbitrariness”<sup>18</sup>. It then added that “the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined”<sup>19</sup>. The Bill addresses the Supreme Court’s finding that the information sharing provisions in Part 4 of the 2014 Act were not in accordance with the law at the level of the named person scheme as a whole. In terms of individual cases, public authorities are able to satisfy the “in accordance with the law” test by complying with the provisions of a statutory scheme which is itself in accordance with the law.

22. The second test that needs to be met is that the interference is “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. “Necessary” in this context relates to whether the interference is “proportionate, having regard to the legitimate aim pursued”<sup>20</sup>. The Supreme Court set out the standard four questions that it addresses in relation to questions of proportionality in paragraph 90 of its judgment in the Christian Institute case:

- whether the objective is sufficiently important to justify the limitation of a protected right,
- whether the measure is rationally connected to the objective,
- whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

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<sup>17</sup> Paragraph 79 of the Supreme Court judgment in the Christian Institute case.

<sup>18</sup> Paragraph 79 of the Supreme Court judgment in the Christian Institute case.

<sup>19</sup> Paragraph 80 of the Supreme Court judgment in the Christian Institute case.

<sup>20</sup> Paragraph 86 of the Supreme Court judgment in the Christian Institute case.

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- whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (i.e. whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure).

23. The Christian Institute case was concerned with whether the Scottish Parliament had acted outwith its legislative competence in enacting Part 4 of the 2014 Act. However, these are also the tests that would be used in any proceedings where the question was whether a public authority had acted in breach of section 6(1) of the HRA – and are therefore the tests that public authorities need to apply in determining whether sharing of information is permissible in individual cases.

24. If an individual consents to their personal information being shared under Part 4 of the 2014 Act, a public authority will not be acting in breach of article 8 of the ECHR or section 6(1) of the HRA to the extent that it discloses information in accordance with the consent given.

## Common law of confidentiality

25. Information about individuals may be subject to a common law duty of confidentiality. If such a duty is (or is about to be) breached, a remedy may be sought through the courts (for example, by claiming damages or by requesting an interim interdict to prevent a breach).

26. Broadly speaking, the law of confidence protects information where:

- the information has the necessary “quality of confidence” (that is, the information is not in the public domain or readily available from another source, and has a degree of sensitivity or value), and
- the information was communicated in circumstances giving rise to an obligation of confidence. This may be express or implied from the circumstances (for example, the nature of a particular relationship, such as between doctor and patient).

27. An individual may consent to the person who owes the duty of confidence disclosing confidential information about the individual to another person. But even in the absence of consent to disclosure, confidentiality is not an absolute right. Confidential information may be

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disclosed by the person who owes the duty of confidence where they are legally required to do so (for example, by statute or a court order). In addition, disclosure of confidential information can be justified by a countervailing public interest (such as where disclosure is necessary for the prevention or detection of crime).

28. The law of confidence has been influenced in recent years by article 8 of the ECHR, such that where the disclosure of confidential information would constitute an interference in the right to respect for an individual's private and family life, home and correspondence, the disclosure must now be in accordance with the law and necessary in a democratic society (as explained in paragraphs 21 and 22 above) in order for it to be in the public interest in terms of the common law of confidentiality<sup>21</sup>. Similarly, where a disclosure of confidential information is required by statute, that will justify the breach of the obligation of confidence in terms of the common law, but the disclosure will still require to comply with the DPA<sup>22</sup> and HRA (assuming the HRA applies in relation to the person disclosing the information).

## The Bill: Section by section

### Section 1: Provision of information by and to named person service provider

#### Overview of Part 4 of 2014 Act as originally enacted

29. Part 4 requires that a person with the functions mentioned in section 19(5) (a "named person") be made available in relation to every child and young person<sup>23</sup>. Responsibility for making such a person available lies with

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<sup>21</sup> Although not focused on Scots law, the discussion in paragraphs 3.65 to 3.100 of the Law Commission's consultation paper in its "[Data sharing between public bodies](#)" project provides a useful general overview of recent developments in this area of law.

<sup>22</sup> Although where the confidential information is "personal data" in terms of the DPA, the existence of a statutory duty may mean that a schedule 2 condition for processing is satisfied (see paragraph 3 of that schedule). Note that there is no equivalent condition in schedule 3 of the DPA, which deals with the conditions for processing "sensitive personal data"..

<sup>23</sup> Section 97(1) of the 2014 Act defines "child" as a person who has not attained the age of 18 years. The duty under section 19(5)(a) of that Act to

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health boards in relation to pre-school children and local authorities for most other children and young people<sup>24</sup>. These bodies, when referred to generally, are referred to in Part 4 as “service providers”. The 2014 Act uses the term “service provider in relation to a child or young person” to refer to the person or body with responsibility for making a named person available to a particular child or young person. In these Notes the term “named person service provider” is (where “service provider” alone does not suffice) used to refer to such a person or body. Part 4 also refers to certain other public authorities as “relevant authorities”<sup>25</sup>.

30. Part 4 does not place any obligations on children, young people or their parents<sup>26</sup> in relation to engaging with individual named persons, service providers or relevant authorities.

31. The functions of each individual named person (“the named person functions”) under Part 4 are “doing such of the following where the named person considers it to be appropriate in order to promote, support or safeguard the wellbeing of the child or young person—

- (i) advising, informing or supporting the child or young person, or a parent of the child or young person,

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make available a named person for a person aged 18 or over (“a young person”) only extends to a person who attained the age of 18 years while a pupil at a school and has, since that time, remained a pupil in a school (section 22 of the 2014 Act). A named person also does not need to be made available in respect of a child who is a member of any of the regular forces (section 21(4)).

<sup>24</sup> The cases where a local authority is not responsible for making a named person available to children who are not pre-school children and young people are set out in section 21 of the 2014 Act. For example, where a child is a pupil at an independent school, the proprietor of that school is responsible for making a named person available to the child. And, where a child is in legal custody, the Scottish Ministers are responsible.

<sup>25</sup> The “relevant authorities” are listed in schedule 2 of the 2014 Act.

<sup>26</sup> Section 32 of the 2014 Act provides that in Part 4, “parent” has the same meaning as in the Education (Scotland) Act 1980. Section 135(1) of that Act defines “parent” as follows: ““parent” includes guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of a child or young person”.

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- (ii) helping the child or young person, or a parent of the child or young person, to access a service or support, or
- (iii) discussing, or raising a matter about the child or young person with a service provider or relevant authority<sup>27</sup>.

32. The factors to be taken into account in considering whether one of these actions would promote, support or safeguard the wellbeing of the child or young person are set out in section 96 of the 2014 Act. These factors are known as the “SHANARRI” indicators – that is, the extent to which a child or young person is safe, healthy, achieving, nurtured, active, respected, responsible and included.

33. Sections 23 to 26 confer additional functions on service providers (and, to a lesser extent, relevant authorities) rather than on the individual named person. These functions are as follows:

- section 23: where a service provider ceases to be responsible for making a named person available in relation to a particular child (for example because the child has started school or moved to a different local authority area), the service provider is required to notify the body that it thinks will take over that responsibility. The service provider must also transfer certain other information to the new service provider.
- section 24: each service provider is required to publish certain general information about the operation of its named person service. In addition, each named person service provider must provide each child, and the child’s parents, with information about how they may contact the child’s named person.
- section 25: a named person service provider may request other service providers or relevant authorities for help in the exercise of the named person functions. The other service provider or relevant authority must, subject to certain restrictions<sup>28</sup>, provide such help.
- section 26: service providers and relevant authorities are required to share certain information about children with other service providers and relevant authorities in certain circumstances and subject to certain limitations and named person service providers

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<sup>27</sup> Section 19(5)(a) of the 2014 Act.

<sup>28</sup> See section 24(3) of the 2014 Act.

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are also permitted to share information in certain other circumstances.

34. As can be seen, sections 23 and 26 allow or require information about a particular child to be shared between service providers and relevant authorities. There is also no prohibition on the help requested under section 25 taking the form of the provision of information about a particular child. Section 24, however, does not involve any sharing of information about particular children between service providers and relevant authorities.

35. Section 27 provides for a duty of confidentiality to transfer in certain circumstances to the recipient of information shared under Part 4 in breach of a duty of confidentiality. Sections 28 and 29 deal with the issue of guidance and the giving of directions by Scottish Ministers in relation to Part 4. Section 30 allows detailed provision about the handling of complaints in relation to the exercise of functions under Part 4 (including information sharing) to be made in regulations.

Sections 23, 26 and 27 of 2014 Act as originally enacted in more detail

36. Sections 23 and 26 as originally enacted contain the following specific duties to share information:

- a duty on a service provider which has ceased to be responsible for making a named person available to a particular child or young person (“the outgoing service provider”) to notify the service provider which will assume this responsibility (“the incoming service provider”) of that fact (section 23(2)(a)),
- a duty on the outgoing service provider to provide the incoming service provider with the name and address of the child or young person and of each parent of the child or young person (so far as the outgoing service provider has that information) (section 23(2)(b)(i)),
- a duty on the outgoing service provider to provide the incoming service provider with certain other information in relation to the child or young person (section 23(2)(b)(ii)),
- a duty on a service provider or relevant authority to provide certain information to the named person service provider (sections 26(1) and (2)), and

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- a duty on the named person service provider to provide certain information to a service provider or relevant authority (sections 26(3) and (4)).

37. Sections 26(8) (read with section 26(9)) also confers a power for the named person service provider to provide information to a service provider or relevant authority if the named person service provider considers that the provision is necessary or expedient for the purposes of the exercise of any of the named person functions.

38. The actions under section 23 require to be undertaken as soon as reasonably practicable after the outgoing service provider becomes aware that it is no longer responsible for making a named person available to a particular child or young person. The duties (and power) in section 26, however, are ongoing rather than tied to the occurrence of any particular event.

39. The tests for what information falls to be provided under section 23(2)(b)(ii), section 26(1) and section 26(3) are broadly the same. These are:

- that the information is likely to be relevant:
  - in the case of the duty in section 23(2)(b)(ii), to the exercise by the incoming service provider of its functions as a named person service provider or to the future exercise of the named person functions in relation to the child or young person,
  - in the case of the duty in section 26(1), to the exercise of the named person functions in relation to the child or young person,
  - in the case of the duty in section 26(3), to the exercise by the service provider or relevant authority of any function with an effect or potential effect on the wellbeing of the child or young person,
- that the information ought to be provided for whichever of the purposes mentioned above applies, and
- that the provision of the information would not prejudice the conduct of a criminal investigation or the prosecution of any offence.

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40. A number of other provisions are common to sections 23 and 26:

- in considering whether information ought to be provided under section 23(2)(b)(ii), section 26(1) or section 26(3), the information holder is, so far as reasonably practicable, to ascertain and have regard to the views of the child (taking account of the child's age and maturity) or young person,
- the information holder is only permitted to conclude that information ought to be provided under section 23(2)(b)(ii), section 26(1) or section 26(3) if the likely benefit to the wellbeing of the child or young person arising from the provision of the information outweighs any adverse effect on that wellbeing from that provision,
- none of the duties in sections 23 and 26, nor the power in section 26(8), permit or require the provision of information in breach of a prohibition or restriction on the disclosure of information arising by virtue of an enactment or rule of law – except that this restriction does not apply in relation to duties of confidentiality (the effect being that information could be provided under section 23 or 26 in breach of a duty of confidentiality) (see sections 23(7) and 26(11)), and
- section 27 provides that where information was provided in breach of a duty of confidentiality as permitted by sections 23(7) and 26(11), and the information recipient was advised of the breach, the recipient is only able to provide the information to a third person if this is permitted or required by any enactment or rule of law.

## What the Bill changes

41. In summary, section 1 of the Bill:

- does not change the duties imposed on outgoing service providers by sections 23(2)(a) and (2)(b)(i)<sup>29</sup>,
- removes the duty imposed on outgoing service providers by section 23(2)(b)(ii) (section 1(2)(a) of the Bill) and creates new duties and a new power for outgoing service providers in relation

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<sup>29</sup> Although provision of information under these duties is no longer governed by section 23(7), which is removed, but by new sections 26A and 26B.

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to the provision of information (new subsections (3) and (4) of section 23, inserted by section 1(2)(b) of the Bill),

- removes the duties imposed by sections 26(1) and (3) and the power conferred by section 26(8) and creates new duties and powers for named person service providers, service providers and relevant authorities in relation to the provision of information (see the replacement section 26 inserted by section 1(3) of the Bill),
- removes the material supplementing the duties imposed by sections 23(2)(b)(ii), section 26(1) and section 26(3) and the power conferred by section 26(8) (described in paragraphs 39 and 40 above). Removal of this material is effected by the replacement of subsections (3) to (7) of section 23 by section 1(2)(b) of the Bill, the replacement of section 26 by section 1(3) of the Bill, and the repeal of section 27 by section 1(5) of the Bill,
- inserts new sections 26A and 26B, both of which make additional provision in relation to information sharing under Part 4 of the 2014 Act (section 1(4) of the Bill).

42. The effect of these changes is that service providers and relevant authorities will no longer be required by sections 23 and 26 to share information (except to the extent provided for in sections 23(2)(a) and (b)(i)). The precise nature of the new powers and duties created and the restrictions and safeguards that will apply in relation to the exercise of these functions is discussed in more detail below.

## Explanation of new provisions

### Sections 23 and 26: duty to identify, or consider effect of providing, certain information

43. Under paragraph (a) of section 23(3), the outgoing service provider is under a duty to identify (from all of the information that it holds in relation to the child or young person in its capacity as the named person service provider<sup>30</sup>) information the provision of which to the incoming service provider could, in the opinion of the outgoing service provider, promote, support or safeguard the wellbeing of the child or young person.

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<sup>30</sup> Other than the information referred to in sections 23(2)(a) and (b)(i).

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44. Under paragraph (a) of each of sections 26(1) and (2), there is a duty to consider whether the provision of information to a specified person could, in the opinion of the service provider or relevant authority which holds the information, promote, support or safeguard the wellbeing of the child or young person.

45. The person who holds the information which is being considered (and who has to comply with the duty under section 26(1) or (2)) is:

- in the case of section 26(1), the named person service provider. Their consideration will relate to whether provision of the information to another service provider or to a relevant authority could promote, support or safeguard the wellbeing of the child or young person,
- in the case of section 26(2), a service provider (other than the named person service provider in relation to the particular child or young person) or a relevant authority. Their consideration will relate to whether provision of the information to the named person service provider in relation to the particular child or young person could promote, support or safeguard the wellbeing of the child or young person.

46. Section 96 of the 2014 Act applies in relation to the assessment under sections 23(3) and 26(1) and (2) of whether the wellbeing of the child or young person could be promoted, supported or safeguarded.

47. In the case of section 23, the outgoing service provider is obliged to comply with its duty to identify information as soon as reasonably practicable after it ceases to be responsible for the provision of a named person in relation to a particular child or young person. In the case of section 26, the duty to consider whether provision of information could promote, support or safeguard the wellbeing of the child or young person arises on the acquisition of new information relating to the child or young person by the named person service provider, other service provider or relevant authority (although a period of time following acquisition within which the duty must be carried out is not specified). Information could be acquired for the purposes of section 26 in various ways (for example, in the case of information acquired by the named person service provider, this might be by way of the child or young person telling their named person something, by another person providing information to the named person,

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or by the named person observing something about the child or young person (such as that they have started arriving at school late)).

48. Consideration under sections 26(1)(a) and (2)(a) extends not just to whether provision of the newly acquired information to the specified person could promote, support or safeguard the wellbeing of the child or young person, but also to whether provision of this information together with other information could have this effect. So, for example, it might be that neither the newly acquired information nor a piece of already held information, if provided by themselves, would be capable of promoting, supporting or safeguarding the wellbeing of the child or young person, but that provision of both pieces of information could have this effect.

49. Note, in relation to the identification of information from amongst other information under section 23(3)(a) or the consideration of already held information under section 26(1)(a) or (2)(a), that it will have been necessary (in so far as the information is personal data) for that information to have been held by the service provider or relevant authority in accordance with the data protection principles. The data protection principles also apply when new information which is personal data is first obtained.

50. Where no information is considered to meet the test set out section 23(3)(a), 26(1)(a) or 26(2)(a), nothing further need be done under that section.

### Sections 23 and 26: duty to consider whether information can be provided in accordance with relevant law

51. Where information is considered to meet the test set out in section 23(3)(a), 26(1)(a) or 26(2)(a), however, the service provider or relevant authority is obliged to comply with section 23(3)(b), 26(1)(b) or, as the case may be, 26(2)(b). This requires consideration of whether the information which meets the test in section 23(3)(a), 26(1)(a) or 26(2)(a) could be provided, to the person specified in each case, in compliance with the DPA, any directly applicable EU instrument relating to data protection, any other enactment and any rule of law (see paragraphs 10 to 28 above for discussion of the relevant areas of law). The code of practice issued under section 26B will provide service providers and relevant authorities with information relevant to this consideration.

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52. If a service provider or relevant authority concludes, following consideration under section 23(3)(b), 26(1)(b) or 26(2)(b) that the information cannot at that point be provided in compliance with the DPA and other relevant law, the service provider or relevant authority is not obliged to do anything further under section 23 or, as the case may be, 26. In a case where it has been identified that the taking of certain steps (for example, seeking the consent of the data subject to the provision of the information) could change this conclusion, there is nothing to stop a service provider or relevant authority taking those steps.

### Sections 23 and 26: power to provide information

53. Sections 23(4) and 26(3) confer power to provide information in certain circumstances. Specifically:

- the outgoing service provider has power under section 23(4) to provide information to the incoming service provider, but only where the provision of that information could, in the opinion of the outgoing service provider, promote, support or safeguard the wellbeing of the child or young person,
- the named person service provider has power under section 26(3)(a) to provide information to another service provider or relevant authority, but only where the provision of that information could, in the opinion of the named person service provider, promote, support or safeguard the wellbeing of the child or young person, and
- a service provider (other than the named person service provider for the child or young person) or relevant authority has power under section 26(3)(b) to provide information to the named person service provider for the child or young person, but only where the provision of that information could, in the opinion of the service provider or relevant authority, promote, support or safeguard the wellbeing of the child or young person.

54. It will be noted that this test is similar to that set out in sections 23(3)(a), 26(1)(a) and 26(2)(a), but also that these powers to share information do not depend directly on the outcome of the consideration of the matter mentioned in sections 23(3)(b), 26(1)(b) and 26(2)(b). There are

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two points to mention in this connection<sup>31</sup>: the first is that these powers are all subject to new section 26A. This section is discussed further below, but in brief its effect is that (whatever the outcome of consideration under section 23(3)(b), 26(1)(b) and 26(2)(b)) these powers can in fact only be lawfully exercised in a way that complies with the DPA, any directly applicable EU instrument relating to data protection, any other enactment and any rule of law. The second is that, as noted above, the outcome of consideration under sections 23(3)(b), 26(1)(b) and 26(2)(b) may in some cases be the identification of steps that could be taken that would enable the information to ultimately be provided in compliance with the DPA and other relevant law – that is, the situation in relation to whether the DPA and other relevant law is being complied with is not fixed. The need is to ensure that the DPA and other relevant law is complied with at the point of the information being provided, not any earlier point.

55. More information on matters such as whether notification needs to be given to children and young people (and their parents) in order to ensure that, if information is provided under section 23(4) or 26(3), it is done in compliance with the DPA and other relevant law could be provided in the code of practice to be issued under section 26B. But even where power to provide information exists and is exercisable in compliance with the DPA and other relevant law, there is no obligation to share information under section 23 or 26: a decision to actually share information under these sections will always depend on professional judgment.

### Section 26A: limitations on provision of information

56. Section 26A places two restrictions on the provision of information under Part 4 of the 2014 Act. The reference to Part 4 means that these restrictions apply in relation to the provision of information in, or in response to, a request for help under section 25, as well as in relation to the provision of information under sections 23(2)(a), (b)(i) or (4) and 26(3).

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<sup>31</sup> And a further, more technical point is that an information holder needs to know that they have a power to share the information when considering whether the information could be shared in compliance with the DPA and other relevant law. If the information holder did not have power to share the information at that point, they would be bound to conclude, by virtue of the requirement in the first data protection principle requirement that processing be lawful, that they could not share the information in compliance with the DPA.

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57. The first restriction is that information may not be provided if its provision would be in breach of any prohibition or restriction on the disclosure of information arising by virtue of:

- the DPA,
- any directly applicable EU instrument in relation to data protection,
- any other enactment, or
- any rule of law.

58. The data protection principles constitute restrictions and, depending on the circumstances, prohibitions, on the disclosure of information. This means that, where information which is “personal data” or “sensitive personal data” is provided under Part 4, it will be necessary to comply with the data protection principles (to the extent that they apply, remembering that they may apply differently where a duty to disclose information exists – as is the case in section 23(2)(b)(i), for example). It will, however, be necessary, in all cases in which the information concerned is “personal data”, for one of the conditions for processing set out in schedule 2 of the DPA to be satisfied. If the information is “sensitive personal data”, one of the conditions for processing in schedule 3 of that Act will also need to be satisfied. The condition for processing which is satisfied is likely to vary according to the circumstances of particular cases. If, in a particular case, no condition for processing is satisfied, it will not be possible for the powers in sections 23(4) and 26(3) to be exercised.

59. The reference to any directly applicable EU instrument in relation to data protection includes reference to the General Data Protection Regulation (see footnote 6).

60. The prohibition on public authorities acting in a way which is incompatible with a Convention right contained in section 6(1) of the HRA also amounts to a prohibition or restriction on the disclosure of information, given that the sharing of information about an individual between service providers and relevant authorities may well constitute an interference in the individual’s article 8 rights<sup>32</sup>. In order to ensure that they are acting in compliance with section 26A, therefore, service providers and relevant authorities must satisfy themselves that any proposed provision of

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<sup>32</sup> Paragraph 78 of the Supreme Court judgement in the Christian Institute case.

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information under Part 4 is proportionate. Paragraph 22 above discusses in general terms the tests that must be considered in this respect. The code of practice under section 26B could provide assistance in considering whether these tests are met in individual cases.

61. Finally, nothing in Part 4 as amended by the Bill overrides the common law of confidentiality. Where information proposed to be shared under Part 4 is subject to a duty of confidentiality, disclosure will be permitted only if it is permitted by the law of confidentiality (as well as by other relevant statute and common law, such as the DPA and the HRA).

62. The second restriction imposed by section 26A is that information may not be provided under Part 4 if the service provider or relevant authority in possession of the information considers that its provision would prejudice the conduct of a criminal investigation or the prosecution of any offence.

### Section 26B: code of practice in relation to provision of information

63. Subsection (1) of section 26B imposes an obligation on the Scottish Ministers to issue a code of practice about the provision of information under Part 4. The code must cover the issue of safeguards that apply to the provision of information under Part 4 (subsection (2)). Examples of the type of issue that the Scottish Ministers may choose to cover in the code are provided at paragraphs 55 and 60 above. Subsection (1) also permits the issue of revised codes of practice as the Scottish Ministers consider appropriate<sup>33</sup>.

64. Subsection (3) makes the code of practice mandatory – service providers and relevant authorities must act in accordance with the code (or any revised code) when exercising functions under Part 4.

65. Subsections (4) to (9) set out the procedures in connection with consultation and consideration by the Scottish Parliament that require to be followed before the first, or any subsequent, code of practice are issued.

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<sup>33</sup> Section 7(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 states that statutory duties may be performed from time to time.

## Section 2: Provision of information in relation to child's plans

### Overview of Part 5 of 2014 Act as originally enacted

66. A child's plan is a plan to address an identified wellbeing need. Under section 33(2) of the 2014 Act, a child has a wellbeing need if the child's wellbeing is being, or is at risk of being, adversely affected by any matter. The SHANARRI indicators, as set out in section 96 of the 2014 Act, will be used to determine whether such an adverse effect (or potential adverse effect) exists. But the existence of a wellbeing need is not sufficient to trigger a requirement for a child's plan – it must also be the case that the need is not capable of being addressed through services which are provided generally to children by a "relevant authority" but is capable of being met through a service which is otherwise provided by the authority. The provision of such a service under a child's plan is referred to in Part 5 as a "targeted intervention".

67. "Relevant authority" in Part 5 generally means a health board or local authority (but may sometimes refer to the managers of a grant-aided school or the proprietor of an independent school). So targeted interventions are usually services provided by, or under arrangements made by, health boards or local authorities. Health boards and local authorities are also "responsible authorities" under Part 5 – generally, the health board for the area in which a pre-school child lives is the responsible authority for such a child; when the child starts school, the local authority for the area in which the child lives becomes the responsible authority<sup>34</sup>. It is the responsible authority which needs to consider that a wellbeing need exists in order for a child's plan to be required under section 33 of the 2014 Act. The responsible authority is also tasked with preparing and managing the child's plan (unless an agreement is made for a different authority to take on these functions). Depending on the type of targeted intervention involved, the relevant authority (which is responsible for delivery of the targeted intervention) may be the same health board or local authority which is the responsible authority; but it may equally be a different body. A

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<sup>34</sup> Section 37 of the 2014 Act sets out the cases where these general rules as to which person or body is the responsible authority do not apply (for example, where a child is a pupil at an independent school, the proprietor of that school is the responsible authority).

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targeted intervention may be included in a child's plan only if the relevant authority which is to deliver it agrees.

68. The fact that a child has a wellbeing need might come to the attention of the responsible authority in a variety of ways. The exercise of the named person functions or the sharing of information under Part 4 may contribute to the identification of the wellbeing need in some cases, but there will also be cases where the named person is not involved in this process. The child's named person must, however, be consulted in relation to certain matters to do with a child's plan<sup>35</sup> – but only if the named person is not an employee of the authority making the decision or preparing or reviewing the child's plan<sup>36</sup>.

69. Part 5 also includes a duty on relevant authorities (and certain other public authorities, referred to as “listed authorities”<sup>37</sup>) to comply with any reasonable request made of the person to provide a person exercising functions under Part 5 with information, advice or assistance for that purpose (section 40(1)). This duty is generally qualified by section 40(3), with the effect that such a request does not have to be complied with if the person to which the request is made thinks that doing the thing requested would be incompatible with any other duty of the person or unduly prejudice the exercise of any function of the person. Sections 40(4) to (6) make additional provision specifically in relation to cases where the request is for the provision of information.

70. Section 40(4) makes provision equivalent to that originally made in Part 4 by sections 23(7) and 26(11). The effect of this is that, in complying with a request to provide information under section 40(1), a person must also comply with prohibitions and restrictions on the disclosure of information arising by virtue of any enactment (for example, the DPA) or

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<sup>35</sup> Specifically, the child's named person must be consulted when a responsible authority is deciding whether a child requires a child's plan (section 33(6)(a)), when a child's plan is being prepared (section 35(6)(a)) and when a child's plan is being reviewed (section 39(2)(a)(iii)).

<sup>36</sup> In practice, the child's named person may also be consulted where they are an employee of the authority making the decision or preparing or reviewing the plan, but a statutory duty to do this would amount to requiring an authority to consult itself.

<sup>37</sup> Listed authorities for the purposes of Part 5 are set out in schedule 3 of the 2014 Act.

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any rule of law. (Note that if a relevant authority or a listed authority is required to comply with a request for the provision of information, then the authority effectively has a duty to provide information. As explained at paragraphs 16 and 17 above, the DPA applies somewhat differently when a duty to provide information exists.) The reference in section 40(4) to rules of law would include the common law of confidentiality but for the opening words of section 40(4), the effect of which is that compliance with the duty under section 40(1) is not restricted by the law of confidentiality. Flowing from this, section 40(5) and (6) make provision equivalent to that originally made in Part 4 by section 27. That is, where a person, in complying with a request for information under section 40(1), breaches a duty of confidentiality and in doing so informs the recipient of the information of the breach of this duty, the recipient must not pass the information on to any third party unless permitted or required to do so by enactment of rule of law.

71. Part 5 also contains a number of other provisions where a degree of information sharing is implied. For example, as noted above, a targeted intervention can only be included in a child's plan if the relevant authority which is to provide it agrees (section 34(2)). The relevant authority in a particular case may not be the same authority as the responsible authority preparing the child's plan. In such a case, the responsible authority would need to provide information to the relevant authority in order for the relevant authority to decide whether to provide the targeted intervention.

### Changes made by the Bill

72. The Bill amends Part 5 by:

- removing subsections (4) to (6) of section 40 (corresponding to the removal of sections 23(7), 26(11) and 27 from Part 4 by sections 1(2), (3) and (5) of the Bill), and
- inserts new sections 40A and 40B into Part 5 (corresponding respectively to new sections 26A and 26B inserted into Part 4 by section 1(4) of the Bill).

73. In section 40, subsection (4) is no longer required, the provision it made being replaced by the limitations on the disclosure of information under Part 5 as a whole set out in new section 40A. Subsections (5) and (6) are also no longer required as one of the effects of the new limitations on disclosure of information set out in new section 40A is that the common

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law of confidentiality will apply in full to disclosures of information under section 40(1).

## Explanation of new provisions

### Section 40A: limitations on provision of information

74. Section 40A places two restrictions on the provision of information under Part 5 – one in relation to compliance with all relevant law (such as the DPA, any directly applicable EU instrument relating to data protection, the HRA and the law of confidentiality), the other in relation to information which could prejudice the conduct of a criminal investigation or the prosecution of any offence. It applies to the provision of information in the exercise of all functions conferred by (or under) Part 5, not just disclosure under section 40. Its effect in relation to the provision of information under Part 5 is exactly the same as the effect of section 26A in relation to the provision of information under Part 4. An explanation of this effect is provided in paragraphs 56 to 62 above.

### Section 40B: code of practice in relation to provision of information

75. Section 40B(1) requires the Scottish Ministers to issue a code of practice about the provision of information by persons exercising functions conferred by (or under) Part 5, while section 40B(2) requires such persons to exercise those functions in compliance with the code of practice. Section 40B is almost identical to section 26B. The sole difference between sections 40B and 26B (other than that section 40B relates to Part 5 and section 26B to Part 4, and the reference to functions conferred under Part 5) is that sections 40B(1) and (2) do not contain any reference to consideration of the provision of information. This is because Part 5 does not impose specific duties to consider the provision of information. In all other respects, the information provided at paragraphs 63 to 65 also applies to section 40B.

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## Explanatory Notes

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