OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 20 September 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 20 September 2017

CONTENTS

Col.
CHILDREN AND YOUNG PEOPLE (INFORMATION SHARING) (SCOTLAND) BILL: STAGE 1 1

EDUCATION AND SKILLS COMMITTEE
23rd Meeting 2017, Session 5

CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

DEPUTY CONVENER

*Johann Lamont (Glasgow) (Lab)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Ross Greer (West Scotland) (Green)
*Clare Haughey (Rutherglen) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Ruth Maguire (Cunninghame South) (SNP)
*Gillian Martin (Aberdeenshire East) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Tavish Scott (Shetland Islands) (LD)
*Liz Smith (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jean Cowie
Lorna Greene (Royal College of Nursing Scotland)
Annette Holliday
Professor Alison McCallum (NHS Lothian)
Kenny Meechan (Law Society of Scotland)
Janys Scott QC (Faculty of Advocates)
Valerie White
Professor Hugo van Woerden

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 20 September 2017

[The Convener opened the meeting at 09:45]

Children and Young People (Information Sharing) (Scotland) Bill: Stage 1

The Convener (James Dornan): Good morning and welcome to the 23rd meeting of the Education and Skills Committee in 2017. I remind everyone present to turn their mobile phones and other devices to silent for the duration of the meeting.

This is the second meeting at which we will consider the Children and Young People (Information Sharing) (Scotland) Bill. Two weeks ago we heard from Scottish Government officials. This morning we have two panels: the first is made up of representatives of the legal profession, and the second of people from the health service.

I welcome Kenny Meechan, who is a member of the privacy law sub-committee at the Law Society of Scotland, and Janys Scott, Queen's counsel, from the Faculty of Advocates.

Liz Smith (Mid Scotland and Fife) (Con): I will ask Janys Scott the first question. In your submission, you rightly say that the Supreme Court identified two key issues with the bill. Your submission states:

> "The first was that there was a serious lack of clarity for those implementing the legislation and the second was the lack of safeguards for those affected."

Your submission then says that

> "Neither of these issues is easy to resolve and some of the criticisms of the Supreme Court will continue to apply if the Bill as drafted is passed and the accompanying Code of Practice is approved."

Could you be very specific about what you think those criticisms by the Supreme Court are, and why they will not be addressed?

Janys Scott QC (Faculty of Advocates): I will start with the criticism, which was that the bill solves one problem only to raise another. The Supreme Court said that when previous legislation required the sharing of data, and compliance with the Data Protection Act 1998 was required at the same time, that imposed a circular consideration on health visitors, teachers and others who were required to abide by the legislation. If a person is required by law to do something, they are not in breach of the 1998 act, but the act exempts them only if they are required to do something by law. There is a circular problem.

The bill proposes a shift so that there is no longer a requirement to share information, but a power to share information. That would remove the difficulty of circularity, but the Supreme Court has said that because the requirement to share information gives people protection under section 35 of the 1998 act, if they are no longer required to share information, that protection will be removed. The responsibility for safeguarding people's data would be shifted, in effect, on to the information holder. That would require health visitors and teachers—laypeople—to implement complex law on data protection, and it is very fast-moving law. If you look at the responses to the consultation exercise, you will see that those people are puzzled and do not know what to do. They are asking you to define terms for them. It is going to be difficult for them.

I can go on to what the problem is with defining terms, if you like.

Liz Smith: I will come to that in a minute. To be clear, are you saying that the responsibility for taking the decision would be shifted on to the named person—the practitioner—instead of resting in law, or with Parliament because it has scrutinised that law? Is that what you consider to be the problem?

Janys Scott: That is part of the problem. It is not just named persons; other service providers must consider whether to pass data on to the named person. Laypeople who are involved in the care of children in other respects will be asked to exercise some very complex functions. The issue that the Supreme Court raises is whether the bill is clear enough to allow them to know what they are doing, and to allow families to foresee what will happen when they share data with their dentist, doctor, health visitor or teacher. Would they know what was going to happen, and could they regulate their behaviour accordingly, if they felt the need?

Liz Smith: Thank you. That is very helpful.

I come to the substantive issue, which I believe has been quite a problem since the Children and Young People (Scotland) Act 2014 was passed, and is a very considerable issue at the present time: the lack of a definition of the term "wellbeing". That is raised in quite a number of the submissions. I am interested in the Law Society of Scotland's perspective on it, as well. Two weeks ago, we were given information from the bill team, who said that the term "wellbeing"

> "has been well utilised and understood among practitioners, families and children".—[*Official Report, Education and Skills Committee*, 6 September 2017; c 12.]

Do you share that view?

Janys Scott: No. The Supreme Court said that it is a very vague concept; it is not "wellbeing" in the general sense that is used in legislation in which there is a statutory definition. There is a statutory definition later in the legislation, which is based on the SHANARRI—safe, healthy, achieving, nurtured, active, respected, responsible and included—concepts, and it is a very low threshold for legal intervention. I would say that it cannot be easily understood. That is my impression, as a lawyer; if other practitioners have a different view, so be it. From a data protection perspective, it is a much lower threshold than is appropriate for processing people's data. Kenny Meechan is better placed to speak to that, because he is involved in local authority work on it.

Liz Smith: The concept of "wellbeing" is absolutely crucial. Paragraph 16 of the Supreme Court's judgment very clearly says, "'Wellbeing' is not defined." It makes the point that the SHANARRI indicators that have been used are far too vague—they can be misinterpreted or interpreted in different ways. There is a fundamental issue about a practitioner having to decide and, in this case, about when they make the decision, whether to share information. In your mind, does that fundamental problem of the lack of a definition of "wellbeing" remain a central problem in the bill?

Janys Scott: Yes, indeed. What we have to bear in mind is that the test for sharing data is higher than that. Therefore practitioners are considering wellbeing and asking, on the one hand, "Am I required to consider whether I need to pass on data?" and, on the other, "Can I do it?" The test for whether they can is higher than the test for whether they should. Practitioners are being asked to do quite a difficult juggling act: that is part of the problem of accessibility of the legislation to ordinary practitioners and families.

Liz Smith: Convener, would it be all right to hear the Law Society of Scotland's perspective?

The Convener: Kenny, would you like to comment?

Kenny Meechan (Law Society of Scotland): The matter was also considered by the Law Society of Scotland's family law committee. It elected to send me here, although I am conscious that Janys Scott is well able to speak to family law aspects.

The committee had concerns about oversharing of information under the previous non-statutory regime. Getting it right for every child—GIRFEC—was working and was being applied reasonably coherently, but whether the level of understanding that is sufficient to make provisions work on the ground gives us enough clarity to allow us to frame legislation around it is a different question

The wellbeing threshold is much lower than what we would have done in terms of child protection measures. The child protection threshold is well understood: when someone has a concern about child protection issues, nobody will ever say, "Do not share the information." That is the message that we have been trying to push through, and which also came through in the Caldicott report, which talked about the "duty to share information" in certain contexts. Because the wellbeing threshold is lower, it gives us a commensurately higher hurdle to get over if we are to make sure that the sharing is proportionate.

Liz Smith: My final point on that is that, as I understand it, the Scottish Government's illustrative draft code of practice is designed to deal with safeguarding and to help practitioners to understand what the safeguarding role is. However, am I right in saying that if the term "wellbeing" is not adequately defined, that remains a central problem for taking the bill and, indeed, the code any further?

Kenny Meechan: I would say that it does. A person has to be clear about the purpose for which they share information. If the underlying definition of "wellbeing" is not clear, how can they say why they are sharing the information? Right away, that fundamentally falls foul of the clarity requirements under article 8 of the European convention on human rights.

Liz Smith: Thank you.

The Convener: I am just about to let Clare Haughey in. First, is the definition of "wellbeing" not already well used, in the Scottish context?

Kenny Meechan: It is well used by practitioners in the field, but that is probably a muddling-through approach.

The Convener: Do practitioners on some occasions share information based around their concerns about wellbeing?

Kenny Meechan: The GIRFEC approach has been proceeding reasonably successfully on a non-statutory basis.

The Convener: Is information being shared?

Kenny Meechan: There will be some information sharing, but at a lower level.

The Convener: So what is being proposed is already in place.

Kenny Meechan: The bill codifies what was existing practice. I think that the practice has tailed off somewhat in the wake of the Supreme Court's decision.

Clare Haughey (Rutherglen) (SNP): I thank the panel for being here. I refer members to my entry in the register of members' interests, because I am going to ask some questions specifically about healthcare.

In your submissions on the complexity of the legal framework, both the Faculty of Advocates and the Law Society refer to the difficulty that busy professionals will have in making decisions about information sharing. However, the submission from the Royal College of Nursing states:

> "Health professionals, such as health visitors, are, however, already well practised and familiar with information sharing and how to do this in line with data protection law, European law and in a manner which is compatible with the European Convention on Human Rights".

Would you care to comment on the RCN's submission? Would you contradict that view?

Kenny Meechan: I do not disagree that medical professionals are well versed in safeguarding—

Clare Haughey: We are talking about healthcare professionals, not medical professionals.

Kenny Meechan: Yes. I am sorry. It is well understood that healthcare professionals have an obligation of confidentiality in relation to information regarding the patients whom they see. However, we are rolling the policy out to a group who are much less familiar with the concept of multi-agency working that would be required. For example, other than occasionally being involved in child protection conferences, primary school headteachers will not have a native background in dealing with complex multi-agency referrals of the type that the bill envisages. Secondary school headteachers and guidance teachers—

Clare Haughey: With due respect, I say that I am asking you about healthcare professionals.

Kenny Meechan: I am reasonably satisfied that healthcare professionals have a working understanding of the safeguarding of information, although they are being asked to do something different that almost turns that on its head. Notwithstanding their understanding of patient confidentiality, we are now saying that they need to share information more widely than they have previously.

Clare Haughey: You said—I find this to be a rather condescending comment—that they are currently muddling through.

Kenny Meechan: I did not intend to be condescending; I intended to say that they are operating a non-codified set of rules.

Janys Scott: Health professionals by definition deal with sensitive personal information that requires a much more restrictive approach to sharing, but the bill deals with information that does not fall within what the Data Protection Act 1998 would consider to be sensitive personal data. We are considering broadening the sharing of information: one of the issues is whether we have adequately categorised information between general data for sharing and more sensitive data for sharing.

If nurses say that they are comfortable with that, so be it. I have seen no cases in which nurses have been challenged for sharing information inappropriately, so I cannot comment. However, there is concern about the widening of the scope of sharing that is implicit in what is proposed—if the bill is necessary at all.

Clare Haughey: What level of legal expertise would the framework require in order to satisfy you?

Janys Scott: How long is a piece of string? It is difficult to say. What we have at the moment has not done what it was meant to do. The committee would be bound to acknowledge that the existing attempt at preparing a code is not adequate to give helpful advice to the people who deal with such situations, although it would be okay for a lawyer who was looking at it.

Clare Haughey: Are you talking about the code?

Janys Scott: Yes. The problem with the bill is that it can operate only in conjunction with the code. If the code is satisfactory, that will assist in dealing with some of the issues relating to the bill.

Clare Haughey: The code is in draft form at the moment.

Janys Scott: Yes.

Clare Haughey: It is not the final piece of work.

Janys Scott: No. The question is whether the committee is prepared to sanction a piece of legislation that is dependent on a code that is not satisfactorily drafted and which is going to be extraordinarily difficult to draft.

The Convener: We will have the cabinet secretary before us on 8 November, and we will have other evidence sessions between now and then. I hope that, by that time, we will have a much clearer picture of the code.

Janys Scott: Yes—but I say with respect that the trouble is that this is a very rapidly moving area. You are trying to hit a moving target.

The Convener: I am trying not to hit it.

We are talking about not just health professionals but a wider range of people. Is the issue not then more about training? Mr Meechan has said that people will have to know a wide range of things that they did not have to know before. Is it not just about making people aware of the parameters within which they work?

10:00

Kenny Meechan: I spend a significant amount of my working life training people on data protection issues, so I know that it is not an easy subject for people to embrace. We have done a lot to get across the message about keeping people's data safe and secure and, barring human error, we are usually not too bad at it. People will need a much deeper understanding of data protection and human rights legislation in order to satisfy themselves that all the tests have been met. In some regards, the tests in the code of practice are misleading, at best. The code suggests that people should ask for consent and that they should, if they do not get it, think about whether they can share the information anyway. That very much runs counter to the Information Commissioner's Office's code of practice on data sharing, which makes it clear that, if people are going to share without consent, they should not ask for consent, because that is misleading.

People will have to be trained in such concepts, and the code of practice does not really address that. It reads as a primer on information law—I have actually commended it to a couple of colleagues who were interested in finding out more about that—but it will not really tell a professional from another discipline what they need to know. It does not tie in in any meaningful way with what a named person is supposed to do.

The Convener: Are you suggesting that the problem lies with how the code of practice is written and that it should be made clearer?

Kenny Meechan: The code of practice has to be made clearer. There are some problems with the bill, but when we strip it back, the bill largely provides just a statutory vehicle for the code of practice. It can be argued that the powers to share information already exist. People have been sharing information because it is reasonably necessary to do that to carry out their functions as part of an education or health authority. That is a reasonably well established legal test. In some respects, the powers in the bill will not add to what we already have. Ultimately, the real meat of the bill is that it creates a statutory code of practice.

Gillian Martin (Aberdeenshire East) (SNP): Am I correct that it is a draft code of practice?

Kenny Meechan: It is a draft code of practice. I have spoken to the bill team about it, who have said that it is a draft.

Gillian Martin: I would prefer that we refer to it as a draft code of practice, because anybody watching the meeting would be given the impression that the code of practice is set in stone, whereas obviously it is a draft at the moment.

In response to Clare Haughey, you said that headteachers and guidance teachers are not used to data sharing practices and child protection issues, but that is not really the case, is it?

Kenny Meechan: They are less used to them. They are involved in child protection processes, but that involves a much higher hurdle and it is easier for someone to understand exactly why they are sharing the information—it is because a child is, or may be, at risk of harm. Everyone can understand that the information is being shared in order to protect the child.

Gillian Martin: Yes—but guidance teachers and headteachers are involved in children's hearings and issues to do with child protection every single day of their working lives. I am concerned about the language that you have used. Guidance teachers or headteachers who are watching the meeting will not be very pleased to hear you say that they "are less used to" data sharing than people in other sectors, because that is not the case.

Kenny Meechan: I work regularly with those people and am in no way, shape or form understating how skilled and experienced they are in the area. They are being asked to get involved in a new area with softer data and with less obvious reasons why they are being asked to do it.

Daniel Johnson (Edinburgh Southern) (Lab): I have a quick question about the code of practice. The Supreme Court ruling suggested that there should be statutory guidance, subject to secondary legislation, but my understanding is that the illustrative code is short of that. Is that a flaw in the current approach?

Kenny Meechan: The Law Society submission deliberately did not go into much detail on the draft code of practice, for the simple reason that it is a draft code. The Faculty of Advocates has expressed some misgivings about it, which we share. I have seen the ICO's written evidence, which you will discuss at a future meeting and which goes into some detail on why it believes that the draft code of practice is not adequate.

Broadly speaking, we agree with those submissions. However, I understand from what the cabinet secretary told the committee that the intention is to redraft the draft code of practice to reflect general data protection regulation requirements. The United Kingdom Data Protection Bill was introduced at the end of last week. Perhaps it can be taken into account to whatever extent that is possible, given that it is only starting its parliamentary journey.

Janys Scott: The problem is that the meat of what is proposed will be in the final code of practice, which will not come before Parliament. That is a big issue. Would Parliament want to approve a code of practice for professionals to implement that it had not seen and which can be changed?

Daniel Johnson: Are you saying that it would be better if the guidance was put on a statutory footing?

Janys Scott: It would be better if the guidance was on a footing that allowed MSPs to have parliamentary scrutiny of it.

Daniel Johnson: That is perfect. That is exactly what I wanted to know.

Johann Lamont (Glasgow) (Lab): I have a couple of layperson questions, although I should say that I was involved in this area of work when I was a teacher.

You talk about the challenges that exist. As I understand it, there are two aspects to that; someone must decide whether the information that they want to share falls within this legal area and then there is a duty on them to consider whether they ought to share it. What evidence would they need to be able to provide to fulfil that duty and show that they had given consideration to whether to share the information? What responsibility would they have in deciding whether they had to think about the issue at all? Moreover, if they had decided that they had to think about it, what evidence would they have to provide to show that they had thought about it?

Janys Scott: That is a practice issue.

Kenny Meechan: Yes, it is a practice issue. At the most extreme end, someone could end up doing a full-blown privacy impact assessment or data protection impact assessment, but that would be far too cumbersome on a day-to-day basis. In practical terms, I imagine that it would come down to using some kind of pro forma that said that the factors in favour of sharing the information and the factors against it had been taken into account, that the views of the young person and the parent—if that was applicable in the circumstances—had been taken into account and that, on balance, all those factors having been taken into account, the decision had been made to share the information.

Johann Lamont: If someone decides not to share the information and something happens further down the line, will that decision be subject to legal scrutiny? Does the fact that someone had undertaken such consideration make the decision okay, or does the quality of the decision making come into play?

Kenny Meechan: Ultimately, the quality of the decision making can always be challenged by way of judicial review. I am not proposing that we ask all the named persons out there to draft a bombproof decision notice of every decision that they make, as that would not be workable. If a decision is wrong, it can be challenged and scrutinised down the line. I would not disagree with that—it is absolutely correct that that should be the case. However, I would not want to create a vast cottage industry in documentation surrounding the information-sharing process.

Johann Lamont: I am probably showing my ignorance, but what happens with a conflict of interests in sharing the information? I might take the view that it would be in the interests of the child for me to share the information, but it would certainly not be in the interests of the parent. How are such situations resolved?

Kenny Meechan: As the purpose of the legislation is to support the wellbeing of the child, the interests of the child would have to take paramouncy, unless there was such a mismatch in the relevant interests that there would be a very small benefit to the child and a huge disbenefit to the parent. That would be taken into account as part of the proportionality arguments and the balancing exercise that would be done under article 8 of ECHR.

Johann Lamont: In our previous session on the bill, we were told that it was an illustrative rather than a draft code of practice. Is there a distinction between those two things?

Janys Scott: That is a political term, is it not?

It is helpful, when passing a piece of legislation, to think whether it will be compliant with all the necessary requirements and whether it will be implemented in a lawful manner. One of the problems with meeting those conditions is that the Supreme Court was concerned that, because the provision in the named person legislation was unclear, it could not easily be implemented in a manner that was compliant with the law. With your questions, you are drilling into how easy and appropriate the implementation of the proposed new legislation will be, and you are expressing concerns about how it will be done and what the practical parts are. That is where professionals need the guidance. At the moment, we are looking at a higher level and at whether a framework will be needed to meet the requirements of the law. That was the concern of the Supreme Court.

Johann Lamont: The issue is also whether the practice inhibits the policy intention of safeguarding children. One of our judgments will be to test the practicalities of the legislation against the intention of the original legislation.

The Convener: I call Tavish Scott.

Tavish Scott (Shetland Islands) (LD): I apologise for being late, convener.

The submission from the Faculty of Advocates to the committee says that, with regard to professionals, the imposition of the code

> "risks making their job considerably more difficult and undermining the trust of families and the willingness to share information with the professionals concerned."

Could you expand on that argument, please?

Janys Scott: As outlined in the Supreme Court's decision, families do not know what professional people such as teachers, health visitors and midwives are going to do with the information that is shared with them. Will I be willing to share with my health visitor that I have post-natal depression? I do not know where that information will go. Can I be certain that it will not be shared with my child's teacher? When might it be shared with my child's teacher? Will it be passed on to them without my consent? In those circumstances, will I be willing to tell my health visitor that I have post-natal depression? If I do not tell them, where will my depression take me? That is just a small example of the sorts of issues that might arise unless we have clarity for families and they are kept involved in the process.

The difficulty is that the draft code does not really help very much. It is a legal document—it outlines the law—but it does not give a clear pointer to where that sort of issue will be taken.

Kenny, is that what you were thinking?

Kenny Meechan: Broadly speaking, yes. The illustrative code of practice does not provide any meaningful guidance in its current form. However, as I understand that it will be rewritten, I do not propose to speak about it at great length.

A more fundamental issue is that the legislation is trying to reconcile two almost irreconcilable points. Because the Supreme Court has said that this is all about sharing information without consent, you build a consent model into the information. Then you look at the GDPR, which is on the horizon, and the draft guidance on consent that has been issued under the GDPR, and they make the point that, because consent under the GDPR has to be freely given and informed, it will not work terribly well if there is a massive imbalance in power between the agency asking for consent and the person being asked. The GDPR specifically says that, for a public authority, consent will not be the most appropriate way forward if that power imbalance exists. That is a difficult square to circle.

We need a consent-based model, but we will find it difficult to make it fit within the GDPR's requirements. I am not saying that that is impossible; it is just that Parliament faces a difficult balancing act to get to that position.

Tavish Scott: You are talking about how it will affect professionals conducting their duties.

Kenny Meechan: Yes, indeed.

Tavish Scott: Earlier you pointed out the contradiction with having a culture of clarity with regard to a person's privacy as opposed to the opposite position. I might be misconstruing that, but that is what I took from your earlier remarks.

Kenny Meechan: We are asking people to change their mindset somewhat, but we are asking them to do it when it is not a good time to be trying to legislate in this field. We are a moving target in terms of what the UK data protection legislation will look like. Although we have the GDPR, an awful lot of it requires member states of the EU to make their own derogations and exemptions, and we have had visibility of the UK Government's thinking on that only since Friday last week. It is hard to see how we can get the code of practice to tie in to that new legislative framework.

Tavish Scott: I totally get that point. Does that explain why the illustrative draft code is so weak? Many of the submissions that the committee has received have not been kind to it because, as you have pointed out, it is a legal document that a practitioner has to be able to understand. Is that partly explained in your point about the timing of these changes?

Kenny Meechan: It is certainly true that the timing has not helped. I believe that, instead of showing the code's final form, the bill team deliberately couched the draft code in terms of the current law to give the committee a flavour of their thinking. The bill team is well aware that the Data Protection Act 1998 will not be in force by the time this legislation is enacted.

Tavish Scott: But both of you have suggested that it is very difficult for Parliament to pass a bill that gives effect to a code when that code, as currently drafted, is so deficient.

10:15

Janys Scott: The other problem is that it is going to be difficult to draft. Let me highlight three points. The first, which we have already discussed, relates to the vagueness of the term "wellbeing" and its centrality to whatever is done under the code and the legislation. Secondly, there is a question whether words are being misused. Some of the submissions refer to, for example, "sensitivity"; however, that is not the same thing as sensitive personal data, which is a categorised form of data.

Thirdly, some of those who have made submissions have built up certain undefined concepts—for example, “vital interests”—that we are not going to be able to help them with. They will just have to form a judgment in that respect; we will have to help them make that judgment, but it requires a very difficult judgment to be made. I accept that the Royal College of Nursing is content with its position, but various other organisations are not—they are confused and worried.

Tavish Scott: Given that there are organisations that are absolutely against this from first principles, is the danger of passing a bill with all the deficiencies of the code and so on that there will be a legal challenge again? Is this not setting up a near-certain legal challenge again?

Janys Scott: Yes, there will be a challenge either to the structure of the legislation or to individual instances of data processing.

Tavish Scott: So the Parliament will achieve nothing. We will pass a bill that will be challenged legally and those who we are meant to be helping—the children and young people—will be bypassed as the process goes back into court for another two years.

Janys Scott: Or people will be challenged and find themselves at the sharp end of litigation when what they wanted to do was to help children and do their best to implement a piece of legislation that had been passed.

Tavish Scott: That is very helpful. Thank you very much indeed.

The Convener: Yes, it is very helpful, but I suspect that the Government already knows that any bill that is passed is likely to be legally challenged. Let us hope that it is tightened by the time we get to that stage.

Oliver Mundell (Dumfriesshire) (Con): I have some questions about the code of practice. The submission from the Faculty of Advocates says that such a code

“is not a substitute for legislation”,

and highlights the fact that it would not be debated or passed by Parliament. Does the bill get the balance wrong? Should more of the guiding principles—and, possibly, the need for and legal test for consent—be on the face of it?

Janys Scott: The difficulty is whether the Parliament can legislate for something that is already in other legislation. We know that very soon—indeed, on 25 May 2018—the legislation that exists at the moment will not be in place any more. At that time, the GDPR will become directly enforceable, and anything that you do will have to be compatible with that.

Our proposal is that, because the Supreme Court made such an issue of the need to inform people that their data was being shared, that should be added to the essential considerations required of the named person service provider. If you are going to ask the service provider to consider whether they should share the information in terms of the wellbeing test and then give them the power to share it, you should add to that a consideration of whether it is appropriate to inform people and so on, as specified by the Supreme Court. You will have seen our proposal; we think it consistent with the bill, and I do not think that it is something that the cabinet secretary will necessarily oppose. It does not impose any extra test other than one that is within the intendment of the bill. If you are going to impose a duty of consideration, you must have the full gamut.

Oliver Mundell: Thank you—that is super.

Your written submission also says:

“Where there is any conflict between the statute and the Code of Practice, the statute will prevail.”

In cases where the statute was silent about something that the code of practice spoke to, where would we stand legally if, for example, we went to judicial review?

Janys Scott: The existing bill contains a requirement for compliance with the code. In such cases, the expectation in any judicial review would be that the code would be complied with. The code is stronger than guidance—it imposes duties on people.

Oliver Mundell: From a technical point of view, does that mean that the code could change the law in this area? Could it in theory change the thresholds or where proportionality sits?

Janys Scott: It could not change human rights issues. If something was contrary to human rights, the human rights aspect would prevail and anything that was in the code would either have to be read down or disregarded. Moreover, it could not change something that had been imposed by a European regulation. Such regulations prevail over domestic law until we leave the European Union—and then we are in the hands of the bill that was introduced in the Westminster Parliament last Friday.

Kenny Meechan: The bill could usefully set out a number of ground rules. It should set out what the law is, and the code of practice should say how it is to be implemented. It should not create any new rules, standards or tests, although it might set out or clarify which tests the existing law expects people to apply.

The logical sequence of events should be, as has been mentioned, to think first of all whether sharing the information will assist the child's wellbeing, however that is defined, and if the answer is yes, to proceed to considering whether it can be shared legally. The first question that you need to ask is, "Can I share this without consent?" The reason why that question comes first is so that you are not then going through the mock exercise of seeking consent when you have already decided to share the information anyway.

If the information is sufficiently important that you feel that you should be sharing it without consent, you are arguably going beyond wellbeing and starting to stray into child protection territory. That would be my thinking. Sharing without consent is something that the Supreme Court was very much against in its ruling. If the information that you have does not pass the threshold of being sufficiently important to share without consent, the next step is to figure out how to ask for consent in a way that is compatible with the GDPR requirement that makes it clear that, in cases where there is a power imbalance, consent is not always going to be appropriate.

The code of practice might usefully address that kind of area. I could envisage a code of practice that says, "When seeking consent from the young person or the parent, you must make it absolutely clear that there will be no adverse consequences if they say no." If that is not made clear—and I appreciate Janys Scott's experience that that is not how it works in practice at the moment—you cannot really say that a person has given free, informed and voluntary consent. That is the level of detail at which I would anticipate a code working.

Oliver Mundell: That is helpful.

My final question comes back to Daniel Johnson's point about the statutory nature of the code of practice and the fact that there is no direct parliamentary scrutiny or vote. I was interested in the bill team's comment last week that their thinking had been influenced by some approving comments made by the Supreme Court in relation to a statutory code of practice on policing. If we look at the code of practice to which the Supreme Court referred in its judgment, we see that it was introduced to the Westminster Parliament by statutory instrument, because a statutory instrument is needed to lay such codes before Parliament. Will such an approach be appropriate in this case, given the quantity of complex legal information that will have to be contained in the code of practice?

Janys Scott: That is a policy matter that relates to what the committee is prepared to do and to recommend to the Parliament.

Oliver Mundell: Do you think that, in that particular reference, the Supreme Court's judgment recognised a difference between a statutory code of practice that required the Parliament's express approval and a code of practice drafted by ministers at their discretion? Is there a legal distinction between the quality of those two instruments?

Janys Scott: You could read that into what Lord Reed said, but I am not in Lord Reed's mind, so I do not really know.

Oliver Mundell: Do you think that that is a possible distinction?

Janys Scott: Yes. When I read through the Supreme Court judgment, I noted paragraphs 84 and 100, which I thought reflected somewhat on that issue and which are probably consistent with your comment.

The Convener: I ought to point out that it could mean anything.

Clare Haughey: I wanted to come in on Kenny Meechan's point about giving adequate consent to share information and cases where there is a power imbalance. Surely there is already a power imbalance in most areas where consent is given. For example, if you give consent to an operation, there is a power imbalance between you and the surgeon; if you give consent to a lawyer to do something, there is a power imbalance there. Does it not already exist in this case?

Kenny Meechan: Yes, it already exists.

Clare Haughey: That was all that I wanted to clarify.

The Convener: Before I move on—[*Interruption*.] Please go through the convener, Tavish. Before I move on to Daniel Johnson's question, I will pick up on one comment that Oliver Mundell made. If something is in the bill, it becomes much more difficult to change or amend at a later stage if circumstances change. Surely we should not be suggesting that something should be in the bill, given the changes that we will face as a result of legislation being made at Westminster. Surely it should be in the code of practice, which is much more flexible, so that we can change it according to circumstances.

Kenny Meechan: I have said previously that if you take everything else away, ultimately, the bill is a vehicle for the statutory code of practice. Given the importance that the Supreme Court has placed on that, I would not suggest that the content of the code should be within the primary legislation. I do not think that that would be appropriate at all. I think that you need more flexibility. However, I suggest that, given the code's critical importance to making this work in a human rights-compatible way, it should probably be contained within secondary legislation to allow full parliamentary discussion of it, rather than simply being laid before the Parliament.

The Convener: That is not how it is generally done.

Kenny Meechan: It is not usually being done on the back of a Supreme Court decision that says that if you do not get this code of practice right, you will not be compliant with the law.

Tavish Scott: Exactly.

The Convener: Every single part of legislation has to be compliant with the law, so I do not see that that makes any difference at all, except for the fact that it has been brought back to us. The same principles applied when we were doing this originally. We had to make sure that it was compliant with the law. The Supreme Court said that in this case, we are not quite compliant, but the same principle applies with this as it does with any other piece of legislation.

Oliver, you wanted to come back in briefly.

Oliver Mundell: Yes. I meant to ask about timing and it has come up again. Is now a good time to look at this area of law or, given the points that you made in answer to the convener and with there being “a moving target” and so on, would it be better just to wait a while and see where things settle?

Kenny Meechan: The Parliament is being asked to pass legislation that is compatible primarily with data protection law. I think that you have given yourselves a near impossible task, given that data protection law is in flight at the moment. It might be more sensible to defer detailed discussion of this until such time as the UK Data Protection Bill has been passed at Westminster.

The Convener: My response to that is that we did not set the timetable for Westminster. Also, the protection of our children should not be held in abeyance until Westminster decides what its legislation should be.

Oliver Mundell: Is it okay for me to come back on that point?

The Convener: No. Daniel, would you like to come in now?

Oliver Mundell: Can I ask—

The Convener: No, Oliver. We are moving on.

Daniel Johnson: If I can briefly paraphrase, I think that you said at the beginning of your evidence that the conflict that was previously inherent in the law has been resolved but it has created a more difficult decision for practitioners. Can you bring out how finely balanced that decision would be for you as legal professionals, with your understanding of the law?

Janys Scott: I put myself in the position of a primary school teacher. Information comes into my possession and I ask myself whether I should share it with social work. To decide that, I will have to go through an exercise which, at the moment, I do not have adequate guidance on. I will have to ask myself, does this information impact on some aspect of the SHANARRI indicators test? Does it impact on how this child is achieving and what does that mean? Is it necessary to share the information to allow this child to achieve better? If I do not share the information, what is the effect of that? If I am thinking of sharing the information, will it be a proportionate sharing? That is to say, will the sharing of the information result in a problem that is more serious than not sharing the information?

The thought of a primary school teacher sitting down at 4 o’clock in the middle of marking a load of books and thinking all that through without help and trying to make their way through a code of practice on things that I, as a lawyer, would find difficult, in the knowledge that if they get it wrong, it will be raised in a court of law, strikes me as something that would be unattractive to that primary school teacher. Does that give a flavour of what I mean?

10:30

Daniel Johnson: Yes. Mr Meechan, do you agree with that? Would you say that, even as a legal professional, that would be a difficult decision to make?

Kenny Meechan: As a legal professional, I would normally be involved in providing legal advice to a practitioner. Typically, I would deal with social workers rather than education professionals, but the principle is the same. I can provide the legal framework for them, but they have practitioner knowledge, experience and skills that I do not have.

It is not purely a legal question. I can readily say—not “readily”; the question is difficult even for a lawyer—“I’ve looked at this and here’s the law,” but, at the end of the day, I do not know about child welfare. I am not a professional who works with young people, so I depend on social workers, teachers or healthcare workers to provide their input into the process. I can envisage an awful lot of people who have been given named person responsibilities having their legal department on speed dial.

Daniel Johnson: Janys Scott mentioned the SHANARRI indicators. It strikes me that, with things such as “included” and “achieving”, we are talking about asking professionals to consider sharing data in areas in which people would not even have begun to consider sharing them before the bill. Is that a fair statement to make?

Janys Scott: I think that it is. An additional duty of consideration is being posed, but that is only the first step in determining whether the data should be shared.

Daniel Johnson: I want to follow on from Johann Lamont's comments and questions about evidence and how people will make decisions. It strikes me that, by stating the duty to consider in law, people will be subject to challenge on whether they considered adequately on both sides of the equation. What might the potential legal liabilities and consequences for service providers and individual practitioners be? Will there be challenges to whether they have adequately considered? Is the danger more about when they share or that they might be challenged when they decide not to share?

Janys Scott: It is a damned if you do, damned if you don't situation. That has been brought home to professionals who are involved in the welfare of children.

Of course people share in cases in which there is an obvious child protection concern, but the bill is not needed to do that. That is done anyway, and the bill would add nothing to that. It would add a duty to consider in circumstances in which people would not previously have done so. In my field of work—I deal with litigation regarding children—if it was found in litigation between parents that a teacher had shared something when perhaps they should not have done so and that had escaped into litigation, there would be criticism. That would be the sort of field in which I would come into things.

At the very worst, if data was shared absolutely inappropriately, there would, of course, be a fine and damages would be payable by the relevant authority. That would come under the general data protection regulation and the approach would be rather more severe than it is at the moment. However, one hopes that we would never get to that. That is the most extreme case; in the least extreme case, there would simply be criticism.

Daniel Johnson: Is it conceivable that teachers and health visitors might end up facing litigation?

Janys Scott: Potentially.

Kenny Meechan: I would not have thought that they would face personal litigation in the absence of bad faith of some sort. Their simply making their judgment call incorrectly would come back to the employing organisation rather than to the individual.

Daniel Johnson: That is helpful. Thank you.

Tavish Scott: On Daniel Johnson's question whether a teacher could potentially face litigation, the Parliament will pass legislation next year that will make headteachers specifically accountable in law for their schools. That could mean the headteacher as the corporate person who is responsible for the school being accountable, if not the particular teacher.

Janys Scott: That would drive down responsibility from the local authority to the school. I can see that, but one would hope that that would not happen.

Tavish Scott: Indeed—of course not. However, do you concede that there is that potential?

Janys Scott: Possibly.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I go back to the question of consent. Both your organisations have indicated that they would like there to be explicit reference to consent in the bill. Is that really necessary? Is that not adequately covered in the code of practice?

Kenny Meechan: There is a non-consensual element in the bill. The provisions that relate to a change in service provider say that the outgoing service provider will provide the details of the child or young person to the supposedly incoming service provider. That does not reference consent anywhere; it just places a straight duty on the outgoing service provider. It is made subject to the test in proposed new section 26A of the 2014 act of whether it is data protection compliant, but the problem is that that takes us straight into the same logic puzzle with which the Supreme Court wrestled and that it concluded was such a weird question that it was unclear and therefore fell foul of the tests.

Because we are talking simply about the name and address of the young person in question, it can probably be done proportionately, but you need to acknowledge that the bill already contains a non-consensual provision. The requirement for consent would probably be more usefully addressed by revising section 26B to say what the code of practice needs to do and say whether you are having it in the primary legislation. However, the primary legislation could set out the parameters of the code of practice and usefully clarify that it must deal with the consent issues.

Janys Scott: The issue is not just consent. We have talked a lot about consent, but it is also about telling people that the information has been shared. One thing on which Lord Reed focuses in the Supreme Court judgment is that people will not necessarily know that their information will be, or has been, shared. That is why we suggest that people should be told if the information has been shared. There may be circumstances when that cannot be done because it would be dangerous to the child but, in general, unless it would be dangerous and cause a real problem, surely people should know that the information has been passed on.

Colin Beattie: It seems from what has been said and from your organisations' submissions that you are indicating that consent is not in itself a gateway to sharing information.

Kenny Meechan: If you can share information validly under the GDPR tests, consent is a gateway for you to do it, subject to the caveat of ensuring that it is valid. I was asked whether there is an existing power imbalance. There is, but, at the moment, there is no legal regulatory framework that makes that a particularly problematic issue. That is changing, so the legal consequences of the existing power imbalance will change come 26 May next year.

Colin Beattie: Is it much different from what the professionals who work with children do and share at the moment? Are we fundamentally changing their responsibilities?

Kenny Meechan: We are fundamentally changing how we approach it. For my sins, I am responsible for GDPR implementation in my organisation. We are beginning to send the message to staff that we will have to work in a fundamentally different way. I have spent the past 17 years that the Data Protection Act 1998 has been in place repeatedly telling people to get consent and I will probably spend the rest of my career saying, "Are you really sure that you want to get consent? I don't think that is the way forward for you." GDPR is driving a fundamental shift in how we engage with people. That change across the board needs to be reflected in the bill.

Colin Beattie: Are you saying that that affects people who are engaged at present in fields in which they have to consider and decide on sharing information?

Kenny Meechan: Yes. At the moment, a social work department, for example, will have an information system, which records client consent to hold the information and to share it with the health board. When we analyse that in GDPR terms, the department should go back and say to its clients that, now that it has considered the matter against the new legal framework, it has to be able to process their information if they want to engage with its services and it will not use a consent model any more for core service delivery because such a model is now misleading. Service providers will be saying to people that they have the choice to engage with a service or not and, if they choose to engage, the service must be able to share their information.

On the back of that, they will be able to offer people additional services for which the service provider would seek consent. One example that I have given is income maximisation. If somebody engages with the social work department because they have an addiction problem, the department needs to be able to process their information to support them with their addiction issues. That is a given. It cannot do that without having the person's information. However, it could also pass that information to another team that could tell the person that they are eligible for a number of benefits that they are not presently getting or that they can engage with a number of services that they are not presently getting. It would need the individual's consent to do that extra piece of work because it would not be the core service with which they were engaging; it would be an add-on.

That is the kind of thought process through which we have to go to change the mindsets within the organisation ahead of GDPR coming in. It is a big change.

Colin Beattie: Given the fact that, as it appears from what you say, a fairly fundamental change is taking place anyway in the way that the professionals will have to approach the matter in the future, is there a benefit—there probably is—in getting the named person provisions right because it would create a structure through which they can operate?

Kenny Meechan: Absolutely. To take the example that I just gave of the social work department with the add-on service, we can make consent work but we need to approach it carefully. I know from previous discussions that Janys Scott has instances in which consent is not exactly freely given in contexts in which the professionals tell people that they need to sign a form or else. They have a signature on a piece of paper, but it is not freely given consent.

Colin Beattie: All those complexities exist at the moment and are gathering force, so there is a bit of an impetus to get it right.

Kenny Meechan: Absolutely.

The Convener: I thank the witnesses very much for attending and giving us their words of wisdom. We will suspend for a few minutes to allow the next panel of witnesses to take their seats.

10:41

Meeting suspended.

10:46

On resuming—

The Convener: I welcome our second panel. Professor Alison McCallum is director of public health and health policy at NHS Lothian; Professor Hugo van Woerden is director of public health at NHS Highland; Valerie White is consultant in dental public health at NHS Dumfries and Galloway; Jean Cowie is principal educator at NHS Education for Scotland; Annette Holliday is a health visitor and member of Unite; and Lorna Greene is policy officer at Royal College of Nursing Scotland.

Before we start, I should mention that Professor van Woerden, Valerie White and Jean Cowie are appearing as individuals who work for health boards, so their perspective is not necessarily that of their employers. In addition, Annette Holliday is appearing as a health visitor and accredited member of Unite.

Colin Beattie: Will the witnesses talk about their current practice in sharing information on wellbeing, with and without consent?

Valerie White: I am happy to take that. In dentistry we had been moving towards implementation of the Children and Young People (Scotland) Act 2014, which involved a different threshold for sharing information. The threshold for sharing information if a child is at risk of significant harm is clear, because that is a child protection issue, so there was a bit of a cultural shift in relation to sharing information about health and wellbeing concerns, which required a lot of education, training and support.

Until the Supreme Court ruling, we had worked on the understanding that there was a duty to share information if there was a health and wellbeing concern, regardless of whether there was consent. That was the path down which we anticipated going. Since the ruling, there is a degree of confusion about what we can and cannot share and the threshold for sharing information. We are clear that we must share child protection concerns, but we are struggling with what to do about a wellbeing concern at the moment.

Colin Beattie: What information would you share, typically, in the past?

Valerie White: Usually in dental services we would share information if there was significant risk of harm to the child and we thought that there was a child protection issue.

Colin Beattie: Would that typically be done without consent, because child protection overrides everything?

Valerie White: Yes. Best practice is to seek consent if that is possible, but child protection overrides that, so information would be shared and a referral made to social services in an instance in which there was such concern.

Colin Beattie: Does anyone share information with consent or does it always come down to there being overriding issues, such as child protection issues?

Annette Holliday: We would always share. In practice, we would always do that in discussion with the parent, especially if I wanted to discuss information with other involved professionals. I would ask the parent if it was all right if I contacted the other professionals involved.

Colin Beattie: Do you have an example?

Annette Holliday: An example would be developmental issues. I might want to discuss with a child's nursery how the child was being supported. I might want to discuss things with our speech and language therapists. There might be discussions with the general practitioner about health issues. The examples are not all child-protection related.

Colin Beattie: How do you think that the requirement to consider sharing information might affect the way that you operate at the moment?

Professor Hugo van Woerden: Part of the background is that, historically, health professionals have worked on the basis that there is an assumption of confidentiality, so nothing is shared unless there is consent or there is some public benefit reason for sharing it. That historic assumption of complete confidentiality is the starting point.

The Convener: You referred to a "public benefit reason". Are we not talking about doing exactly the same thing, except that we might well have lowered the bar as to what we consider to be public benefit—in this case it is about the wellbeing of the child as opposed to the protection of the child?

Professor van Woerden: I think that you are right. Fundamentally, there is a change to where the bar is in that regard. As Professor McCallum said in her submission, the slight risk is of a clash with professional guidance for, say, doctors, in relation to where the General Medical Council puts the bar.

The Convener: Professor McCallum, would you like to comment on that?

Professor Alison McCallum (NHS Lothian): Yes. I want to make two points. One is about the infrastructure within which we share information for the purpose of providing services to children and families, which I mentioned in our submission.

Under NHS and education acts, we have duties to work together to provide safe, effective care for children, which includes providing immunisation, ensuring that children have the support that they need should developmental issues become a problem and ensuring that there is not a lack of a framework for that to happen when an individual family comes forward. One aspect is ensuring that we have the right framework that allows information to be shared for the benefit of children when it is appropriate to do so.

The other point is that we talk about consent when we mean working with children and families to engage them in services to come to a shared view of the best way forward and when we are talking about getting formal consent for procedures. The duty to consider sharing information seems to me to be an appropriate phrase that allows us to engage children and families to come to a shared view, even if it is not appropriate to go down the route of obtaining formal consent, which older children and families could withdraw.

Colin Beattie: Are you referring to situations in which there is a professional relationship with the family and a decision is made in that context on the best way to care for whichever member of the family requires the care, as opposed to sharing information with third parties, which is perhaps the more contentious side of things?

Professor McCallum: The framework that we have in place in Scotland allows us to have formal relationships between, for example, the health service and the local authority and with third sector organisations and to agree, in line with the Data Protection Act 1998, what information is shared for the purpose of providing services.

Local authorities do not provide all the services themselves; some services are provided under contract by third sector organisations. Therefore, it is important that the frameworks that we have put in place to enable people to seek help do not get closed off because of concerns about the sharing of information that children and families have already signed up to as part of an engagement with a service. For me, most of the work that we do around the appropriate sharing of information is, as far as possible, coming to a shared view about the best way forward and then agreeing what sort of information will be shared in what format rather than it being a blanket yes or no.

Lorna Greene (Royal College of Nursing Scotland): Could you please repeat your original question about the changes to information sharing? I want to make sure that I answer it correctly.

Colin Beattie: The changes to information sharing?

Lorna Greene: Yes. You asked what the implications might be.

Colin Beattie: Yes. It is proposed that there be a requirement to consider sharing information. How would that change current practice—the way in which you are operating at the moment? Would it have a significant impact?

Lorna Greene: The RCN thinks that it could have a quite significant impact by leading to defensive practice. By including the duty to consider sharing information, you could be leading professionals towards what might become a tick-box exercise, which could detract from meaningful practice. We would see that as, ultimately, having the opposite effect to what the Scottish Government would like to achieve through the implementation of the named person policy—the principles of GIRFEC. We think that that would be best achieved by allowing professionals to develop trusting relationships with the people whom they are providing services to and giving them the longest time possible to engage meaningfully with those people. We are worried that, with the introduction of a duty to consider, professionals might become nervous and want to cover all their bases, which would take time away from that meaningful, face-to-face interaction. That is what we see as the potential negative impact on practice of the duty to consider sharing information.

Colin Beattie: Has the Supreme Court’s decision had any impact on your confidence to continue sharing information as you are doing?

Lorna Greene: I should clarify that I am not a clinician or practitioner; I am a policy officer. I am not out there at the coalface, delivering care.

We are hearing from our members that, as a result of the judgment, there is confusion and nervousness. What was being done as best practice and what was seen as a good policy change—we are very positive about the principle behind the named person—is now under threat because practitioners are increasingly nervous. That is down to a combination of factors including the negative media reports that have surrounded the policy and the controversy that has followed it.

In our engagement with the Scottish Government, we have said that some of the messaging around the named person needs to change to make it clear that it is fundamentally about building trusting relationships that are about supporting people and working in partnership with families and children. That is what our members, as health visitors, set out to do every day, and the policy is about ensuring that their practice is as meaningful as possible. We are concerned that the duty to consider could get in the way of the meaningful part of the practice.

Colin Beattie: Does anyone else have similar concerns about the Supreme Court's decision?

Annette Holliday: We see defensive practice happening anyway. Regardless of whether a named person is there, people get nervous about things. There are sometimes concerns about professional regulation and so on. Defensive practice is part and parcel of everyday health visiting.

Daniel Johnson: I am interested in the issue of defensive practice. The RCN's submission says that the duty to consider may

> "undermine the principles of GIRFEC by resulting in defensive practice."

That is quite a strong statement. What would be the impacts and consequences on the ground if that were to come about?

11:00

Lorna Greene: To explain what we mean by that, we need to go back to where the concept of the named person came from and took off. The approach in Highland is a really positive example of what happens when practitioners are allowed to develop meaningful relationships and build trust, and when information sharing takes place in an appropriate way that is in line with the existing legal parameters. That happened as part of best practice, and we see it as a really great contributor to GIRFEC and promoting and supporting wellbeing.

We think that the duty to consider will affect meaningful practice, turn the process into a tick-box exercise and affect the time that is available to professionals to provide face-to-face support. Such support is key. If we look at the place where the concept began, we see that it was about the time and the relationships that were built up, and those are key to GIRFEC. Working in partnership with children and families and offering support are key. We do not want the principles to be undermined by a reduction in the time that is available because more time is being spent at a desk sifting through paperwork.

Daniel Johnson: One of the points that the bill team made was that carrying out the duty to consider—I hope that you will agree that that is the key change for practitioners, as it is a new consideration that they will have to carry out—is in essence just a continuation of the professional judgments that practitioners make daily. Is it the same kind of decision and judgment or is it a different kind? What additional pressure might the new duty bring about on the ground?

Annette Holliday: With some of the GIRFEC principles, there are definitely changes to decision-making practices and to current health visiting practice, so that will create differences. The issue about time goes back to resource and being able to ensure that there are an adequate number of health visitors, or more, so that time can be spent with families and shared decision making can happen. We know that that is a longer and slower process than the sort of fix-it model in which we think that the professional knows best. These things take time and energy to build. If they are not resourced enough, we will move back to that tick-box exercise of making sure that we are covered rather than working in true partnership with families.

Daniel Johnson: Further to that, one of my concerns is that health visitors will be named persons for children beyond the point that they might ordinarily have contact—you talked about when children are at nursery. Is there a concern about ensuring that health visitors have sufficient contact to give them the experience that they need to make those considerations in the first place?

Annette Holliday: An enhanced universal pathway is to be brought in when we are resourced enough to deliver that. That will provide the additional contacts that were lacking previously. There were three minimum contacts for a health visitor, and we will move to 11, one of which will be in the pre-school year. Over time, health visitors have built up good communication with nurseries. However, no health board has yet implemented the universal pathway contacts. That creates concerns about the length of time before children are seen, and that takes us back to resources.

Daniel Johnson: I have one final question. One of the points that was raised by the previous panel, particularly by the Faculty of Advocates, was that the system may well lead to legal challenge, certainly of service providers and perhaps of practitioners. Is that a concern to the RCN and Unite? What consideration have you given to that prospect?

Annette Holliday: Do you mean legal challenges to the practitioner?

Daniel Johnson: Yes, or the service provider.

Annette Holliday: There is certainly nervousness about where responsibilities lie in the delivery of named person services.

Lorna Greene: The RCN is very concerned about that. The bill says that service providers and organisations have a duty to consider. However, if we think about it, how does an organisation consider? It is a very vague, strange concept. The reality is that it takes a person to consider; it also takes a person to evidence that they have considered. Organisations can delegate duties. When they do so, they delegate them to professionals who are individuals. We are concerned that the approach would affect our members, who could find themselves exposed to professional risk that was not there previously and which is disguised, in the bill, by hiding behind words such as “organisations” and “service providers”.

Daniel Johnson: Thank you.

The Convener: I will come in at this point. The advice that we got was that the organisations are responsible for that, and not the individuals. That is the way in which it has been written. The bill is not law yet, but that is certainly the advice that we have got from—

Daniel Johnson: In all fairness—

The Convener: Excuse me, Daniel; I am speaking.

That is the advice that we got from our support team before today’s committee meeting. Anyway, as I have said, we are still going through the process; let us see how it works out. What I am trying to do is to put the panel’s minds at ease that there is not a trap here to catch practitioners.

Professor McCallum, would you like to comment?

Professor McCallum: We already face challenges from parents—particularly those who do not wish information about their children to be shared. That impacts on the way in which we provide immunisation services, for example. Under the National Health Service (Scotland) Act 1978, we are required to offer immunisations to all children. It is important that we have positive child identification so that we can identify children for whom immunisation is not clinically appropriate but it can be offered to everyone else. There is a point of consent at which parents and, indeed, older children can refuse consent to immunisation. We need to know who every child is and where they go to school in order to provide universal services, as well as to ensure that we have the infrastructure in place to provide additional support for children with chronic and on-going problems, so that is already a problem for us.

In the health service, however, we have Caldicott guardians, who are people, such as me, who take on that organisational responsibility. I have an information governance assurance board that covers such issues, and it has two non-executive directors on it. Therefore we have organisational cover. When we work with local authorities, we have a partnership, but they do not have the same infrastructure that we do to enable such decisions to be taken professionally, and with legal advice, but not directed solely by the actual words that are written in the law. Therefore there is an opportunity there for us to move to legal interpretation of things where that was not the original intention of the process.

Professor van Woerden: I have a tiny, small practical point, which is that it might be helpful if the guidance were to clarify how long information is stored for, where there is a duty to consider sharing information. It is just a small practical issue that would be helpful.

The Convener: Thank you for that. That is helpful.

Annette Holliday: We understand the position about the organisation’s responsibility, but it is very difficult, when you are one person sitting in somebody’s living room. Certainly in health visiting practice, no one practitioner has another’s knowledge, because no other practitioner builds up the same relationship at the same time. The information that a practitioner takes back to their organisation is theirs.

The Convener: I completely accept that. What I am saying is that the umbrella cover is that of the organisation. The information that we were given is that it would not be Annette Holliday who would be held to account; it would be the local authority.

Annette Holliday: I appreciate that, but I am the person who holds that information and tells it back to my employer—

The Convener: Yes; I get that too.

Annette Holliday: —and no one else can independently verify that, because they have not been in and around that child at the same time.

The Convener: And the organisation has placed trust in you and is responsible for your behaviour on that one.

A couple of people want to come in, so I will come back to Lorna Greene.

Gillian Martin: A few of you were sitting in the gallery when the previous panel was in. Janys Scott made a recommendation, which was also in a submission to us, that people be notified when data about them is shared. Given what you have just been talking about, what impact could that have on, say, the safety of children? If you notice that a parent has refused care for a child in a way that concerns you and the parent has to be notified when you make another person aware of the situation, what impact might that have?

Valerie White: Obviously, people will want to follow good practice and get consent where appropriate, but there is certainly a tension in that respect. How will seeking consent affect your on-going relationship? It is a difficult issue; on the one hand, you have your professional obligations, but, on the other, you do not want to stretch your relationship with the family. If you were able to have an informal conversation with the named person about some low-level concern, they might be able to reassure you on the matter or even say, "Thanks very much—I'll have to go and look into that."

Gillian Martin: So if a letter had to be originated to let a parent know that you had spoken to the named person, that could be an issue in some cases.

Valerie White: It could be a barrier. Let us be realistic: historically, there was some nervousness even about certain child protection matters, but we have got over that and moved past it now. We are talking about a cultural shift with the new threshold that has come about as a result of GIRFEC and the wellbeing-focused and supportive approach that is being taken. Having to share letters and so on might make it difficult for people to see it as a supportive approach.

Annette Holliday: The fact is that relationships can be fractured and it can be difficult to restore them. At certain levels of child protection, other processes come into play. There is the potential for more of that to happen at the wellbeing level, because at that level you might not have the child protection framework that you can use as a counterbalance. It all comes down to having shared decision making and shared views with families, and practitioners being brave enough to go beyond all that, but you certainly do not want to fracture any more relationships with families, as that will be damaging in the longer term.

Lorna Greene: The RCN has made it quite clear that it sees the named person as part of an early intervention and prevention programme and that conversations about wellbeing should, for the most part, take place in a forum where there is consent and where you are having a dialogue with the family and their children. If you have that conversation and you are concerned that the child is at risk of harm, you begin to veer into child protection issues, which will require a different conversation. As a result, we have tried to focus on this as part of an early intervention and prevention strategy and policy and to keep it rooted in that domain.

Going back to the duty to consider sharing information and the impact on professionals, which we discussed earlier, I think that it is also worth mentioning an issue that has not yet been mentioned: the duty to identify. It, too, could have repercussions for professionals, but it feels quite vague and we are not entirely sure what it means yet. For example, is it a duty to identify information that comes directly to you, or is it a duty to identify and further investigate a particular issue? What does that mean for the role of the health visitor? When we spoke to the legal professionals in our organisations, they were a little bit concerned about that duty and flagged up the potential for that role to take on something of a watchdog aspect. It is not an issue that we have explored a whole lot—and I did not hear it being explored in the previous evidence session—but it should definitely be flagged up, because we think that it could have repercussions for our members.

The Convener: Thank you. That was helpful.

Professor van Woerden: I think that trust is often built on sharing, openness and transparency. I certainly support the suggestion that, under normal circumstances, families would be informed if information was being shared. I say that for two reasons: first, it builds trust; and secondly, it provides the opportunity to correct matters of fact. Often such areas are quite complex, and it is possible that the professional in question might be incorrect about certain matters of fact.

11:15

Johann Lamont: It has been said that responsibility for a failure in the system would lie with the local authority or health board. I am interested to know what such organisations would do internally to protect themselves. What are the consequences for practitioners if a health board says, "We might get into trouble, so we want to ensure that all our employees are doing the right thing"? Does that put a different kind of pressure on people? Perhaps Annette Holliday can answer my question. Have you had training on that, Annette? I presume that an organisation would want to ensure internally that employees were doing the right thing in order to protect itself.

Annette Holliday: I am not here to speak for my organisation. As a health visitor, I can say that we have had training, but it took place before the Supreme Court ruling so there would need to be updates and changes in respect of the Children and Young People (Information Sharing) (Scotland) Bill. We were trained on the duty to share.

You ask what would happen if there were failures. As with anything, the usual investigatory proceedings would follow, and practitioners are concerned about disciplinary proceedings being taken against them.

Johann Lamont: Have there been conversations in health boards about the nature of such a disciplinary procedure, given that there is a lack of clarity about expectations?

Annette Holliday: I cannot answer that—I do not know.

Professor McCallum: There has been a lot of training in NHS Lothian. Following the Supreme Court judgment, further communications went out to say, "Please continue to work in the current professional manner and seek advice as appropriate.”

Our child health commissioner sits on our information governance assurance board and our multi-agency data-sharing partnership. She and one of her support folk have a work programme that is designed to ensure, as far as possible, that people understand how to do their jobs and how the organisation will support them.

The Convener: Tavish Scott can go next, followed by Liz Smith.

Tavish Scott: I have a couple of questions about individual responsibility for decisions, which you have touched on this morning, because the position is not clear. Your concerns are clear, and I would like to bottom those out. We are discussing not the principle of the named person scheme but the draft bill and the code of practice. You will have heard a lot of concerns about the code in earlier evidence. Can you describe your concerns about what it would mean, as currently constituted, for individual responsibility for decisions?

Lorna Greene: Are you referring to the code of practice specifically?

Tavish Scott: Yes.

Lorna Greene: I appreciated what Gillian Martin said in the previous evidence session. It is an illustrative code, so it is an example and in no way indicates what we could reasonably expect to see at the end of the process.

The RCN, along with Unite and others, has engaged with the GIRFEC team as part of its work with stakeholders. At the most recent meeting, we were told that it was more than likely that the code of practice would look entirely different at the end of the process. We have not spent much time engaging on the code, first because we do not think that legislation is the right way to go about fixing what the judgment said about the 2014 act, and secondly because we do not see the point in engaging on an illustrative code that could change dramatically. At present, there is not a lot that we can sink our teeth into.

In addition, we have not been given an assurance about where the code will sit in relation to the Nursing and Midwifery Council’s code of practice. We are clear that anything that becomes law would sit above the NMC’s code, but we do not know where the two codes of practice would sit in the hierarchy relative to each other. Would one sit higher than the other, or would they sit next to each other? We have not been told. Our main concern at this stage is to get clarification on that point so that, if the code of practice comes in and we have to comment on it further, we will at least know where it sits in relation to the NMC’s code.

Tavish Scott: That is very fair. The Parliament is being asked to pass legislation that gives effect to a code of practice that is now in draft. As you have just said, we do not know what it could look like in the future. That is not the way it should be done, is it?

Lorna Greene: That is why we do not think that the legislation is a good idea.

Liz Smith: I have a practical question that relates to quite a few of the comments that have been made. The proposed change would mean that you would have to make decisions about whether you should share information or not, and you have just flagged up some of the codes that you would have to be cognisant of in order to do that. Are any of you able to quantify the amount of time that you would have to spend in your daily job to ensure that that was documented and, given that you were accountable, why you had made a decision to share or, in some cases, not to share information? Can we get from you any indication of the time that that might involve?

Valerie White: I can probably answer from the point of view of dentists or independent contractors. The time to sit and document all of that is probably not built into the daily routine of how they manage their patients, so it would have a significant impact in terms of time. I am hugely positive about getting it right for every child and its principles, but how it will work in practice has not been factored in. General dental practitioners have a huge amount of information that could support the health and wellbeing of children, and there are probably other professions, too, on which it would have an impact. There has been financial modelling on the health visiting aspect, but it goes much wider than that.

The Convener: Professor van Woerden, I believe that I cut you off the last time you were about to answer. I am sorry that I did not notice you.

Professor van Woerden: There are implications for individuals, but there is also organisational time resource involved, in relation to the collation, transmission across or between organisations, storage and eventual safe disposal of such information.

Clare Haughey: I want to come back briefly on Lorna Greene’s point. She may not have seen the NMC’s submission. The NMC said that, because its “main interest” was

> “making sure that our UK wide regulatory provisions and any named person information sharing provisions in Scotland can operate”

beside the code, it could

> “currently see no conflict between the draft legislation proposed and our own regulatory approaches, notably our Code.”

I just wanted to offer that reassurance that the NMC is engaged in the process, which it needs to be.

Lorna Greene: Sure; I have read that submission. The NMC is part of the same group that we are with the GIRFEC team. That is correct, but what it is talking about is the legislation, not the code of practice. The NMC has not commented on the code of practice because it is aware, as are we, that it is not the final code of practice.

Clare Haughey: Absolutely.

Lorna Greene: That is still our concern.

Clare Haughey: I wanted to offer reassurance, particularly to registered nurses and midwives who may be watching this meeting, that the NMC is involved and engaged in the process, which is important.

Lorna Greene: The NMC is involved, and we are working with it.

Ruth Maguire (Cunninghame South) (SNP): Good morning panel. Thank you for coming. One of the strong themes that came through in the submissions was the need for training and guidance on information sharing. I am interested to hear panel members’ reflections on their experience of the training that was provided for the 2014 act and the type of training that they think would be most useful. Also, we have heard that GIRFEC is to cut across all teams who are working with children—how wide do you think the training needs to be?

Jean Cowie: The training needs to go across all professional groups. NHS Education for Scotland has been involved in developing resources—online modules—but those are on hold until decisions have been made about information sharing. The training needs to be sustainable and practical, with real-life examples and scenarios to work through to explore decision making. To support the training, a system of supervision needs to be in place to support practitioners with their decision making. I know that supervision has been considered in nursing, although I am not sure what is happening in other professional groups. However, to ensure that there is consistency across the board, there perhaps needs to be a model or system of supervision that goes across the professional groups.

Ruth Maguire: As different professionals have different models of supervision at the moment, will that be challenging?

Jean Cowie: Possibly.

Annette Holliday: The training on other aspects of the 2014 act was challenging for the workforce. Where practice support was required, people could access training, but putting that into their practice and changing models of practice was hugely challenging, and it is still not fully embedded.

Ruth Maguire: This is a big question, but what specific lessons can we learn from those challenges?

Annette Holliday: It is a big question. In my organisation, I was involved in rolling out training on the national practice model. We had two-day training for health visitors, and there was then an expectation in the organisation that people would go off and start to implement the model. However, we quickly realised that that would not happen, and we are still embedding the change. The issue comes down to things such as the need for more supervision at times of change, the case-load management decisions that are made and perhaps a need for more audit. There are huge resource implications. After that organisational training, we also had the wider NES training, but it is still not fully embedded.

Professor van Woerden: I will reflect on training more widely. It is very simple to train somebody to ask a child, “Can you count from one to five?” because the child either can or cannot do that. As was referred to in the previous panel, with tests such as the SHANARRI assessment, there is always a risk of what are called false positives and false negatives. In other words, the risk is that there is a problem but you do not spot it, or you think that there is a problem but there is not one. The challenge is that people are trying to deal with that across the SHANARRI indicators—safe, healthy, achieving, nurtured, active, respected, responsible and included. One of the challenges with the test is whether it is administered identically by all people with the same thresholds. I do not know whether any academic work has been done on SHANARRI to explore whether there is inter-individual variation in the threshold of assessment of wellbeing. One of the challenges of training is how we train people for tests that are not simple ones involving whether a strip turns pink or blue.

Ruth Maguire: The professionals who we are speaking about who are involved in child development make judgments on that anyway, based on the situation. It is not always black and white, is it?

Professor van Woerden: Absolutely.

Professor McCallum: To build on Professor van Woerden’s point, in line with best educational practice, to ensure that everyone can practise at the level that we would expect them to most of the time, seven and a half hours of training will provide awareness raising and highlight gaps in confidence and on-going skills, but those gaps will then need to be filled using scenarios to test decision making and support systems that allow people to have their decision making checked out. There also needs to be on-going support as new scenarios and new evidence come along that people need to learn from. For me, it is important that there is a comprehensive programme that links with early intervention, prevention and support. Even as a marginal additional intervention, seven and a half hours of training will give us only a false sense of security.

11:30

The Convener: I have a question on an issue that might be in Jean Cowie's area of expertise. When new things come in and training regimes are put in place, do they not eventually just become part of the educators' role or part of the role of whoever is responsible for training in an organisation? Do they not become part of the overall training rather than stand-alone training?

Jean Cowie: With the introduction of the health visiting pathway, for example, we provided continuing professional development days to upskill the workforce. However, as Alison McCallum said, that is more about awareness raising, and we expect practitioners to go and learn more. We had sessions with the educators on the health visiting courses in Scotland to ensure that the courses addressed the key requirements and priorities for Scotland and the pathway at that time, and the 2014 act was part of that. However, as Annette Holliday pointed out, that was a couple of years ago, and the training needs to be constantly revisited and updated.

The Convener: Eventually—again using your role as an example—the training will become part of the training for new recruits into nursing or whatever.

Jean Cowie: Yes, that will happen over time, but it will probably take quite a while for it to be integrated properly.

Lorna Greene: The word "comprehensive" was used earlier, but a comprehensive approach is missing in what we have seen so far on the training that will be provided. It feels as though it will be a pretty one-off process, and we are not reassured that there will be something comprehensive to back that up to ensure delivery going forward. Annette Holliday mentioned resources, which are massively important when we talk about training, not just for funding the training but to ensure that, when people undertake CPD or further training, backfill or cover is available.

If we introduce 500 new health visitors into the workforce, they will need supervision as they do their day-to-day job, because they will be new to the role. Although they will be well trained, that supervision will be important as they carry out their job, and the resources that are put into the profession will have an impact on that.

Ross Greer (West Scotland) (Green): I have a question on the back of Lorna Greene's point about the need for adequate resourcing of training. The financial memorandum for the bill sets out that there will be just under £1 million for health boards for the training. Is that adequate?

Annette Holliday: Unite's written submission said that around 800 extra health visitors will be required to deliver the increased contacts in the universal pathway and to allow best practice to happen, rather than the 500 that the Government has set out.

Lorna Greene: There could be an impact on services' budgets. One-off funding will be provided for training, but where will the funding come from for on-going training or training for professionals other than health visitors who might be impacted by the named person role? It might have to be found from within services, which would be challenging at a time when resources are very tight.

Professor van Woerden: This does not answer the question directly, but I think that part of the modelling is the assumption that, where an intervention is required, that will on average involve, I think, 10 hours. For early prevention to work, there must first be what I call a latent phase when something is not too bad a problem but can be detected, and it then has to be detected. When it is detected, something has to be done about it that makes a real difference—in other words, an intervention that changes the trajectory for the child. The important bit is not so much the detection but the intervention thereafter that sets the child on a better trajectory.

Ross Greer: Going back to the 2014 act, do you believe that there is adequate training for practitioners who are involved but who are not the named person, such as those who share information with the named person?

Annette Holliday: I do not think that the 2014 act went wide enough. At the time, the approach was about trying to train the people who would be named persons, but other health colleagues are still not fully trained in GIRFEC. That perhaps goes back to Ruth Maguire's point. When child protection first came in, it had to go beyond women and children—it had to be recognised as board wide and an all-services issue—and perhaps when we talk about "wellbeing" the same should apply.

Valerie White: Training for general dental practitioners and dental teams is provided by NHS Education for Scotland, but that is only the tip of the iceberg. The issue is on-going and we need local training on local systems. Training does not happen just at a high level; it filters right down through the whole system and needs to involve all professionals, too.

Annette Holliday: Is the £1 million of funding for training recurring or non-recurring?

Ross Greer: I understand that the £1 million is for 2018-19 and is a one-off payment.

The Convener: Thank you, Ross. Oliver Mundell wants to come in.

Oliver Mundell: I will start with a simple question. From a professional point of view, is the bill as it is currently drafted easier or harder to understand than the original legislation?

Professor van Woerden: It is positive in that its aspiration to give children in Scotland world-class development is very clear and is a fantastic aspiration to have. The clarifications have come as a result of the Supreme Court’s ruling. Generally speaking, it is a positive thing but there is huge complexity underpinning it, which many people have alluded to in different ways.

Lorna Greene: The RCN is a supporter of GIRFEC and of the principle of the named person. We feel that the bill introduces vague concepts that we have talked about already, such as the duty to consider and the duty to identify. We do not feel that those are helpful concepts.

Oliver Mundell: Does it make the decision-making process more complicated for professionals than the original act did? Does it add to the burden of complexity and difficulty for professionals?

Lorna Greene: It is difficult to comment on that. The parts of the original act that referred to information sharing were deemed not to fit in with human rights law and European Union law; therefore, whether they were easy to understand is irrelevant because they were not lawful. That does not matter. What matters is that the bill that is in front of us now introduces vague concepts that we do not feel would necessarily aid professionals in providing a meaningful service that would achieve the best possible results through a named person service.

Oliver Mundell: Thank you very much.

I have one further question on the recording of evidence and decisions. You have talked about supervision and the need for consistency across different services, with people making the same decisions every time. How can you achieve that consistency without looking at the decisions that are being made and the information that people have decided not to share? How can someone supervise that process without understanding the decisions that have been made?

Professor van Woerden: It is complex, as you know. The area that I tried to highlight in my submission as being particularly complex involves teenagers. The question is whether a teenager is competent to give consent on their own behalf. That is one of the areas in which professionals would have to make decisions. There was a slight unintended mixed message in what was being said in that, by considering the wellbeing of a teenager, one was, in effect, saying that the teenager was not competent to consider and look after their own wellbeing. At the same time, one might say that the teenager was competent to make a decision about consent. With children under the age of 12, there is a difference such that that is not the case.

One potential solution, which might clarify the situation, would be for GIRFEC to apply up to the age of 12 and not to teenagers. An alternative solution that would reduce the mixed message would be to say that, if somebody is not competent to look after their own wellbeing, they are not competent to give consent either.

Valerie White: From a practitioner’s perspective, I do not think that the legislation will ever be clear; it will always be complex. It is underpinned by guidance that is supported by the key stakeholders for the professions—in dentistry, that is the General Dental Council—and the defence organisations. By its nature, the legislation will always be complex and difficult to interpret, so it will probably be really important that the underpinning even below the code of practice is in place and agreed by key stakeholders, so that we are all singing off the same song sheet.

Oliver Mundell: Lorna Greene mentioned the press interest in the matter and the negative media attention. If the bill is passed and implemented, will there be considerable interest in the decision-making procedures below the legislative framework? If something goes wrong, will the focus of attention be on the recording and sharing of information and the decisions that are made at a local level?

Lorna Greene: That is a difficult question to answer, because I do not know what will happen with the bill down the line. We mentioned the media coverage and flagged it to the GIRFEC team because we were aware of the impact that it would have on our members, who are trying to do their job. To do that, they need to be trusted by the people whose doorsteps they turn up on to deliver care and support. Whatever happens with the bill, we want actions that make it clear that health visitors provide care and support through building trust and meaningful relationships with the people who use their services. I do not know which way the media will go with the matter following on from the bill. We want the GIRFEC team to promote the positive messages and underline why health visiting and the named person role can be meaningful.

Clare Haughey: I was struck by the Unite submission, which says:

> "Unite the Union are dismayed by the approach that many in public life have taken during this debate with the Named Person becoming the rope in a political tug of war. The well-being of the child and the professionals identified as the Named Person being the potential casualties in a battle of political dogma. Ultimately it will not be a politician who has to argue the merits of the Named Person but a clinician establishing a relationship with a child and their family."

That is an important point to make. You guys are out there at the coalface, working with families, so you have to develop a trusting relationship. We must be mindful of that.

Tavish Scott: The converse of that is that the witnesses expect us to pass legislation that works but, as they all said, the code of practice, in effect, does not exist because the draft is going to change, so we cannot do our jobs. I get the point about the need to pass sensible legislation that can work, but I am worried about passing legislation when we do not know the basis of it because we do not yet have the code of practice. The witnesses have confirmed that today. What do they want us to do—pass legislation that they know has failings in it or wait and ask the Government to get it right when everything else has been sorted out?

The Convener: I am not convinced that that is a question for the witnesses to answer. It is a fair point to raise, but I do not think that the committee is trying to propose legislation when we do not know what it is about.

Tavish Scott: In that case, I am not sure that I see the point of our being here.

Gillian Martin: I will ask about workload. The witnesses have covered much of what I would have asked about. Am I right in thinking that there is an issue about having to evidence things that ordinarily would be onerous to evidence for a bureaucracy that will steal time from the job that professionals should be doing?

We have talked about the illustrative code of practice, which I take as being intended to engender a conversation among professionals about what such a code could look like. I throw the question open to you: what would you like the code of practice to look like? How would you like to engage in the process so that the code of practice gets your support, given that you are the key stakeholders?

11:45

Professor van Woerden: The key point is that the code should emphasise that parents are the experts on their own children and that others stand alongside to help and support them in exercising their duties. As a society, we aspire to fantastic things for our kids and for the next generation of children who are growing up, but we do not want to pressure parents unduly by saying that they are failing unless their kid is right at the top in everything. We need a sense that the parent is the expert and that the system comes along to be supportive and encouraging and to help to maximise the achievements of every child.

Annette Holliday: Unite wants consistency and clarity for its members, with every practitioner across Scotland working to the same code of practice rather than following different variations. There might be local tweaks but, in general, there should be a clear, consistent message rather than a code that is based on a load of legal speak that we do not understand because we are health visitors and not lawyers.

Lorna Greene: As I said, we have not engaged on the code of practice because it is illustrative and will change and because we do not support the bill. The RCN would like the Scottish Government to consider more carefully the merits of allowing best practice, in line with data protection law and European law and in a manner that is compatible with the European convention on human rights, to be the basis for information-sharing provisions. We think that, with the right guidance and training, professionals can be trusted and expected to deliver a high-quality and consistent named person service. Services across Scotland are already delivered in line with standards and in accordance with best practice as laid out in guidance. We do not see why the situation would not be the same in this case.

Professor McCallum: I am keen that the aspiration that we all have for our children and young people to achieve their potential is realised. That requires an infrastructure that enables information sharing to allow professionals to do their jobs, to deliver universal services and to ensure that practitioners can work with colleagues from other disciplines to deliver high-quality services. We must be able to share information in order to do our jobs to the standard that the people of Scotland require. Any legislation must support that work and not get in the way.

Gillian Martin: Given that you already have to record an awful lot of what you do on the ground, and given that the new considerations might have to be evidenced in some way, can you say, “Look—we are already doing this. We have this covered and don’t need a bureaucratic layer on top”? You are largely recording such information now, particularly in the Highlands, where that has been happening for a very long time.

The Convener: Does anyone want to respond to that?

Valerie White: Currently, a general dental practitioner will write notes, so they would have to add a line to their notes to say, “I have considered this”. It would become part of the record-keeping process. However, if everything was okay and they did not think that there was anything that they needed to consider, would they still have to write that down?

Gillian Martin: I suppose that that is where the code of practice would come in.

Valerie White: Yes.

Gillian Martin: Thank you very much.

Johann Lamont: I was interested in Dr McCallum’s point about the legislation not getting in the way of people doing their job. The RCN has basically said that the bill does not help, and other folk have talked about the extra burden. It all feels very complicated. Is there a point at which we say that all this very technical debate is getting in the road? If somebody has not only to make a decision but to show evidence that they have thought about it—considered it and decided in which categories they have to consider it—at what point do we say that that is getting in the road? What would be the test for that?

Professor McCallum: At the moment, practitioners document what they do in line with their professional standards so that they can have conversations with their supervisors, and they write clinical notes in order to deliver a service, as I and others would. I do not think that the duty to consider provides much of an additional burden to that.

The concern is with the legal way in which the code of practice is written. I understand why it is written in that way, but it feels as though we would be held to legal evidential standards for everything that we write, rather than just documenting the situation, the things that we have discussed with the child and family, what we think the next steps are and who else we need to involve. If the approach moves on from that to being something that has to be to a standard that is testable in court, that is when it moves from being good practice to being an additional bureaucratic burden.

Johann Lamont: There is a duty to consider, so you will have to give evidence that you have considered sharing information, and you will have to know in what circumstances that duty applies. There is no getting away from that. Will that get in the way of you doing what makes perfect sense to me, which, as you said, is looking at the situation and identifying who you need to speak to about it to highlight concerns? I presume that there are circumstances in which, as I mentioned to the earlier panel, there is a conflict between the interests of the child and the practice of the parent or what the parent is doing.

Professor McCallum: Such things are heavily documented, because they involve the sort of complex professional judgments that people want to talk to their professional supervisor or line manager about in order to get additional help. My understanding is that a code of practice can be for the purposes of providing additional evidence and support to lawyers and the Government about how a bill is enacted, but when we talk about codes of practice, we tend to think of codes that show how legislation turns into something that we can use to help children and families. Currently, the code of practice is written to help lawyers and I understand why, but I think that we are all saying that there cannot be a division between the things that are written to help lawyers and the Government to enact the legislation and the things that we need in order to do our job. Those things have to be perfectly aligned and they are not quite there yet.

Johann Lamont: Do you see it as the code of practice’s purpose to identify how you fulfil your duty under the legislation?

Professor McCallum: Yes.

Johann Lamont: The current code does not define good practice in the sense that we would normally expect.

Professor McCallum: No.

Johann Lamont: It is about the obligation. I wonder whether that will get in the road of good practice, because it is a legal test that you will be facing.

Professor van Woerden: It is particularly important that the guidance has proportionality. Let us imagine that a health visitor comes in and says, “Your kid is a wee bit slow at speaking. I am going to refer you to the speech and language therapist.” For 95 per cent of the time, the parent would say, “Wonderful. I am so pleased. Thank you so much.” The difficulty comes when the parent says, “Oh, speech and language therapists. I think they are total quacks. They are a waste of time.” Does that make sense? There has to be proportionality once you are into child protection.

The difficulty is that there is a spectrum. Most parents want to ensure the wellbeing of their child and have no contention at all with professionals; that is the case 95 per cent of the time. The challenge comes with distinguishing what I would describe as idiosyncratic parenting from poor or harmful parenting; there is a gradient and it is about demonstrating how, proportionately, one has considered the child's needs, the need to communicate with other professionals about the child's needs, and the varying extent to which that would be documented.

Daniel Johnson: On the point about wellbeing, the SHANARRI indicators cover things such as a child's being "included" and "achieving". Surely that brings differences of opinion much more squarely into scope, perhaps in more than 5 per cent of cases. For example, one parent might think that a child should speak up all the time, and another might think that a child should listen first and then speak—I am not saying that that would be flagged up, but we can see that there might be consequences. How much of a concern is that?

Professor van Woerden: I am 100 per cent behind the aspiration of the Scottish Government. We want our children to do well. We want to be able to make a holistic assessment of the child, and we want to push forward every boundary of the child's wellbeing.

The challenge for me as an academic is that, as far as I am aware, SHANARRI has not been through some test of its sensitivity and specificity—if I may use the technical terms. That raises questions about its capacity to differentiate in such circumstances.

Let me give the committee a crazy example. Let us say that Johnny is a seven-year-old whose dad died trying to blaze a new route up Mount Everest. Johnny falls out of a tree and has a hairline fracture to his arm. Accident and emergency sends a wee form to the named person to say that Johnny fell out of a tree, and the social worker says to Johnny's mum, "You need to be a bit careful about Johnny's climbing." Mum then says, "Johnny is going to do what his father could not do and blaze that trail up Mount Everest." That is idiosyncratic parenting in which dangerous activity is highly valued.

In terms of early prevention, Johnny's climbing is probably a latent phase—he will probably do a lot of dangerous climbing in the future, and we might say that there is a higher risk that the child will die while mountaineering. Is there an effective intervention in that situation, and is the parenting poor to a level that requires intervention? There are a bunch of complex questions in such an example.

Daniel Johnson: That is a helpful hypothetical situation.

The Convener: I do not think that any of us has an answer to it.

Colin Beattie: It is almost inevitable nowadays that people who deal with the public will face a complaint at some point. In relation to health organisations, should there be a complaints procedure for the named person service? Is the existing remedy of recourse to the Scottish Public Services Ombudsman adequate?

Valerie White: Speaking as an individual, I see no need for another complaints system.

Colin Beattie: In your experience of it, if you have any, does the SPSO work as well as it should?

Professor van Woerden: I can give an individual view. Whether a complaint is of nature A, B or C, as long as the complaints process can flex across all situations, I think that there are more dangers in creating an alternative mechanism than there are in sticking to established mechanisms.

Colin Beattie: How do we ensure that the consent that you receive is explicit and is as easy to withdraw as it is to give? Is there already a mechanism for that or does more work need to be done? What is your experience? I can imagine a situation in which a parent withdrew consent. How would you deal with that?

Lorna Greene: Are you asking specifically in relation to the named person?

Colin Beattie: I am asking in relation to the named person, but you might also reflect on your current process.

12:00

Lorna Greene: As I said, I am not a practitioner, so I am not a clinician who delivers care in that sense. However, in relation to the named person and what you said about withdrawing consent, it is clear that children and their families are under no obligation to engage with the named person service if they do not want to or if they have changed their minds about it. GIRFEC guidance is clear that there should be no problem if consent is withdrawn from the named person and there is no involvement with child protection.

Colin Beattie: What would be the mechanism for withdrawing consent? You have said that consent is not always in writing and is sometimes implied.

Lorna Greene: I imagine that that is why robust guidance on the matter will be needed—whether that is in relation to best practice or whether that is dealt with in the final stages of the bill. Either way, there will need to be robust guidance that outlines the position clearly to the practitioner. Families need to be absolutely aware that they are not obliged to take part in the named person service and can end their participation in it at any point. That is what the GIRFEC team has said and it will need to make that clear when implementation happens.

Professor van Woerden: Caldicott has been mentioned. I am a Caldicott guardian for NHS Highland and I know that there is a lot of on-going work on information sharing. Dame Fiona Caldicott has produced three reports over the past decade and more; the most recent is the national data guardian for health and care's "Review of Data Security, Consent and Opt-Outs", which she produced last year. It considers the issues in relation to health. She does not provide total answers but, for example, her recommendation 11 states:

> "There should be a new consent/opt-out model to allow people to opt out of their personal confidential data being used for purposes beyond their direct care."

The issue is bubbling in all care areas and it relates to the new European legislation that will come into play to replace the Data Protection Act 1998.

Colin Beattie: So that is all still developing.

Professor van Woerden: At one level, it will always be developing, because technology is changing so fast. That is about technological changes such as cloud storage of data and so on that mean that there is an on-going scenario of change—it will always be a dynamic area.

The Convener: I have one last question. The issue of guidance has come up a lot from just about everybody. The committee surveyed local authorities and health authorities and found that more than three quarters of them agreed that their organisation should provide further guidance on when information could be shared. I know that Perth and Kinross Council has a child protection committee. Have any witnesses looked at the Perth and Kinross example or similar examples to identify best practice and how guidance has been rolled out? I accept that that roll-out had to stop because of where we are now, but it did take place.

Professor McCallum: We looked at Perth and Kinross as our data-sharing partnership was developing guidance in the area. We have multi-agency child protection guidance and guidance for persons caring for adults whose children are vulnerable, and similarly with adults.

There is overarching agreement between agencies, and individual agreements for the purposes of delivering particular services. That means that we can say to—in this case—children and families, "This is how we do our business. This is what the team around the child looks like." If consent was withdrawn for a particular agency, that person would not be part of the team around the child and everybody else would just have to fill in. We do not see that changing in practice and we see the named person idea as strengthening practice and perhaps ensuring less confusion in complex situations.

The Convener: So it could be possible for organisations to roll out guidance once it becomes available.

Professor McCallum: Some organisations have the infrastructure in place, but not all do.

The Convener: Thank you very much. That brings us to the end of the session. I thank you all for your helpful evidence.

12:05

Meeting continued in private until 12:19.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba