OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 25 October 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 25 October 2017

CONTENTS

EDUCATION AND SKILLS COMMITTEE
26th 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:

Detective Chief Inspector Norman Conway (Police Scotland)
Megan Farr (Children and Young People's Commissioner Scotland)
Ben Farrugia (Centre for Excellence for Looked After Children in Scotland)
Donna McEwan (Centre for Youth and Criminal Justice)
Teresa Medhurst (Scottish Prison Service)
Maggie Murphy (Glasgow Kelvin College and Colleges Scotland)
Judith Tait (Care Inspectorate)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 25 October 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (James Dornan): Good morning. I welcome everyone to the 26th meeting in 2017 of the Education and Skills Committee. I remind everyone to turn mobile phones and other devices to silent mode for the duration of the meeting.

Apologies have been received from Tavish Scott.

Agenda item 1 is a decision on whether to take in private item 4, on our work programme. Is everyone content to take that in private?

Members *indicated agreement.*

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

10:00

The Convener: Item 2 is evidence from two panels of witnesses on the Children and Young People (Information Sharing) (Scotland) Bill. This is the fifth meeting at which we will consider the bill. We have already heard from the Scottish Government's bill team, members of the legal profession, health service professionals, local authority education and social work representatives, nursery and early years education representatives and the Information Commissioner's Office.

Our first panel this week includes organisations that will be required to consider whether to share information with named persons. The second panel will focus on children—for example, looked-after children and young offenders—who are already involved with statutory agencies.

I will start by asking a couple of questions of the whole panel. To what extent will your organisations share information with named person services, do you expect?

Is anybody keen to start?

Judith Tait (Care Inspectorate): I am happy to start. At present, in our regulatory work, the Care Inspectorate would not share information directly with named person services. Our role is to support and encourage service providers to share information appropriately with named persons. When, on a regulatory basis, we inspect early years services and children's services, we will encourage them to build good relationships with named person services and share information with them, as appropriate. That will be our main focus when we undertake our regulatory responsibilities.

In our joint inspections of services for children, we will become aware of and consider situations in which wellbeing concerns are getting in the way of a child's development. Again, we expect that partnerships and service providers will take appropriate action and make decisions about when it is right to share information, rather than that we will work directly with named person services.

The Convener: Before anybody else responds to my question, I apologise for not introducing you all first. Judith Tait is service manager for strategic scrutiny in children and justice in the Care Inspectorate. We also have with us Maggie Murphy, who is senior curriculum manager at Glasgow Kelvin College and is a representative of Colleges Scotland; Detective Chief Inspector

Norman Conway of Police Scotland; and Megan Farr, who is a policy officer with the Children and Young People's Commissioner Scotland.

I thank Judith Tait for answering my question. Anyone who wants to respond to a question should try to catch my eye. Does anyone else wish to respond to the first question?

Megan Farr (Children and Young People's Commissioner Scotland): In the majority of our operations, the CYPCS is not an information sharer, but we have an inquiries line and we get inquiries from children and young people and their parents, from professionals and, sometimes, from people who know the child in question. We do not share information without consent unless there is a child protection concern, and we expect that approach to continue.

We have a system to record consent by the child. There are two parts to it: one part is about giving the CYPCS consent, and the other is about giving the local authority or service provider consent to share information with us.

For example, last week we had a case in which we were contacted by a person about an issue regarding a child. The case did not meet the child protection threshold, but was of significant enough concern for us to want to discuss it with the local authority, so we sought the consent of the young person before we contacted the local authority. We usually inform a child if we are going to share information, even in child protection matters. The only exception to that would be if the child or young person would be put at more risk by finding that out.

Detective Chief Inspector Norman Conway (Police Scotland): Following the Supreme Court judgment, we have carried out quite a lot of work on our concern hub practice and have really tightened up on the duty to consider sharing information, and on justifying sharing of such information with the various agencies. We see the named person service as being just one piece of the jigsaw in GIRFEC—getting it right for every child. Some concerns have been expressed about an avalanche of information going to the named person service: from the police's perspective, that will not be the case. We would consider who the best people were with whom to share information while acting within the law. Some of that will involve statutory agencies—social work services and maybe the named person service—but there are also opportunities to share information with the third sector.

Maggie Murphy (Glasgow Kelvin College and Colleges Scotland): Colleges—in particular, the college that I represent—support a high volume of vulnerable people between the ages of 16 and 18, many of whom have statutory involvement with social work organisations and other support-based organisations. As a result, we share information; we do so with the consent of the young person, who is directly involved, and we do it from a person-centred point of view. A college would share information for the safeguarding and betterment of a young person's involvement in college life, and we recognise the value of doing that on a fairly sustained basis.

The Convener: DCI Conway has already said something about the next point that I wanted to raise. What sort of preparatory work have your organisations done in relation to the duty to consider sharing information?

Maggie Murphy: Glasgow Kelvin College supports members of staff through training on safeguarding and corporate parenting, and staff would be updated on any changes in legislation. They have an understanding of their responsibilities and the duty of care from a safeguarding perspective. There will, accordingly, be continuing professional development for staff under safeguarding and corporate parenting legislation.

The Convener: Does anyone else want to comment on that?

Megan Farr: The CYPCS has looked at the duty to consider sharing information, but the reality is that we already consider, when we receive information from children, young people or other people, whether there is a child protection concern. That is already part of our normal processes; the evidence that has been heard previously suggests that that is also the case for other organisations. Our other concern around the duty to consider sharing information is that it needs to be clear that it does not change the threshold at which non-consensual information sharing occurs.

The Convener: I have a final question. In general, do you support the GIRFEC approach and the provisions of the universal named person service, and do you also agree that information sharing is important if we are to succeed in the objective of improving outcomes for children and young people?

Maggie Murphy: I fundamentally agree with the approach. Glasgow Kelvin College takes a GIRFEC approach and we record young people's success using the SHANARRI indicators—safe, healthy, achieving, nurtured, active, respected, responsible and included. We fully and whole-heartedly embrace that. There are case studies of young people who have had multiple agencies in their lives while at college, about whom we have shared appropriate information, and who have gone on to thrive, succeed and articulate well.

Megan Farr: We support the getting it right for every child approach and we support the named person scheme, which will make a significant contribution to the realisation of children's rights. It gives children, young people and their families a single point of contact to access services, which is an improvement on situations that occur at the moment. We supported the named person scheme in the joint letter from children's organisations that was sent to the Government in June 2016, but we raised concerns during the passage of the Children and Young People (Scotland) Act 2014 about information sharing and the potential for lowering information-sharing thresholds, so we supported the arguments that Clan Childlaw made in relation to information sharing and concern for children's privacy.

Judith Tait: The Care Inspectorate certainly welcomes the policy intention of the bill. We support the general principles to support practitioners in clarifying their understanding of the right point at which information should be shared, below the child protection threshold. We also welcome the recognition of the importance of professional judgment in making those decisions.

We would consider scrutiny in the context of our having come a long way, to the current position in which partner agencies have ownership of the need to protect and promote children's wellbeing, and in which the agencies recognise their roles in that. We would not wish momentum to be lost, because that work has come far.

When we are out inspecting, we would be able to identify the levers for promoting positive early intervention, as well as some of the barriers to that.

Detective Chief Inspector Conway: Likewise, Police Scotland fully supports the getting it right for every child approach and the named person service. The bill is an opportunity to bring a bit more consistency to practice throughout the country. We have done a lot of internal work on our standards of information management by taking the rights of the child as part of the assessment process, and in justifying and recording a rationale for sharing information, no matter the agency. What we have just now around the country is a bit of a patchwork quilt with regard to where information goes, so there is a huge opportunity for us to go back to the Christie commission approach in terms of delivering on the prevention agenda, and to get much better at picking up on early warning signs.

Ross Greer (West Scotland) (Green): I am particularly interested in how this will affect Police Scotland, given its relatively unique position. One of the objectives of the named person service is improved consistency on information sharing. Police Scotland is a national force, so what is your officers' experience of consistency across the local authorities when it comes to your relationship with social work and schools?

Detective Chief Inspector Conway: That has been a challenge. In-house, we have been able to drive consistent practice on how we manage, assess and share information. That means not sharing all information—we have really tightened up on what is shared and with whom it is shared. The Supreme Court judgment created a fair bit of uncertainty with regard to what could happen, so there were differing interpretations among local partnerships of what it meant for them, and there was a bit of push and pull with the local partnerships about their expectations of when we would and would not share information. We have managed to work through a lot of that.

The bill will probably bring a bit more clarity about the roles, responsibilities and functions in the named person service, and it will declutter the landscape and help us to ensure that children do not fall between the gaps.

Ross Greer: Once the service is fully implemented, how much will it change your current practice? Your previous submissions to the Finance and Constitution Committee, particularly around the concern hubs, indicated that you are, essentially, operating in line with the provisions in the bill.

Detective Chief Inspector Conway: We are fairly comfortable about being on a continuous improvement journey. I have heard examples of things not being dealt with properly, but I hope that they are isolated examples and that there is not a massive issue. We have trained our concern hub staff and we have started to embed the standards of information management and sharing.

The challenge for us is in operational practice. There is further training to be done with our operational officers because every week we deal with quite a high volume of child concerns. The journey of identifying wellbeing concerns, recording them and articulating them to children and families can start in the household at 3 o'clock in the morning, so we need to make sure that our officers get it right at the first point of contact.

Liz Smith (Mid Scotland and Fife) (Con): I will pick up on the point that DCI Conway has just raised. Concerns were expressed about resourcing in Police Scotland's submission to the Finance and Constitution Committee. How much time during officers' training is spent on learning what is right and what is not right with regard to information sharing?

Detective Chief Inspector Conway: Police Scotland has put significant investment into my project, which has been one of the workstreams

for the past three years or so. It has been a journey of continuous improvement.

We are still working through the potential implications of the European Union's general data protection regulation, the bill and the code of practice. We do not have a definitive view on what the training for our operational officers will look like. There is a school of thought that says that we may be able to provide it through e-training, but we might need face-to-face training. There will be a big focus on standards of information.

10:15

It is difficult to be certain about resource commitment and time, but we flagged up in our response to the financial memorandum that the Government should recognise that no account had been taken of Police Scotland's training requirements. As a caveat to that, however, I add that I do not think that that is insurmountable. Even if we did not have the bill, we would still have to be training our officers in relation to standards, the GDPR and explicit consent.

Liz Smith: I am sure that you would. How much money has been spent on training already?

Detective Chief Inspector Conway: The project that I am involved in—the risk and concern project—has been pretty wide ranging. There have been three workstreams. We have largely been working on concern hub improvement, the Children and Young People (Scotland) Act 2014 and the bill, and we also have the vulnerable persons database. Our project team has been working on that for about three years. It is really difficult to put a costing against that and to strip out what was spent where. In general terms, the workstreams have all run alongside one other. From a police perspective, I think that we are in a much better place than we were in three years ago.

Liz Smith: Thank you for that.

I am interested by the fact that you have obviously made quite a strong complaint to the Finance and Constitution Committee to the effect that you do not feel that resourcing is adequate. To make that judgment, you must have some idea of what is required to make resourcing adequate. Can you expand a little on what money you believe needs to go into training?

Detective Chief Inspector Conway: The complaint in the submission was not in relation to resourcing in general; it was just to recognise that a level of resource will need to be committed to developing and delivering training packages. I am saying that I do not think that that will cause us a huge issue, but we thought that it would be worth our while to flag up to the Government that that had not been picked up in the financial provisions for roll-out of the bill. In terms of our project, the cost in resources could probably be subsumed in other work that we are doing, as we take things forward

Liz Smith: That said, I think that a comment was made that you were a bit surprised that the budget was for only one year beyond implementation. Rightly, in my view, you have made the point that there will be on-going training for new officers. Have the police made any estimate of the cost of that?

Detective Chief Inspector Conway: We do not have a cost against that. If there is an e-based training package, it will be much more straightforward to deliver the training. If there is to be face-to-face training, there will be more implications in terms of delivery, costs and resources.

We are still at the stage of considering what we will need. It is not totally clear what the GDPR is going to look like—we do not know that. In general terms, we will be involved in redrafting the code of practice. This is very much a work in progress, and it is difficult to say at this time what the situation will look like in the future.

Liz Smith: Surely, however, once you know those details it would be practical and sensible to make a recommendation about how much money is required for you to do your job properly. That is the implication of what has already been said to the Finance and Constitution Committee.

Detective Chief Inspector Conway: That is a fair point.

Liz Smith: Okay. Thank you.

Gillian Martin (Aberdeenshire East) (SNP): I want to pick up on something that DCI Conway just said. You said that you

"will be involved in redrafting the code of practice."

That gives me an opportunity to ask what you feel, from speaking to the people in your organisation, should be in the code of practice and how it should look.

Detective Chief Inspector Conway: In our written submission, we express some concerns about the heavy weighting towards consent. I know that there are strong views about that. I caveat my comments by saying that I am not an expert on information management and I am not a lawyer, but I have spent quite a lot of time over the past year and a half looking at standards of information management and at schedules 2 and 3 to the Data Protection Act 1998. We have made the point in relation to what is coming, with the GDPR and explicit consent, that we find it really difficult to see how, in an operational setting,

explicit consent would be applied. We feel that in the current illustrative draft of the code of practice there is too much weight on consent, and that there is a legal basis for the police and partners to share information in other ways, which we do successfully just now.

It is important that we take a rights-based approach to children and young people, but if I have officers in a really challenging situation at 3 o'clock in the morning, they might find it difficult to achieve the standards for obtaining explicit consent. Officers will often not know what will happen after that when we join it all up in the chronology of the consent assessment process. How can we tell the people concerned where we are going to share their information if the officers do not know that?

The code of practice must be redrafted to give more clarity. There are dangers in going for an exclusively consent-based model, because it will cause real difficulties for the police and, probably, for other emergency services. That model will probably cause us to withhold information that otherwise could have been shared under the current law. I would like to work through that with the Government. I am comfortable that we can support the Government to redraft the code of practice to be more reflective of current law.

I am not dismissing children's rights—part of our training will always be about seeking the views of children and young people. However, if we ask a child or young person in a house at 2 o'clock in the morning whether they consent to our sharing their information and they agree, but later, as part of the assessment, they say no, and then, at our assessment stage, we believe that we have a legal basis to share that information, there will be tension between what the child or young person said and our statutory duty.

We are comfortable about taking into account the views of the child or young person or of the parent or guardian, as part of the assessment process. However, there are some dangers in going for a practice model that could see child concerns being stockpiled and our not getting the right information to the right people at the right time. Those are the difficulties that we foresee from a police perspective.

As the ICO has indicated, public bodies will find it difficult to meet the standards that will be required for consent. We are not excluding consent, because there will be circumstances in which we will seek consent to share information. However, we will probably look for another legal basis on which to share the information, rather than relying exclusively on consent. That is what we need to work through in the code of practice.

Gillian Martin: That is really helpful. I wonder whether anyone else wants to come in on that aspect.

The Convener: Before anyone else answers, it would be helpful for Oliver Mundell to come in at this point.

Oliver Mundell (Dumfriesshire) (Con): I hear what you say, DCI Conway, about consent and another sort of test. What do you think that test would look like? With regard to redrafting the illustrative code, do you have a suggestion for us for where that threshold would lie?

Detective Chief Inspector Conway: I do not want to become technical, but schedules 2 and 3 to the Data Protection Act 1998 have other conditions for processing information that still allow us to satisfy the law. Consent is only one of those conditions for processing. If we are looking for a practice model that is more consistent and focused on prevention, with a shift towards family support and away from crisis responses, we need to use the law in its current format. We would still be compliant with data protection and human rights and would tighten up on necessity, proportionality and justification, and would share only relevant information with the right people. There would not be a blanket sharing of information.

Through our statutory duties under the Police and Fire Reform (Scotland) Act 2012, our core purpose to improve the safety and wellbeing of people, places and communities, and some of the core functions of a police constable in preventing and detecting crime, we can look to share information and can justify the sharing of that information as acting in the best interests of a child. However, we can also look at the receiving organisation and assess whether it has a core function, role and responsibility to help that child or young person. Importantly, the current law allows us to do that. Isolated cases may have highlighted where we have got it wrong, but I like to think that training will address much of that. Nothing stands still; a lot is happening and there is continuous improvement across the board. The opportunity is there to act within the Data Protection Act 1998 and the Human Rights Act 1998 without going for the solely consent-based model.

Oliver Mundell: That reply is helpful and interesting. Paragraph 107 of the Supreme Court judgment talks about a "compelling justification" for sharing information. I understand your argument in the context of the police, but other people who might have to interact with the legislation may not have the background experience of a police constable. Do you accept that it will be difficult for them to figure out what "compelling justification" means in individual circumstances?

Detective Chief Inspector Conway: I take your point. My understanding is that the redrafted code of practice will be the high-level document that sets out the standards and that the intention is for each organisation to develop its practice guidance to sit under the code of practice. The guidance cannot be rigid; there has to be flexibility and I accept that there will be circumstances in a controlled environment where consent is the appropriate route. However, we cannot forget about the statutory duties of the police and others to share information. For example, there is a tension with the Children's Hearings (Scotland) Act 2011 and our duty to share information with the Scottish Children's Reporter Administration; we could be dealing with a child youth offender and have a statutory duty to share that information with the SCRA but, at the same time, have to ask for consent to share their information with the named person service. We are trying to make the process practical, so that the rights of children and young people will not be ignored but will be taken into consideration as part of our assessment process to see whether we can lawfully share information.

Megan Farr: DCI Conway has covered the situation of the police very well, but other service providers will also share information about children and young people. Information sharing should be based on consent in the vast majority of cases; sharing without consent should be exceptional. DCI Conway has given some examples; a child at 3 am is very unlikely to be able to give consent in that situation.

The majority of service providers deal day to day with children they know. The national health service, local authorities, schools and social workers should be able to provide environments in which there is a relationship with the child or young person and their family within which consent can be freely given and explicit consent can be obtained. The NHS does that routinely in respect of medical care, so the concept is not new.

Evidence was given to members at earlier committee sessions that there continues to be a lack of clarity in the code of practice and other guidance, and DCI Conway mentioned that there are different local authority practices and different interpretations. It is important that the code of practice and other guidance put consent at the heart and make clear that a children's rights approach should be taken. Article 19 of the United Nations Convention on the Rights of the Child says that the state shall protect children and shall

"take all appropriate legislative, administrative, social and educational measures to protect the child from ... physical or mental violence, injury or abuse, neglect or negligent treatment".

That is the right under which children's rights to privacy can be overridden. Information can be shared when children are at risk of significant harm.

The code of practice needs to be clear and understandable for practitioners who work at all levels, bearing in mind that people who share consent will not necessarily be in senior management. It needs to be in language that can also be understood by parents and young people, because there is a need to build confidence in the arrangements that are happening under the Children and Young People (Scotland) Act 2014 and to clarify exactly what will be shared and when, and under what circumstances that will be done on child protection grounds. The Information Commissioner's Office has produced statutory guidance in recent years that is easy to understand, so we do not feel that it is an insurmountable problem to produce a code of practice that meets those requirements.

10:30

The Convener: To go back to something that Gillian Martin asked about, will you have the opportunity to feed the points that you are making to the committee back to the Government, or have you already done so?

Megan Farr: We met the Government last week to discuss this and we continue to play the role that Parliament set us up to provide, which is to make sure that children's rights are at the heart of the process. We will continue to feed that into the Government.

Judith Tait: From a scrutiny perspective, our inspection findings tell us that, where the performance of community planning partnerships is strong and positive, practitioners are very reliant on good clear guidance. Guidance and legislation are essential—they are parts of the whole network and framework of how children's needs can best be met. Underpinning that is the presence of strong and respectful co-operative relationships between partners, which also support positive and appropriate information sharing.

We also see that training is incredibly important. Multi-agency training will have a very positive impact and that should not just happen once but should be revisited. Practitioners need opportunities to come together to tease out the difficult situations. The situations that are clear are clear—people know what to do and they take action. The ownership of the need to protect children means that that is now very well understood across services.

The situations that sit below that threshold—the tricky ones—require good relationships to tease them out, supported by good guidance and by

quality assurance arrangements within services that help managers and leaders to look back and ask, "Have we got that right? What can we learn about how we can improve that?" Guidance and legislation are one aspect of being able to meet children's needs appropriately at an early point.

Maggie Murphy: I agree with most of what has been said about the underlying principles of the code of practice—it should be person centred and should take the young person's needs into consideration from the outset. The colleges work extensively with authorities and local partners to ensure that young people's needs are upheld as well as possible, but the code of practice also needs to have a practical element, so that staff can interpret, understand and apply it with a reasonable level of consistency, whatever organisation they represent. If the underlying principles are about the young person being at the centre, there is a better chance that that will be the outcome. It needs to be a practical document that people can understand and use within their day-to-day operational teaching and learning organisation, and it ultimately needs to represent the needs of young people. I strongly urge that that is kept at the forefront.

The Convener: Gillian Martin started off this line of questioning, so I will go back to her, and then Johann Lamont wants to come in.

Gillian Martin: What I am hearing is that there may be an opportunity to improve information sharing. You mentioned that the situation as it stands is a patchwork. It also sounds as though there is an opportunity for joint training so that there is a greater understanding of what each type of organisation faces. Is that off the mark? You are all nodding.

Judith Tait: Information sharing is happening on a joint basis as part of GIRFEC implementation. Across the country in our joint inspections we see evidence of opportunities for joint training. What we do not see so often are opportunities for partners and staff to come together routinely and regularly to revisit that training once they have become more familiar with the process and the guidance. They should come back together to discuss things such as what it is like to put the guidance into operation, how they overcome some of the sticky points in it and what areas people are less clear about. On-going training and opportunities for people to come together are important.

Gillian Martin: I am sorry to butt in, but can I ask about the wellbeing information that is shared? You have been sharing wellbeing information in the concern hub. That word—wellbeing—is right in the middle of the whole thing. How is that being done and how do you see it being done as a result of the bill? How will it change?

Detective Chief Inspector Conway: It will not. Those standards that we apply to the information in the police will not necessarily change, although our operational officer practice will. Under the bill and the code of practice, we will probably find more consistency in the routing of that information and where it goes. It is a good opportunity to define the roles and responsibilities and make it clearer where everyone fits in the bigger picture of getting it right for every child. Traditionally, much of that information has gone to social work teams. There is now an opportunity to look at the role of social work, the named person and the third sector in all of that. There are great opportunities through joint training to get a better understanding of each other's roles and responsibilities.

Gillian Martin: Will the information go to the person who needs it the most?

Detective Chief Inspector Conway: Yes.

Maggie Murphy: I concur. In colleges we work with some of the most vulnerable and excluded young people in areas that are the most deprived and experience the greatest poverty, and with that comes a range of issues. I cannot do my job in isolation—I have to work in partnership with a range of organisations.

In practice, in the faculty and team that I work to support, it is implicit that staff should be encouraged to raise concerns and to do so regularly, regardless of whether they become full-blown safeguarding issues. The code of practice needs to give staff the opportunity to raise concerns. Collegiate partnership working is imperative if we are to move that forward successfully. We can no longer exist in isolation.

Johann Lamont (Glasgow) (Lab): I have a specific point for Megan Farr. You said that information should not be shared unless there is a significant risk of harm—that would be the test. How does that sit with the view that we need early intervention? You seem to be suggesting that information should not be shared until there is a crisis, but then there is a problem because you have not done the things that you could have done to prevent the crisis in the first place.

Megan Farr: From a human rights perspective, information should not be shared without consent below the child protection threshold.

Johann Lamont: At what age should the consent be given by the child rather than by their carer?

Megan Farr: The UN Committee on the Rights of the Child's general comment 12, which deals with the issue of children's right to have their views taken into account, states that children should be

presumed to have capacity unless they are assessed otherwise. In terms of current data protection legislation in Scotland, an age of 12 is set as the age at which the majority of children will have the capacity to consent to information sharing.

Johann Lamont: To play devil's advocate, I will ask what happens if there is a young person under the age of 12 whom you have concerns about and with whom you need to work at an early stage—there is not a crisis, but you can see that there is a problem coming. As a schoolteacher, I have seen such deteriorating situations. Are you saying that the adult who is responsible for that young person could withhold consent because there is not a significant risk of harm?

Megan Farr: That is the current situation and we feel that there is no compelling evidence that children's rights under article 8 of the European convention on human rights and their rights under the UNCRC should be breached.

Johann Lamont: What about their right to a secure family situation and their ability to learn? Consent could be withheld by a carer—

Megan Farr: If I could answer—

Johann Lamont: I want to be clear. We are talking about concerns about someone who is under 12 and circumstances in which an early intervention strategy would allow you to come in early to support them. However, you would say that there is a higher test for consent.

Megan Farr: We would say that the approach for children and families that should already be happening under getting it right for every child is that service delivery organisations, schools and the health service should be working in partnership. We have already talked a bit about partnerships. Partnerships should include parents and their children. There should not be a situation in which no relationship has been built up with that family.

Johann Lamont: Do you think that there is ever a situation where the rights of the child and the rights of the carer are different?

Megan Farr: There are such situations.

Johann Lamont: In such circumstances, the carer's exercise of consent might have an impact on the young person, so would you still apply the same test?

Megan Farr: If, on balance, the child's right to be protected outweighs the parent's right to exercise article 8 of ECHR on behalf of their child—if the child is below 12—we would say that the right to be protected takes precedence, in which case the information could be shared. I have expressed that in human rights language, but it is, in effect, the current situation with regard to child protection.

Johann Lamont: Policy on early intervention comes up against that.

My final question is on a theme that has come up in other evidence sessions. The duty that will apply might lead to defensive practice on the part of those who make decisions about information sharing. If someone has a duty to share, that is pretty straightforward; if they have a duty to consider whether to share, and there is some question about what evidence they must give to show that they have done so, people might, in certain circumstances, think that they should not pursue something, to be on the safe side. Is that a concern of anyone on the panel?

Megan Farr: That is a concern that we have, in that we have heard of cases in which child protection issues have not been shared.

We have also come across examples of people not sharing information with their line management. That is not information sharing in terms of data protection; it is how organisations operate. For example, it is normal practice for a classroom assistant to inform their line manager of a concern, so that is not "processing" under the data protection legislation.

Maggie Murphy: As I said, Colleges Scotland offers training on safeguarding and corporate parenting to front-line teaching staff, reception staff and support staff. We take a holistic approach to understanding the underlying principles of safeguarding and we encourage conversation and information sharing as much as possible. We try to ensure that staff get appropriate continuous professional development, so that they understand their roles, the legislation and the jurisdictions around that and can protect themselves and the young people who attend their college campuses. I think that the principals are pretty clear on that.

Johann Lamont: Is there a new approach as a consequence of the Supreme Court ruling? Has the ruling made practitioners more cautious than they would have been before?

Maggie Murphy: I think that if a good code of practice and good training are applied, that will not be the case.

Detective Chief Inspector Conway: Many years ago, we probably shared only at the child protection threshold, and we have been on a journey since then. After the ICO guidance in 2013, we started to think that we had good grounds for actively sharing wellbeing information about children.

Following the Supreme Court judgment, we have tightened up on individual rights and the information that has been shared, but I would not

say that that has been defensive practice. I would say that we are balancing the rights of individuals with the need to act in children's best interests. There should not be defensive practice but, from a police perspective, I am fairly comfortable that how we deal with information about children and young people has improved.

Judith Tait: I agree. We have come a long way in relation to partner agencies' ownership and understanding of their responsibilities to look after and promote children's wellbeing. From our scrutiny work, we know that, where wellbeing concerns have been acted on, for the majority of children safety has been improved further down the line. The decision to share information is a highly complex one for practitioners. They must take into account a whole set of variables, such as what they know about the child and the family, the child's presentation, child development and the impact of adverse events on the child. A code of practice needs to support professional judgment in coming to the conclusion that data must be shared.

Although since the Supreme Court judgment there has potentially been a dip in the confidence of people who undertake the role of named person that they know what they should be doing—and I would not want any more momentum to be lost—I think that the commitment to get it right and share information at the right time and in the right circumstances is strongly held across the country.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Gillian Martin asked about the term "wellbeing". Is there a common concept of wellbeing? Does everybody share the same understanding of what it means? That is quite important.

10:45

Judith Tait: The wellbeing indicators provide a very helpful framework for practitioners. Across the joint inspection programme, we have seen practitioners develop confidence in understanding the holistic needs of children. There will inevitably be some differences in the interpretation of terms such as "responsible" and "respected" and what they mean for children of different ages. However, the more practitioners come together to debate and discuss those issues, and to consider what their role is in promoting children's wellbeing, the further down the road we will be towards a shared understanding of language and what positive wellbeing means.

Detective Chief Inspector Conway: I support that. The vast majority of wellbeing concerns that the police deal with relate to safety and health, and the indicators are really good in enabling us to assess the need to share information where we have a legal basis to do so.

Maggie Murphy: I concur with Judith Tait. Our understanding of the principles of wellbeing is consistent and that understanding is ever growing and is shared through the work that colleges do with secondary schools so that there is a seamless transition for young people who move from secondary schools to further education. We share a common understanding of wellbeing and we apply the SHANARRI principles accordingly, so I am pretty confident that we are consistent in our approach to standards of wellbeing.

Megan Farr: We see a good understanding across different sectors, and the SHANARRI framework in particular is used to provide holistic assessments of children's wellbeing. It is a good way of ensuring that children's rights are realised.

Colin Beattie: Am I correct to interpret what you have said to mean that there is a core of understanding of what "wellbeing" means, with variations within disciplines that interpret the term as it applies to individuals? I have said that rather clumsily—I am trying to get at the question of whether there is a little bit of flexibility in how you apply the term.

Maggie Murphy: We recognise that we represent different organisations—for example, I do not see children, as I work mainly with young people. I see those young people in an educational context, and the indicators for them will be applied in a classroom environment so that my staff can pick up on any deterioration or issues in that respect. There are nuances and differences, but the principles are applied consistently.

Judith Tait: From our perspective, the indicators have been helpful. In the past, when we were viewing plans for individual children as part of an inspection, we found that education staff focused on their role in supporting achievement. As confidence in the use of the wellbeing indicators has grown among professionals, we see that they recognise the range of contributions that they can make across those indicators. Children's plans will recognise the contribution of teachers and schools in meeting the "respected" and "responsible" wellbeing indicators as well as the "healthy" and "active" indicators. The new approach has broadened understanding among professionals of how they can contribute to wellbeing.

Colin Beattie: Again I am interpreting a little here, but am I correct to say that too rigid a definition or description of wellbeing in the bill or wherever might be counterproductive? Having a little bit of flexibility within each discipline is perhaps the way that it should be.

Detective Chief Inspector Conway: I agree with that. A rigid definition could be applied in black and white, and practitioners could make decisions that do not fit the definition. The indicators allow for enough flexibility, bearing in mind that every concern regarding a child should be judged on its own merits. They are only indicators; they are part of a whole assessment process and a wider chronology for a child or young person.

Colin Beattie: Will the changes that are coming through the GDPR and so on affect your interpretation of the concept of wellbeing in any way, or will the core remain unchanged?

Detective Chief Inspector Conway: Off the top of my head, I do not think that there will be any impact on consent or on the SHANARRI indicators.

Maggie Murphy: I do not think that the principles should change because of the new regulation regime. We should still operate from the same position on wellbeing.

Daniel Johnson (Edinburgh Southern) (Lab): We are looking at information sharing on the basis of wellbeing. We have established that, under existing law, information sharing already takes place on the basis of welfare and, to some extent, wellbeing. I am interested in how the bill will change things. Judith Tait and Maggie Murphy, will you explain what information you currently share in relation to wellbeing and on what basis you share it? Will you bring that to life and maybe give some examples?

Judith Tait: Within the regulatory responsibilities, when we inspect care services for children, we will discuss how well the service is recognising the wellbeing needs of the children for whom it provides a service. If we believe that there are concerns for a child's safety, we will direct the service to take action, but we may also refer directly if we believe that the threshold for child protection has been met. Where the concerns sit below that, our role will be to encourage the provider to take appropriate action and to share information with the named person service. We do not share information directly with the named person service ourselves.

In our joint inspection programme, we review records of vulnerable children. Those children already have a lead professional and a multi-agency plan, so information will already have been shared widely within the appropriate group of professionals.

Maggie Murphy: I will give the college perspective, particularly in the areas for which I have responsibility. The majority of young people who come to me will have been referred by school or social work, so from the outset information comes to me from another organisation. The referral document will have key indicators and pieces of information about wellbeing and associated factors.

In the college environment, a young person will be in possession of an individual learning plan, to which they contribute significantly, with learning targets and goals that they want to achieve throughout the year. The staff who are part of their curricular area add relevant information to those plans.

Young people who come from school come with a wellbeing assessment plan, which has key indicators. We use the college experience to try to nurture and develop them.

Those are two examples of where colleges work in partnership and share information accordingly.

Daniel Johnson: This question is for the whole panel. So that sort of information, which is not information that must be shared when the child protection criteria are met, is already shared by everyone without consent. Will the bill change the nature of the information that can and will be shared?

Detective Chief Inspector Conway: The bill will probably strengthen things by bringing in statutory functions for the named person service as part of the assessment process for sharing information under data protection legislation. Defining the functions, roles and responsibilities of a named person service will bring more consistency in the models across the country, so there is a positive.

I mentioned the patchwork quilt, which is the current position. By putting the named person service on a statutory footing and giving greater clarity on the information-sharing arrangements, the bill will bring greater consistency in practice across the country and probably reduce inequalities in service provision.

Daniel Johnson: To be fair, in the bill, that clarity is restricted to the duty to consider. Is that sufficient?

Detective Chief Inspector Conway: I think it is and it will be underpinned by the code of practice. We need to get the code of practice right; that has been a common theme today. The bill, which will put the named person service on a statutory footing, and the code of practice will declutter the information-sharing landscape for me; it will provide greater clarity.

Daniel Johnson: You are absolutely right about the need for clarity.

My last question is for Megan Farr and is specifically on that point. Your written submission states:

"We were concerned that the threshold for sharing data proposed by the CYP Act had been lowered to a point where there was a risk of the child's right to privacy might be violated. The current bill does not add any clarity on this."

Will you expand on your concerns? What changes need to be made to the bill to give that clarity?

Megan Farr: Our concern was that there was no clarity in relation to concerns about wellbeing, to go back to that question. Our view is that such information should be shared on the basis of consent, which is in line with how getting it right for every child should work.

We would be concerned if parts 4 and 5 of the 2014 act continued to be delayed, because they are important and the named person service is an important way in which children's rights will be realised in Scotland. However, it was not clear whether a threshold is being created that is lower than the child protection threshold, particularly if it is based on a risk of harm to wellbeing—indeed, at one point a phrase was used about the risk of being on a pathway to harm. I am not sure that the duty to consider adds anything, because it does not change the threshold; it merely says that practitioners need to think about whether an issue meets the threshold, and that should already be happening—it is good child protection practice in service delivery organisations, and practitioners are regularly trained in child protection and should be aware of what is likely to be a child protection concern. It might be that the child protection threshold needs to be adjusted, but our concern with the 2014 act was that there was potential for the threshold to be interpreted as being considerably lower.

Daniel Johnson: Finally on that, it strikes me that there are some key points of principle around information sharing that, frankly, are not in the bill but will be in the code of practice. Principally, they are to do with consent and the rights of the child. Should those be in the bill? Given the importance of the code of practice, should it have a greater level of scrutiny, rather than being—in essence—in the gift of ministers?

Megan Farr: It is really important that the code of practice receives scrutiny, to ensure that it can be understood by practitioners, older young people—not all children will be able to understand it—and families. In fact, it should be able to be understood by everyone, so I think that it needs scrutiny. The most important aspect of the bill will be putting a clear code of practice and clear guidance in the hands of practitioners who share information so that everyone has confidence that it is being shared appropriately.

Daniel Johnson: The other part of my question was about whether the issue of consent should be in the bill.

Megan Farr: In line with the Government's commitment to taking a human rights-based approach, such an approach should be taken.

Clare Haughey (Rutherglen) (SNP): Unfortunately, I have a question for DCI Conway—sorry, but we seem to be targeting you. You mentioned a concern hub. For those of us who are unaware, could you tell the committee what that is and how it functions?

Detective Chief Inspector Conway: Sorry, I should have explained that earlier. The vast majority of concerns that we deal with regarding members of the public are not protection threshold concerns but wellbeing concerns. There is a significant amount of information there that we need to understand better. When we moved to Police Scotland, we put in place concern hubs in every division. They have dedicated staff who are trained in standards of information management. However, it is not just all about information management; it is about picking up on the early warning signs.

We have a strong evidence base going back many years relating to cases in which repeat concerns came up regarding children and the police and our partners did not pick up on them. The hubs and the staff in them consider standards of information management, respecting individuals' rights and balancing those with acting in the best interests of a child or adult, but they also look to deliver early intervention and prevention—actually, they are looking to deliver on getting it right for every child. The advantage of starting to record chronologies regarding children is that, instead of having the information in a lot of places so that it is not visible, we have it in one place, which helps us to make a better assessment of what services might best be used to provide support or to intervene. That is better than waiting until there is a crisis response or until protection thresholds are crossed, because traditionally that approach has gone wrong and it has been far too late.

It is about a focus on Christie, trying to bring a greater focus on early intervention and prevention, and a bit of information management and standards in relation to the Data Protection Act 1998.

There are 13 hubs in the 13 divisions across the country, and their daily role is to triage the information in the morning, research it, assess it and then take a decision on whether to share it. When they take that decision, they put a strong emphasis on recording the rationale so that there is an auditable record of why something went somewhere. That is a real tightening-up of practice compared with where we were previously.

11:00

Clare Haughey: Will the bill be advantageous for the concern hubs? Will it make things easier for Police Scotland in relation to information sharing and the ability to direct information to the correct person?

Detective Chief Inspector Conway: Yes. I do not think that it will have a significant impact on the daily operation of the hubs, but it will have an impact on where the information is routed to. The statutory named person service will be only a piece of the jigsaw. Not all our information regarding children will go to the named person service. We will be looking at other routes, and some of that will be done with consent, particularly when we consider the third sector organisations that have really strong services to support children.

Ruth Maguire (Cunninghame South) (SNP): Good morning, panel, and thank you for being here. I want to ask about data protection. We have heard in your evidence this morning that information sharing is already going on and is working well for you, but we have heard previously in evidence that people are concerned about information sharing. I would like to know how much of the challenge—if there are challenges or concerns in your organisations—is about the GDPR rather than about the specifics of the bill. Obviously, the GDPR is on the horizon and has an implication.

Maggie Murphy: We are less concerned about the GDPR. We are comfortable with the various documents and the information that we have in the college environment, and we are also comfortable that we share the right information at the right time with the right people. The focus in the Children and Young People (Information Sharing) (Scotland) Bill is on a learner-centred approach—the young person being at the centre. The GDPR will be a little later for us, but I do not think that it is seen in any way as an impediment.

Detective Chief Inspector Conway: The GDPR is more of a concern to the police—the requirement in relation to explicit consent and how that will operate in practice, how we will inform people of their rights, how we will have an auditable record of the consent and how we are going to do that in really challenging circumstances. I am probably more concerned about the GDPR than I am about the bill.

Judith Tait: We will continue to be interested in how well partners that we are inspecting are sharing information and acting within their policy and guidance. As well as considering the impact for us, we will be interested to see how providers are interpreting that.

Megan Farr: We will continue to look at the GDPR in relation to children's rights. As an organisation, our provision of a service is not dependent on whether young people give consent, so our current practice will continue. We share information without consent only very exceptionally.

The Convener: Thank you.

Oliver, you wanted to come in. Will you make it brief?

Oliver Mundell: I will be as brief as I can be.

The Convener: That is not good enough. [*Laughter*.]

Oliver Mundell: Sorry, but it is quite a technical question. I want to refer to two bits of the Supreme Court judgment and then ask Megan Farr a further question that follows on from her responses to previous questions.

Paragraph 79 of the Supreme Court judgment references the judgment in the case of Gillan v United Kingdom, which talks about who an instrument applies to and

"the number and status of those to whom it is addressed."

I think that you touched on it being addressed to children of 12 and above who might be looking to understand it. That links with paragraph 81 of the Supreme Court judgment, which talks about

"sufficient foreseeability to allow a person to regulate his or her conduct".

I wonder whether, given the flexibility that comes with the SHANARRI indicators and the flexibility that some other people are looking for in information sharing, it is possible to have legal certainty and retain that flexibility in a statutory form.

Megan Farr: I think that there are two questions there, one of which is about the age at which children have capacity. We have legislation in Scotland dating from 1991 about the age of legal capacity and the age at which children have the capacity to make decisions about medical matters, and that age coincides with the age at which children in Scotland have capacity around data protection under the Data Protection Act 1998: the age is 12. The age of 12 is therefore the age of capacity in current legislation. The United Nations Committee on the Rights of the Child would argue that children below the age of 12 could also have capacity. In fact, that is also the situation with both legal and medical capacity. Those tests around capacity are fairly well established in Scots law with regard to the age at which children are able to make decisions.

Sorry, but was the second part of your question around SHANARRI indicators and wellbeing?

Oliver Mundell: It is about whether the indicators can be quantified in a way that meets the Supreme Court judgment but also retains the flexibility that practitioners are looking for.

Megan Farr: The Supreme Court judgment said that, in practice, information sharing might result in a disproportionate interference in the article 8 rights of children and young people and their parents. We talked in our written evidence about achieving a balance, and I mentioned earlier the balance between the protection of children and their right to privacy. Decisions on that will have to be made on an individual basis. I think that we have all agreed that the important point about the code of practice, which is a vital part of the legislation, is that it must be clear enough—as must the guidance accompanying it—to enable practitioners to make judgments about what rights, on balance, must have priority.

Oliver Mundell: Does it not also need to be clear enough to allow children with capacity to make a judgment about what they choose to share? In order to regulate their behaviour, they need to have that foreseeability.

Megan Farr: Our view is that the majority of service providers who provide services to children on a daily basis—social work, the health service and third sector organisations working with children—should have an environment in which children can freely give explicit consent to share information. DCI Conway talked about situations in which the police are not in that position. However, our view is that, from a human rights perspective, that consent should be possible for children with capacity. Under current Scots law, a child of 12 can instruct a solicitor to bring an action in court, so that capacity is not a new concept.

Oliver Mundell: That is fine. You also mentioned that you met the Government to discuss concerns about the draft code of practice.

Megan Farr: The discussion was on a range of matters, but we did discuss the draft code of practice. I reiterated to the Government what we said in our written evidence to the committee, which is also what I have said today.

Oliver Mundell: And the Government seemed receptive to changing the draft code of practice.

Megan Farr: I think that the Government took my comments on board.

Oliver Mundell: Thank you.

The Convener: I thank the panel members for their time this morning and for answering all our questions.

I suspend the meeting for a moment or two to allow the witnesses to leave and the second panel to come in.

11:08

Meeting suspended.

11:12

On resuming—

The Convener: I welcome the witnesses for our second panel: Ben Farrugia, head of development and innovation at the centre for excellence for looked after children in Scotland; Donna McEwan, practice development adviser at the centre for youth and criminal justice; and Teresa Medhurst, director of strategy and innovation at the Scottish Prison Service. Thank you all for attending. You should indicate to me if you would like to respond to a question and I will call you to speak.

I will start things off. How would you expect to be involved in the development of the final code of practice? Would you expect there to be any substantive differences between the code that is issued under part 4, on the named person, and the code that is issued under part 5, on the child's plan, of the Children and Young People (Scotland) Act 2014? Could the same document cover both requirements?

Ben Farrugia (Centre for Excellence for Looked After Children in Scotland): Good morning and thank you for inviting us here today. On the first question, we are a Scottish Government-funded part of the University of Strathclyde. We were set up to support the Scottish Government in the realisation of its objectives on looked-after children and child protection and to support our partners across the sector in their own efforts. In that respect, we would expect to contribute to the work that the Scottish Government is about to undertake on the code of practice and revisions to statutory guidance on parts 4, 5 and 18 of the 2014 act.

Our organisation works across the multi-agency partnership that works with children. We have a valuable perspective on what information sharing and practice to support children more generally looks like in a multi-agency context. We also cover the whole country, which, to pick up on what members of the previous panel said, brings an important perspective on the patchwork element that we see across the country. We can bring that information to bear in the next stages of the code of practice revision.

The Convener: We can talk about the first aspect of my question and then go back to the second part.

11:15

Donna McEwan (Centre for Youth and Criminal Justice): Please excuse me—I have a bit of a sore throat, so I apologise if I am not

speaking clearly. The CYCJ is similar to CELCIS in that we are a Scottish Government-funded agency. We support practitioners and promote development in supporting children and young people who are involved in offending behaviour, and their families, across the country.

In particular, we provide support and promote the development of practice and understanding when new legislation comes in. We hear from practitioners on the ground and take that information back, along with people's lived experience. We look at the legislation and support practitioners to translate it into practice.

I met the Scottish Government last week to discuss the bill and the proposed code of practice. The Government is keen for us to be involved, to provide support and to use our links with practitioners and people's lived experience to inform the code of practice as it moves forward. That is crucial in enabling us to undertake our role in supporting the application and development of GIRFEC across the country.

Teresa Medhurst (Scottish Prison Service): Over the past few years, the Scottish Prison Service has worked closely on transforming practice, in particular in Polmont, where the vast majority of 16 and 17-year-olds are located when they come into custody. We have developed a positive futures plan that is based on the SHANARRI principles and informed by the work of the organisations that are represented today.

We have moved towards applying the best-practice principles that have been set out for case conferencing and information sharing. We have worked, and will continue to work, closely with the Scottish Government in order to be part of and inform the code of practice as it is revised.

The Convener: The second part of my question was about substantive differences between the code that is issued under part 4 and the code that is issued under part 5. Could the same document meet the requirements for both parts?

Ben Farrugia: Yes—I believe that the same document could cover both parts. There are distinctions between the two parts, particularly with regard to the populations of concern with whom CELCIS, the CYCJ and the SPS work. The same document could cover both parts, but not necessarily in the same chapter, if that makes sense.

Donna McEwan: I agree that the same document could apply, but it would have to be quite explicit in relation to part 4. We would need clarity on the different parts of the legislation in order to support practitioners who are applying it in understanding what it means in relation to decisions. We would also need clarity on the triggering of a child's plan and how that fits with the questions that have been raised about the named person role when people choose not to be involved with the named person. Those aspects must be clarified in the code of practice.

Teresa Medhurst: I agree with the two previous speakers.

Liz Smith: What specific changes do you foresee in the rewritten code of practice that are not in the illustrative code?

Donna McEwan: I am happy to take that question. Through speaking with practitioners prior to the Supreme Court judgment, the CYCJ was involved in developing case examples for the 2014 act. Although the act came into force last year, the named person aspect did not. The code of practice therefore needs examples of wellbeing concerns. We should make the different elements of legislation, including the Human Rights Act 1998 and schedules 2 and 3 to the Data Protection Act 1998, easy to understand for practitioners who apply them. As has been said, children and young people and their families need to understand the legislation, too. Using examples would be beneficial so that workers can see what happens in the process.

Liz Smith: Would you go beyond the SHANARRI indicators in defining wellbeing, given that the witnesses on the previous panel told us that there are differences within different professions?

Donna McEwan: When I heard that, I thought that it was quite relevant. I am a social worker by trade. Our understanding of wellbeing shares the same overarching principles as that of other professionals, such as health professionals, but there might be nuances to how we apply our professional knowledge and skills to that understanding. There needs to be flexibility, because there is a concern that if we make the definition too rigid, we will rule out a universal approach. When we talk about wellbeing concerns, we are looking for universal responses to prevent children and young people from being escalated into statutory services.

Liz Smith: It is interesting that you make that point. Some previous witnesses have said the opposite—that they feel uneasy in deciding when they should share information, because they are uncomfortable that the definition is not tight. Do you accept those concerns?

Donna McEwan: I accept that practitioners in other professional disciplines might feel that way. I know from my experience as a social worker that, when it comes to understanding presentations, whether in the context of wellbeing concerns or higher-level welfare concerns, we have to filter our approach through our professional knowledge and understanding of the individual child, the child's

specific context and what that might mean. Only then can we decide whether we should be sharing the information. As professional social workers, we might make such decisions more regularly and might deal with more nuances than do other professions, in which stricter or tighter criteria might apply.

Liz Smith: So your advice would be to have different codes of practice in different professions to get over that problem.

Donna McEwan: We could share the same code of practice, but there would need to be flexibility in the definition of wellbeing.

Clare Haughey: I will pick up on the issue that Liz Smith asked about. My professional background is as a healthcare worker, so I am used to working closely with social work and third sector organisations on the SHANARRI and wellbeing principles. In those professions, there is a good common understanding of the SHANARRI and wellbeing principles, but the members of the panel work with much wider professional groupings and organisations. Do those other professions interpret the SHANARRI and wellbeing principles differently? How do you see that working in achieving a common understanding with other professions?

Ben Farrugia: I can go first on that question, and I will also answer some of the previous questions.

I think that the first panel gave a good answer. There is a core understanding but, as has been hinted, there is divergence at the edges, when we get into the detail of what wellbeing might look like in respect of some indicators. It has been implied that the introduction of wellbeing has created confusion about when to share information, but the experience of our work is that that confusion has always been there. The introduction of wellbeing has given us a different narrative on that, but professionals have always wrestled with such questions.

Through some of our work, we have encouraged professionals to see the introduction of "wellbeing" as a way of widening our lens when it comes to how we view children rather than as a lowering of standards or something that is separate from welfare. We want professionals, instead of concentrating in their work with a child on a narrow bit of a child's life in school or in relation to health, to broaden out their consideration and to think about the wider context of the child, which is what the SHANARRI indicators encourage people to do. When we talk about planning and assessment, that has implications for the child's plan in a more real sense.

It is easy—it is understandable that this happens—to get caught up in conversations about welfare and wellbeing and different professionals' understanding of those concepts, but we are talking about a broad approach that involves enabling professionals to have a more holistic understanding of children rather than the introduction of a specific new category of need.

Donna McEwan: I agree with what Ben Farrugia said—it makes sense to me. We want a holistic response and recognition that children exist within their circle of friends, their peer groups, their school, their home life and their community. We need to think about what wellbeing means for each individual child.

As professionals, under the SHANARRI principles, we are all responsible for the wellbeing and the safety and protection of our children. There is common ground when it comes to the understanding of wellbeing, so we are talking about widening that out around the edges and recognising the various professionalisms that might have something more to bring. Those in health services might have more to add than I would as a social worker and we need to recognise those skills and that knowledge, too.

Clare Haughey: I suppose that I am speaking from my professional point of view, but does the panel agree that SHANARRI and GIRFEC have given professionals and others a common language to speak when we are dealing with wellbeing and child protection issues? You are all nodding.

Teresa Medhurst: For the SPS, which is mainly a custodial organisation, SHANARRI gives much more clarity to the staff who deal with young people, and it provides a common language to use in case conferences and when talking to other professionals who come to work in Polmont. It is not only that the language is shared, but the understanding has been increasing. It has definitely been an improvement for us.

Ben Farrugia: I will go back to an earlier point about the code of practice. Since we submitted our evidence to the committee, I have been advised on and have learned more about the limitations on a code of practice—on how much it can include—because of its status in law. I do not want to contradict my colleagues—I totally agree with their points about what needs to be available to practitioners—but I understand that there are limitations on what can be in the code of practice, which means that the guidance that accompanies it becomes particularly important.

That is an opportunity, because there is much more flexibility with guidance—statutory or not—than I understand there can be in the code of practice. Our expectations are now perhaps less

about seeing lots of changes being introduced to the code of practice, but what sits with it and what is available to practitioners will become even more important.

Johann Lamont: That is not necessarily the evidence that we have heard from others, who feel that the legislation will stand or fall by the code of practice's ability to give confidence to practitioners and those whose information may be shared that the approach will be in line with the Supreme Court judgment. You spoke about there being different chapters, but I am not sure whether you think that that is in line with what is expected from the legislation. Basically, if you are saying that there will be chapters, you are just collating different codes of practice in one place.

Ben Farrugia: I am sorry—I think that we do need some distinction in the code of practice between parts 4 and 5 of the 2014 act, and that is what I was acknowledging in talking about distinguishing those and having separate pages. In my previous point, I was picking up on my colleague Donna McEwan's point about the need for things such as practice examples, case study work and everything else. My understanding is that it would not be the easiest thing to incorporate that into what is quite a legal document, in which quite restrictive language might be used.

We definitely need a code of practice that is clear and accessible to professionals, but that will have to be supplemented by further documentation and work. Documentation and training alone will not move us to the culture of information sharing that we want in Scotland. Those things are essential, but they are not sufficient on their own.

We need to attend to structures of supervision in real time—who can professionals turn to for advice and guidance about complex cases? There are established processes in social work and health, and such things happen in some of our best schools, too. We must learn from those processes and ensure that they are available to all professionals in the relevant areas.

The Convener: The cabinet secretary will be here on 8 November, when I am sure that we will get clarification about the code of practice—not exactly what will be in it, but the sort of code of practice it will be and the guidance that will go with it.

Johann Lamont: You might have heard me put the next question to the earlier panel—it concerns the issue, which we raised in previous evidence sessions, of whether the situation might lead to more defensive practice. Is that the danger of the changes? Rather than people being more confident about sharing information, they might be more hesitant and anxious about how to meet the duty to consider sharing information. Do you think that that might be the case? Will gathering the evidence that they will need to show that they have considered whether to share information be an extra burden on people who work in this area?

Donna McEwan: In my previous practice as a social worker, I was involved in early and effective intervention, which is part of the Scottish Government's whole-system approach to supporting young people and children who are at risk or are involved in offending. Early and effective intervention is for children from the age of eight to the day before their 18th birthday who are involved in low-level offences.

In relation to—I am sorry; I have lost my train of thought.

The Convener: We have all done that.

11:30

Donna McEwan: It is because I have a cold.

Johann Lamont's question was about defensive practice. Following the Supreme Court judgment, there were examples of people withdrawing from sharing information because they were anxious, concerned and unsure about the situation. However, that has now been redressed, because we have had an opportunity to look at our practice and make sure that we are sharing information in a proportionate and appropriate way that meets children's needs.

There is a concern that there might be defensive practice and that people might pull back from sharing, but it is really important that we get this right and that we share the right information, so that children and their families, when they choose to engage with named person services, can get the right support at the right time to reduce the risk of situations escalating. Having a clear code of practice, with additional guidance, would support practitioners and children and their families in understanding what the situation is with sharing information.

Teresa Medhurst: I agree. We are moving towards a more rights-based approach but, in all our decision making, we look at proportionality and, especially in our work with 16 and 17-year-olds, we are aware of the requirement to work with the young person and their family and the lead professional, as well as to ensure the individual's safety. Given that such work is a small proportion of what we do, we will need to give our staff appropriate support and guidance. I do not see that the bill will lead to more defensive practice in decision making.

The Convener: Daniel Johnson and Ruth Maguire have questions, but they can ask them later on.

Colin Beattie: I want to ask about the child's plan. Children and young people who are involved in the criminal justice system and looked-after children and young people might need targeted interventions, from which a child's plan could well evolve. To what extent is information on wellbeing shared in existing multi-agency practice?

Ben Farrugia: If we conceive of wellbeing information as being information on different components of a child's life, such as their education, their health and aspects of their home life, such information is core to the child's plan. There has been a statutory obligation to provide a child's plan for looked-after children since 2009—and, indeed, prior to that in different forms. For us in the looked-after-child world, the introduction of a child's plan in part 5 of the 2014 act consolidates what should already be there.

A good plan talks to as many different components as possible of information that we conceive of as wellbeing information in giving a holistic assessment of the child.

Colin Beattie: I refer to parts 4 and 5 of the 2014 act. In part 5, which is on the child's plan, there is a duty to share information in relation to the child's plan, but in part 4, which is on the named person service, the duty is to consider sharing information. How will that work?

Ben Farrugia: I will have the first go at answering that, but my colleagues might have different views. My area of expertise is looked-after children, where there is a child's plan already. Organisations that are under a statutory obligation to provide a range of services and support for such children have to share information in that context in order to undertake their functions. That is one of the permitted areas in which public organisations can store and process information. We are comfortable with the duty to share information in relation to the child's plan, because it reflects current practice and current statutory obligations.

The duty in part 4 to consider sharing information seems appropriate to us. That reflects the contribution that we gave to the committee back in 2014 when the Children and Young People (Scotland) Bill was being considered, and our concern that a duty to share for named persons would put at risk what you heard about earlier from the witnesses who eloquently discussed children's rights to privacy and so forth.

We believe that the duty to consider sharing information adds emphasis by requiring professionals to think about whether they should talk to other professionals about something—it is probably more appropriate, in the first instance, for them to think about talking to other professionals in their organisation, which is not information sharing as defined by law, and then with the family as well.

Colin Beattie: Do other witnesses have comments on that?

Teresa Medhurst: The position at the moment is that the child's plan will be shared when somebody comes into custody if they are a looked-after child or if a child's plan exists, and the criminal justice social work report will be shared with us as well. There already exists a case conferencing system that allows that sharing of information, and our positive future plan, which supports the individual's journey through custody, is also based on the SHANARRI principles, so it is about wellbeing. The information that is shared around the child's plan during the period in custody is very much focused on wellbeing and supporting the individual.

In relation to the named person, as I said earlier, we will require to support our staff—our named person will be at senior management level—to work through the decision-making process and ensure that they are making appropriate decisions based on proportionality and the rights of the child. However, our work is based on positive engagement and we will absolutely work to get consent from the individual.

Colin Beattie: Will the changes that are coming down the line from Westminster with the GDPR and so on impact on the sharing of the child's plan?

Donna McEwan: I will be perfectly honest. I have not explored the GDPR at this point, as I have been focusing on the Children and Young People (Scotland) Act 2014 and the bill. I would have to go away and look at the GDPR and consider it further.

Ben Farrugia: At CELCIS, we welcome the added obligations under the GDPR. It is going to require more process and policy in a number of organisations. You have heard from the police and other organisations that they are going to have to think through what it means for them and maybe increase what they do or change the way they do things. Given that we are talking about sensitive personal information, that is entirely appropriate.

The GDPR builds on what the Data Protection Act 1998 laid out for the United Kingdom. Our focus at CELCIS is on supporting our organisations to introduce the necessary mechanisms to meet the GDPR requirements in a proportionate way.

Donna McEwan: Sorry—may I come back in? I have heard about the GDPR this morning and while listening to previous committee meetings, and the notion of consent—and, within that, explicit consent—is important. Particularly when

we are talking about lower-level concerns that do not require statutory intervention, that consent, the child's voice, their rights and the family's rights are absolutely crucial. If the GDPR is taking that forward, that is a positive step and one that is absolutely in line with the intentions of GIRFEC.

Johann Lamont: In a scenario in which a young person is being picked up by the police because of low-level stuff and there is a bit of concern about them, the proposed approach would prevent the police from speaking to guidance staff and saying, "There may be an issue here. Can we bring the family in?" How does consent apply when the police are just seeing a bit of that behaviour and early intervention could be helpful, with the police working with the housing department or the school to speak to the family? You have said that consent would be required in that situation.

I suppose that what I am wrestling with is this: I get the need to protect young people and not to share information inappropriately, but I wonder whether what is proposed would inhibit low-level early intervention, whereby people can say, "There are signs of stuff coming up here. Maybe we need to speak to somebody."

Donna McEwan: I recognise that concern, but a balance has to be struck. After all, we have to recognise that parents, too, have a role to play and a responsibility to support their children. If a child has been involved or had contact with the police, we would expect the police, in the first instance, to speak to the parent, carer or guardian to ensure that they take appropriate action to support their child.

Going back to the early and effective intervention process that I mentioned earlier, we found that, after the police had had contact with a child, had spoken to the child and their parents and had advised on the EEI process and the sharing of information, parents were quite often happy for that information to be shared and that response to be given. However, in cases in which there were no other concerns and the parent had dealt appropriately with the incident in which the child had been involved, no further action was required. The approach recognised the parents' choice to engage in the process and the actions that they took. There were other circumstances in which support and interventions were provided, there was engagement with and consent from the parents, which the police gathered at the first contact, and then things were taken forward. The bill is making us explore in more detail how we get consent, what the full meaning of explicit consent is and how we ensure that people understand that.

Johann Lamont: A young person can be a bit troubled. Something might happen in the community and the school might, if asked, say, "Well, yeah, something is happening here." It might not be sounding huge alarm bells, but it might think that a conversation needs to be had. Do you think that the bill makes such conversations more or less likely? I am not talking about speaking to the parents, because that would happen anyway, but it might well be that, instead of this being just one incident, a pattern of behaviour is developing and people are not picking up the clues. The concern that I want you to allay is the concern that the bill will inhibit the normal approach of people having a word with a guidance teacher or whomever to find out whether the same thing is happening at school, which might also inform the conversation that is had with the family.

Ben Farrugia: You have framed your question in terms of whether the bill would inhibit or encourage that kind of information sharing. I think that it would provide encouragement on that side of things, but the reason why the code of practice is so important is that it would encourage things to be done in an appropriate and legal way. Some of the concerns that, in the end, the Supreme Court dealt with related to previous versions of the duties putting at risk certain other rights of children and their families. In this context, I think that the bill is encouraging professionals to think about when it is appropriate to reach out to other professionals and, most important, to families and others.

The Convener: I will move on to Daniel Johnson.

Daniel Johnson: First, I want to ask a bald, blunt question. Given that the bill does not change what can be shared but, instead, obligates practitioners to consider sharing, do you think that it helps, hinders or makes no difference to practice?

Ben Farrugia: The discussion that we are sitting here having, the fact that the bill is generating a necessary, if at times difficult, debate and the opportunity that the code of practice and subsequent guidance will give us are essential to our moving forward and creating and clarifying what I have referred to as an information-sharing culture that is positive and which secures the best outcomes for children. An analysis might find that the existing legislative framework is robust enough and sufficient for this work to continue—which is what I think was implied in your question—but, as far as the Scottish context is concerned, the bill puts extra emphasis on GIRFEC and on encouraging professionals to think about focusing on and securing the best outcome for the child. On that basis, I welcome it.

Donna McEwan: As I have said, it is difficult for practitioners to take everything into account. As well as the bill, we have the Children and Young People (Scotland) Act 2014, the Human Rights Act

1998 and schedules 2 and 3 to the Data Protection Act 1998, and, as others have pointed out, the GDPR is about to come in. To be perfectly honest, my own head is confused, and I have had time to read through the material.

It is not an easy decision to make. That is why the emphasis is on the code of practice. It is not that the bill should not go through, but the code of practice and any additional guidance will make it applicable and enable its implementation in the real world.

11:45

Teresa Medhurst: I agree. I listened in to some of the earlier comments from practitioners. The bill is welcome. It strengthens the provisions that we already have and will provide more clarity. That will be positive and improve outcomes for young people.

Daniel Johnson: I think that you are all saying that it is useful to have a discussion and debate about what good practice looks like. Do we need legislation to facilitate that or should it be policy led? Could we not do it by encouraging better practice and policy rather than by introducing legislation?

Ben Farrugia: At CELCIS, we submitted a response that articulated our feeling that the current legislative framework would probably be sufficient, which is reflected in other responses. However, we have concluded that the bill can make a contribution to continuing to build the appropriate, positive information sharing that we need in Scotland within the boundaries of the Data Protection Act 1998 and the new directives from the European Union.

Daniel Johnson: I am slightly confused by your response because, in the second paragraph of your written submission, you say:

"Unfortunately the Bill, and more importantly the draft Code of Practice, do not achieve"

clarification of the complex issues on information sharing. You also say that that lack of clarity is

"putting at risk the … wider GIRFEC agenda."

Are you saying that you have changed your mind?

Ben Farrugia: Are you asking me about the bill?

Daniel Johnson: Yes.

Ben Farrugia: That is very much about the code of practice. We were not, and continue not to be, entirely happy with the language that was used, as you have heard from a range of witnesses. However, having followed the process that you are going through, I understand that concessions have already been made. As we heard this morning, some organisations are already involved in redrafting the code of practice and thinking about what goes beyond it. When we wrote the submission, we thought that the code of practice would be the entirety of the guidance that would be available to people on information sharing. We now understand that that will not be the case.

Daniel Johnson: Given the importance of the code of practice, not just for the practicalities of making the bill work but for compliance with all the other legislation that Donna McEwan just outlined, should its status within the bill be elevated? Rather than it just being a creature of ministers, should it be subjected to wider parliamentary scrutiny because of its centrality to making the bill work practically and legally?

Ben Farrugia: Can I clarify the question? Are you asking whether the core elements of the code of practice should be incorporated into the law?

Daniel Johnson: Yes, and be subject to parliamentary scrutiny.

Ben Farrugia: I will have to take guidance from you on what the 40 days of what I interpreted as parliamentary scrutiny looks like. I understood that there was already a requirement for the Scottish Government to lay the code of practice before the Parliament for 40 days. I do not know what process is then undertaken.

Daniel Johnson: It is then subject to parliamentary approval.

Ben Farrugia: Okay—so it is just for your comment and feedback.

It is important that the code gets proper scrutiny, but I do not have a firm view about whether it needs to be scrutinised at the same level of detail as the bill. A range of organisations are already engaging actively with the Scottish Government, through the bill process and other processes, to try to ensure that the code that the Scottish Government publishes is robust. Over the past four years, we have seen that a range of organisations take information sharing extremely seriously and are willing to go to the furthest lengths possible to ensure that children's rights and families' rights are maintained. I am working on the basis that that scrutiny will continue to be applied to the next stages.

Ruth Maguire: Good morning. Thank you for coming. I appreciate the evidence that you have given so far. It is always a bit challenging coming in at the end, because we have covered so much ground.

Ben Farrugia mentioned a culture of information sharing. I think that we all agree that effective and proportionate information sharing is important in improving outcomes for our young people and

children. What further progress do we have to make in that regard? The crucial question is, how do we best create confidence among practitioners to enable them to share information better in order to improve outcomes for looked-after children and young people in the criminal justice system?

Donna McEwan: Looked-after and accommodated children are not my area of expertise; Ben Farrugia will be able to answer that specific question.

In the main, information sharing in respect of young people who are already involved in the criminal justice system is good. If a child has appeared in court and been found guilty and a criminal justice social work report has been requested or a referral to the Scottish Children's Reporter Administration has been made or a children's hearing has been convened on offence grounds, there are duties on practitioners to share information. In those situations, as has been said, information sharing is good.

Again, it comes down to relationships with individuals. Practitioners need to be clear about the information that is to be shared and with whom it will be shared. As far as possible, they must get the person's consent and ensure that they understand fully who will know what as well as what people are not going to know, which is also important.

At the statutory level, practitioners are quite confident. It is in non-statutory situations, where there is no duty to share information, that there is an issue. We should give clear case examples, because we know from speaking to practitioners that they value such examples. We should not give them a tick-box exercise—instead, we should present different ideas so that they can identify where their own practice sits. We need to be clear about the role and importance of explicit consent in sharing information at the non-statutory, non-duty level of information sharing.

Teresa Medhurst: For us, a good structure is already in place. However, we need more clarity around pathways and a consistency of approach, which can only lend confidence to young people not only when they engage with the child's plan but while they are in custody.

Ben Farrugia: I am smiling because that is what we do at CELCIS day to day. We try to support organisations to move to the new culture or to sustain the great culture that they already have.

What I took from Ruth Maguire's question is, what more do we need to do to learn from those places that are sharing information well? In our experience, the areas that do it well—whether they are geographical or organisational—are those that attend to different aspects. They look at structure. Are they structured well and do they have in place proper processes for supervision of and support for professionals in relation to information sharing and a wider range of practice? Do they have good systems for data storage and recording to meet their requirements, which will now be enhanced under the new European Union directives? Do they concentrate on ensuring that their professionals can build positive relationships with families and children, as has been mentioned? I think that that would be true of the adult sector, too.

A lot of the questions that we are rightly discussing fade away where there is good trust, where there are good relationships between professionals, and where families and children understand that information is being stored and shared for their benefit rather than simply for the benefit of services. If we can create systems in each of our sectors—education, social work and health—that operate on that model, we will go a long way towards moving through some of the concerns.

The Convener: That is the end of the question session. I thank the panel members for their time this morning and for answering all our questions. That concludes the public part of the meeting.

11:54

Meeting continued in private until 12:07.

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