OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 1 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 1 November 2017

CONTENTS

EDUCATION AND SKILLS COMMITTEE
27th 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:

Sheila Gordon (Crossreach)
Kirsten Hogg (Barnardo’s Scotland)
Sally-Ann Kelly (Aberlour Child Care Trust)
Professor Nancy Loucks (Families Outside)
Maggie Mellon (No to Named Persons Campaign)
Eileen Prior (Scottish Parent Teacher Council)
Alison Reid (Clan Childlaw)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 1 November 2017

[The Convener opened the meeting at 10:00]

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

The Convener (James Dornan): Good morning and welcome to the 27th meeting in 2017 of the Education and Skills Committee. I remind everyone to turn their mobile phones and other such devices to silent for the duration of the meeting.

Our first item is two panels of evidence on the Children and Young People (Information Sharing) (Scotland) Bill. This is the second-last evidence-taking session on the bill. Next week, we will hear from the Deputy First Minister and Cabinet Secretary for Education and Skills.

I welcome to today's meeting Sally-Ann Kelly, chief executive of Aberlour Child Care Trust; Sheila Gordon, director of children and family services, Crossreach; and Maggie Mellon, from the no to named persons campaign. All discussions take place through the convener, so if you would like to respond to any question please indicate to me and I will call you to speak. I remind members that supplementary questions should lead on from the question that is being pursued.

Gillian Martin (Aberdeenshire East) (SNP): I would like to ask about the code of practice, and my question is really for Aberlour and Crossreach, who would use such a code. We are giving everyone who might use the legislation, in whatever form it eventually takes, the opportunity to tell us what you are looking for in the code of practice.

Sally-Ann Kelly (Aberlour Child Care Trust): Although I am the chief executive of Aberlour Child Care Trust, I am also here representing a coalition of seven charities that produced written evidence for the committee. As we state in our written submission, our view on the code of practice is that, in its current state, the wording is overly complex and legalistic. The committee has heard the same thing from other witnesses.

Given the complexities of some of the considerations around information sharing, which we acknowledge, if there is a requirement for a code of practice, it is important that we are clear about who the code of practice is for, what its purpose is and therefore how it should read. Our view is that it should be supported by statutory guidance and should not stand alone. That statutory guidance should be fully conversant with the law, but should also be produced and presented to practitioners in its fullest form so that they can exercise their professional judgment in a sound way.

Maggie Mellon (No to Named Persons Campaign): I agree with Sally-Ann Kelly that any code of practice should be on a statutory footing. The definition of wellbeing must be crystal clear. One of the key points in the Supreme Court ruling was that there was no definition of wellbeing and that the eight SHANARRI indicators—safe, healthy, achieving, nurtured, active, respected, responsible and included—are very vague and subjective. The Faculty of Advocates pointed to the need for any code of practice or guidance to be part of the legislation. Given the history of the legislation, it is important that what is voted on is crystal clear and compliant with the law.

This stack of paper that I am holding up is the legislation that any code of practice or guidance would need to cover—it is what any practitioner would need to refer to in making their judgment. When you ask that question, you are opening up a huge subject and a significant area of concern.

Sheila Gordon (Crossreach): I agree with Sally-Ann Kelly's comments about the need for statutory guidance to sit alongside the code of practice. That would be very helpful. It can be really challenging for people in the third sector to make decisions when they are slightly removed from other services—universal services usually operate in quite an integrated and joined-up framework. It is therefore of more importance that we have very clear guidance.

The code of practice must be rights led from the start. I feel that there is a gap in the way in which rights are reflected, by which I mean the rights of the child as well as the rights of the family. Addressing that would also be beneficial.

Gillian Martin: This is a forum in which you can feed into what the code of practice might be, but are you going to engage with the Government on what you see the code of practice looking like?

Sally-Ann Kelly: It is my understanding that we will be engaged in that process. We have had on-going dialogue with the bill team and the Government in relation to how the bill will be taken forward, and we have been given assurances that we will be involved in that.

Gillian Martin: Is it the same for you, Ms Gordon?

Sheila Gordon: Yes, it is the same for us.

Oliver Mundell (Dumfriesshire) (Con): I have two questions, the first of which picks up on the comments that have been made about the current draft code of practice being overly legalistic. Is it possible to have guidance that meets the requirements of practitioners and the requirements that have been set out by the Supreme Court?

Sheila Gordon: I think that the guidance can do that. We have examples of clear existing guidance—for example, on the Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007—that would tick all the boxes that you have mentioned.

Sally-Ann Kelly: Ultimately, it is a matter for Parliament, but I suggest that there is good practice that you could lean on to inform your view on the guidance.

Oliver Mundell: That leads me to my second question, which is on parliamentary scrutiny. One of my big concerns—this has also come out in a lot of the evidence that the committee has heard so far—is that there is no mechanism in the bill to allow Parliament to actively scrutinise and vote on the final code of practice. Given how central the code of practice is to making the policy and the legislation work, should Parliament have a say in or a vote on the contents of the code of practice?

Sally-Ann Kelly: That is a parliamentary decision. I do not want to comment on that, as it is a matter for Parliament.

Maggie Mellon: I would say that Parliament must absolutely have a vote on the code of practice. The difficulty with discussing the code of practice before we discuss the bill is that the code of practice will not be any good unless the bill is right. At the moment, the bill does not answer the criticisms that were made by the Supreme Court, because it contains no central definition of wellbeing. There are a range of problems with the bill as drafted, but that is a central one. Unless you get the bill right, the code of practice is, in some ways, a secondary question.

I ask that attention be given to what is in the bill and whether it addresses the Supreme Court's criticisms. We need to get it right this time, because nobody wants the matter to have to go back to the Supreme Court. The Scottish Parliament has the powers to get it right, and I think that it is essential that the Parliament has the chance to vote on any guidance that accompanies the bill. You should take the advice that you have been given by the Faculty of Advocates and the Law Society of Scotland.

Daniel Johnson (Edinburgh Southern) (Lab): I seek some clarification. Both Sally-Ann Kelly and Maggie Mellon have said that the code of practice should be placed on a statutory footing. Can you explain precisely what you mean? That could mean different things to different people.

Sally-Ann Kelly: My experience of working with new legislation from the Parliament that impacts on practice is that statutory guidance will be attached to it. The appearance of the code of practice might have confused the issue of statutory guidance. There is a question about whether the code stands instead of or together with the guidance, which is a matter for the Parliament to consider. In my view, there should be statutory guidance as a minimum, and that statutory guidance must be detailed and cover the whole of parts 4 and 5 of the Children and Young People (Scotland) Act 2014, not just the information-sharing part. The guidance must embrace the named person service and what might happen in practice, including information sharing, but it should not stay silent on the child's plan part of the act, which is one of the essential building blocks of getting it right for every child.

Daniel Johnson: Is that about detail or is it about the status of the guidance?

Sally-Ann Kelly: It is about both.

Ruth Maguire (Cunninghame South) (SNP): We have heard from previous witnesses about wellbeing and wellbeing indicators being helpful in understanding individual children's needs and also that, if those things were too rigid, that would impede good practice when working with children and young people. As the indicators stand, are they helpful? If not, what would you have in their place?

Sally-Ann Kelly: Our view is that the wellbeing indicators are helpful. They offer a framework, although probably not as detailed a framework as we would want at this stage. That is certainly something that we need to consider in relation to any statutory guidance.

Parliament needs to consider the definition of wellbeing and whether too stringent or too narrow a definition of wellbeing could be counterproductive in terms of allowing professionals to exercise their professional judgment. Parliament also needs to consider how we could use the existing SHANARRI indicators in a more proactive way to support that professional judgment but give more direction than is currently available to practitioners.

Maggie Mellon: I am a social worker by profession and I still practise. The threshold of significant harm is really important, as it assures families that there will not be interference in their family life on a basis that is less than that their child faces significant harm. When I say “interference”, I do not mean when a family asks for help and gets the help that they want—that is not interference. However, the idea of somebody else making a judgment about whether there needs to be compulsory interference in how parents are bringing up their children or the conditions of that is really quite dangerous. It damages trust between professionals—

The Convener: Ms Mellon, your opinion on the named person scheme is well known, and clearly the title of your organisation suggests that you do not—

Maggie Mellon: I am trying to answer the question about the wellbeing indicators—

The Convener: If you could get to your point about wellbeing, that would be good.

Maggie Mellon: My position might be well known, but I would like to put before the committee the particular dangers of using wellbeing—

Ruth Maguire: Sorry to interrupt, but we are not discussing whether all that we aspire to is an intervention when there is significant harm; we have established that we want to support children and to help them before there is significant harm. Apologies for interrupting, but you are not actually answering my question.

Maggie Mellon: I was trying to answer by saying that compulsion on the basis of wellbeing is not right.

The Government has often said that parents asked for the named person scheme. However, although parents of children with special needs asked to be offered help when they needed it, that is not what the legislation says. That is the fundamental problem with it. Asking for compulsory intervention on the basis of subjective indicators and requiring professionals to interfere is not helpful and not—

The Convener: Can we just stick to the point? When you are asked a question, can you try to stick to the point of the question, please?

Maggie Mellon: I apologise.

Clare Haughey (Rutherglen) (SNP): On the back of that, I have a question for Sally-Ann Kelly and Sheila Gordon. Given the organisations that you represent, do you recognise compulsory interference as being part of the named person service? I come from a nursing background and have worked closely with child and family social workers, and that is certainly not my understanding of the named person service.

Sally-Ann Kelly: We need to just calmly return to the first principles of part 4 of the 2014 act. Part 4 is about early intervention and supporting families early enough at the time that they need it. For the vast majority of families, that happens on an informed consent basis. Part 4 of the act is about looking at situations where there may not be informed consent for a variety of reasons.

Potentially, it offers the opportunity to share the information in a much clearer context in the early intervention stage compared with what happened previously. There is no dispute in our organisations' minds about the thresholds around significant harm and welfare concerns.

Child protection practice should not change as a result of the bill. It is for early intervention. I would not use the term "compulsory interference" when talking about the named person service, because we work with families primarily on the basis of informed consent and only in very few circumstances do we have to go beyond that. If there is not explicit consent from the parent, the named person, and those referring information to the named person, would need to use their professional judgment in considering whether there is good enough reason to do that.

10:15

Sheila Gordon: I agree with that in principle, but there is still a challenge. Although we fully understand the wellbeing indicators, which are now used widely in practice, the issue is cases in which there are concerns for the wellbeing that are not necessarily safety or child protection concerns. For workers, particularly in the third sector, understanding that threshold is the biggest challenge. It is not an easy problem to solve. There is not quite enough clarity on that. There is a duty to consider wellbeing, but where is the framework that the person would operate in for that? It would be helpful if that framework was teased out in more detail.

The Convener: Would that be in the statutory guidance?

Sheila Gordon: Possibly, yes.

Liz Smith (Mid Scotland and Fife) (Con): The committee faces a considerable dilemma, irrespective of our views on the named person policy. Many of the witnesses, several of whom support the policy in principle, feel, just as you have intimated, very uncomfortable with the code of practice, although it is only illustrative. They feel that it does not give them sufficient confidence and legal backing. That is set against the fact that the Deputy First Minister said strongly to the Delegated Powers and Law Reform Committee:

> "The code of practice will be obligatory and binding on any individual who exercises the responsibilities."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 19 September 2017; c 4.]

In other words, as several witnesses told us, the code of practice is crucial when it comes to people recognising their responsibilities.

The committee has a duty to scrutinise the matter and then take it to the full Parliament. Do the witnesses believe that having an illustrative code, as we do currently, enables us to do our job of scrutiny effectively enough to satisfy the practitioners who have to operate the policy?

Sally-Ann Kelly: My understanding is that there have been significant comments on the illustrative code. I think that there is an understanding that it needs to shift significantly.

The parliamentary scrutiny is a matter for Parliament. Our organisations would be pleased to be involved in developing the statutory guidance and amending the code of practice, if that happens, to ensure that both documents, if there are going to be two, are fit for purpose. You may also choose to scrutinise the code. That is your choice.

Liz Smith: I will pick up on that point, because it is central and relates to wellbeing. We have been told that the SHANARRI indices are helpful but do not extend much further than that. Wellbeing is not defined in law, and therefore the concept can be interpreted in different ways. If it was clearly defined, would some of the problems that we face diminish?

Sheila Gordon: It is a challenge to define wellbeing. Perhaps we should reverse that and ask whether we can define circumstances in which we would have concerns about wellbeing or can have a framework for that. That might be a way of considering the question.

Liz Smith: Do you accept what Ms Mellon said regarding the threshold? It is very clear if a child is at significant risk of harm and there is a real welfare issue, but do you accept that the threshold for assisting a child, or making an intervention, is not clear enough, and that that is creating doubt in the mind of some practitioners about when they should intervene and when they should make that judgment?

Sally-Ann Kelly: The bill will potentially place new duties on existing members of the workforce. I would not want to be disparaging in any way towards those professionals, but those responsibilities are significant, so we certainly need to offer them comprehensive training on their duties. That needs to include professionals who make referrals to the named-person service, as it is about not just statutory professionals and the named person but the whole system that supports the child.

In that training, we might need to look at a framework for wellbeing. I agree with Sheila Gordon that it would be really difficult to find a single definition of wellbeing, given the number of areas of a child’s life that that impacts upon. The SHANARRI indicators could be used to develop a framework for wellbeing to take that to the next level, but arriving at a single definition would be difficult. Further, doing so could come with the unintended consequence of restricting practitioners’ professional judgment.

Maggie Mellon: Finding a definition of wellbeing is indeed a huge problem, and no definition has been brought forward. There is a difficulty when wellbeing is defined so broadly. I am not at all averse to Parliament and Government being committed to improving the wellbeing of its citizens—that is the whole purpose of Parliament and Government. The issue is about making a definition in law that requires people to actually act.

One person’s idea of what is good for children is quite different from another’s, unless we are talking about what everybody would agree is obviously harm. The danger when the definition is so broad and subjective is that we might get risk-averse practice among practitioners, who think, “I don’t want to be the one who doesn’t pass on this concern and share this.” That leads to parents, children and young people feeling worried about a lack of confidentiality and about trust. For example, people want to be able to trust their health visitor when they come round and might confide in them about financial or marital difficulties or feelings of depression. People do not want that information to go all round the system unless there is some evidence and it is not just on the basis of a concern about wellbeing.

We now have so many children in Scotland who are suffering from poverty. When named persons are asked to help them, what help have they got to give? Can they give a child a meal, clothes or shoes? I see committee members looking perplexed, but I cannot help but see wellbeing as part of social justice.

Liz Smith: At the start of the meeting, Ms Mellon, you held up a wad of paper that had in it, in your opinion, the legal information that practitioners would have to have good knowledge of to carry out their duties effectively. I have a question for your two colleagues. Would the legislation be binding with regard to the knowledge that practitioners would be required to have? Ms Kelly, you mentioned training. Do you feel that practitioners are adequately trained to know those things?

Sally-Ann Kelly: I am not sure what Maggie Mellon has in that pile. I would say that, in any professional context, some parts of legislation will be more significant and relevant to the task that a person does than others. The training would have to address that.

As I said, if we are to introduce this legislation, we will need to put in place comprehensive training. For practitioners, that training would include the legal context, but it would need to be proportionate. It should not cover every dot and comma of every act but just the bits that refer directly to their role.

The Convener: Tavish Scott wants to come in briefly.

Tavish Scott (Shetland Islands) (LD): Sally-Ann Kelly rightly said that it was for Parliament to decide how to scrutinise draft or proposed legislation. Can I take it that you, as a practitioner and professional in the field, would like the code of practice to be published, clear, definable and easily understood by people in your professional world?

Sally-Ann Kelly: Yes.

Tavish Scott: Would the statutory guidance that you have described be in addition to the code of practice? Is the idea that you are putting forward this morning that it would be helpful in understanding the code of practice?

Sally-Ann Kelly: Yes.

Tavish Scott: When you said that it should be statutory—

Sally-Ann Kelly: My view is that if Parliament decides that there is a need for a specific code of practice, there needs to be statutory guidance that sits alongside it that can be easily interpreted by professionals.

Tavish Scott: That is fair. When you were describing that earlier, I wondered whether you meant, when you said it should be statutory guidance, that it should all be laid out in the bill, line by line—it might or might not be a document of some length—which would by definition make it law, if the Parliament passes the bill. Did you, on the other hand, mean that the Government would propose legislation that would say that there will be statutory guidance, after which that statutory guidance would be issued and discussed?

Sally-Ann Kelly: You will need to forgive my lack of legal expertise—

Tavish Scott: It is not really a legal question, in fairness. I do not want to tie you in legal knots.

Sally-Ann Kelly: It is one for the lawyers to decide, but—

Tavish Scott: I do not think that it is, actually. I think that it is for Parliament to decide.

Sally-Ann Kelly: Or, it is for Parliament to decide—

Tavish Scott: My point is that if there is statutory guidance saying, “You, Sally-Ann Kelly, will do the following,” and it is laid down paragraph by paragraph—you probably deal with that all the time in your professional life—as a statute in law, it is by definition the law of the land, so if you were to disobey it you would be in front of the sheriff. Do you want that, or do you want statutory guidance that accompanies a code of practice that says that there shall be guidance—that would be laid down in law—and beneath that, there would be a document from the Government providing its guidance on this subject?

Sally-Ann Kelly: I am speaking on my own behalf here, because we have not commented on that, in the coalition. My preferred option would be the second of the two.

Tavish Scott: Thank you. I am sorry to tie you up in knots.

Sally-Ann Kelly: That is okay.

Johann Lamont (Glasgow) (Lab): We have talked about wellbeing and the threshold for child protection being two very different things. Is not it the case that the named person legislation arose from concern about the inability of the system to spot child protection issues early, and about young people falling through the system because no one person was responsible? It feels as though that has shifted and that people are saying, “Everybody knows about child protection—that is clear,” although the evidence that we hear in our communities and the tragic cases that we know about suggest that that is not true. Are we separating off something that was supposed to help us to spot early issues that could develop into child protection issues?

Sally-Ann Kelly: My earlier comments were about the law as it currently exists in relation to information sharing for child protection; I think that that law is clear. I did not say that it is followed in all cases in which that is required. There are still issues for us in terms of consistency of practice, in that regard.

On the origins of the named person provision, I accept that that came from failures to share information adequately that resulted in specific issues relating to serious harm to children, which is regrettable, but what we are discussing now is about early intervention.

I will also say that one of the things that we need to accept as a country, if we are truly committed to giving the earliest help to families, is that we need a cultural shift in how services intervene or work alongside families to ensure that they feel confident about seeking that early help. As Maggie Mellon said, we need to be clear about the purpose of information sharing. If information sharing in the early-intervention context is about trying to get extra support to families, that extra support needs to be available locally. One of the things that our coalition is clear about is that there is no consistency of provision in the country; we need to think about that, if we are to pass legislation such as the bill. We are not separating the issues out. What I am trying to do is be clear that that part of the bill should not directly impact on people's perceptions of when and whether they can share information in a child protection context, because that has not changed.

10:30

Maggie Mellon: I totally agree that there is some clarity around information sharing for child protection purposes. There have sometimes been problems when information that has been shared has not been acted on, but we should not make the mistake of saying that we must share information about absolutely everything and everybody.

Last week, we were told that there are 815,000 people on the vulnerable persons database. That makes us wonder how long it will be before there are fewer people not on a database than are on one. We have 815,000 people on that database because of people thinking that we must record information on people and put down something about their vulnerability or need. We also have more than a million people with criminal records. We are talking about a third of the population. That is needle-in-a-haystack territory if our concern is about children who might slip through the net and not be picked up and helped.

The committee needs to examine that concern about information sharing. It is not about a wish not to help people. As Sally-Ann Kelly said, it is necessary to have help available, and it should be available to parents and children across the country when they need it. However, that is not what is happening. What is happening is that records are being built up and people are sharing information, I think in quite a risk-averse way, without knowing what they can actually do to help.

An act saying that children and families can ask for help, and that it is the duty of services to try to provide it in order to help them to have good wellbeing, would be quite different from the bill that we have been presented with. The danger of sharing information indiscriminately or using a lower threshold is that we must deal with a lot of people, so professionals actually would not be able to discriminate between children who are seriously at risk and children who have a need.

The Convener: However, "indiscriminately" is not how information would be shared.

Maggie Mellon: Well, that is a matter of opinion.

The Convener: "Indiscriminately" is a pejorative word that suggests that people will just be passing on information willy-nilly. That is not the point of the bill.

Maggie Mellon: I used the word "indiscriminately" in the sense of not defining the grounds for sharing the information. For instance, what is your definition of "wellbeing"?

The Convener: Discrimination will be used about what information is shared. That is the whole point of the bill.

Johann Lamont: Ms Mellon said that there is an issue about defensive practice, and the implication was that people would share a lot of information. We have heard a lot about defensive practice, but my reading of that was actually the opposite—that people would be ultra-cautious. My concern would be that things that people might share now will not be shared in the future. Do the other two panel members have a view on that?

I think that the fear that is being expressed to the committee is that something that was well-intentioned might in practice make things worse. We really need to be reassured about this, because we might now be in a position where even those who were most committed to the approach are ending up in a place where they will not be able to take it. There is clarity about a duty to share information, but a duty to consider whether to share information is slightly different. Do you have any comments to make on defensive practice?

Sally-Ann Kelly: One of our concerns is the uncertainty that has existed since the Supreme Court ruling. We have examples at Aberlour of people being unsure or unclear about whether they can share information. I am sure that other charities have such examples. There might well be concerns out there in relation to understanding when it is okay to share information.

The coalition has argued for comprehensive training because it is really important that that situation does not prevail and that children and families feel properly supported. In the circumstances, proper training and statutory guidance across the wellbeing framework would certainly help.

We have also argued for a nationwide campaign to clarify what the named person service is and what it is not and, within that, for clarity about the circumstances in which families can expect their information to be shared and what their rights are in relation to the named person service.

What adds to the confusion for practitioners is a wider confusion in the public about the status of the named person, what the scheme is and what it means for them. Many of our practitioners are parents, too, so there needs to be a clear statement and response from the Government to clarify that.

Colin Beattie (Midlothian North and Musselburgh) (SNP): The concept of wellbeing appears to be an important potential gateway to the sharing of information. Given the question of consent, how do you envisage information sharing working with United Kingdom and European data protection law, particularly in the light of the incoming general data protection regulation?

Maggie Mellon: That is the million-dollar question. We have not talked a lot about consent. The Data Protection Act 1998 requires consent for the sharing of information—and informed consent, at that. The GDPR will make that even more stringent: it says that just having consent will not be sufficient. We will have to be sure that it is informed consent—that the people who are consenting understand the consequences of their doing so. The question is important.

I understand that the Data Protection Act 1998, or the guidance under it, will be amended by the GDPR. The act is clear, which is one of the reasons why the Supreme Court struck down the named person provisions. The bill does not address that. All that it does is say that the professionals themselves have to work out all the problems that the Supreme Court pointed to. It tells them to keep within the law, but to share information. It tells them that they might be blamed if they do not share information, but it does not give them any clarity. However, the Data Protection Act 1998 gives them clarity. It would be important for the understanding about consent to be in the guidance, regulations or the bill.

Sally-Ann Kelly: I have already explained to the committee that I am not a legal expert. The legal experts are in debate about that point. I would be reluctant to comment much on the legislation prior to its being enacted, other than to say that regardless of what we do in the law, we need to achieve consistency in what is offered to families. We need to ensure that there are no unintended consequences of legislation in Scotland on which the GDPR might impact.

Sheila Gordon: That is a challenge. We do not have the answers yet, but we have to remember that, for the majority of the time and in the majority of circumstances, we are working with active consent from families. We work alongside parents and children: they know whom we are talking to and what is happening. Therefore, the number of situations in which there would be concerns is very small. We always have to remind ourselves of that. If children's rights and families' rights are addressed in the legislation, that gives us a way to deal with the matter.

Colin Beattie: Previous witnesses indicated that individual practitioners within the different functions are already exhibiting a degree of defensive behaviour with the GDPR coming in. How will the question of consent impact overall? We have heard again and again that the legislation has to be proportionate in terms of the individual versus the local authority, or the organisation that receives that consent. How will that work?

Sally-Ann Kelly: We need to remember that, as Sheila Gordon just said, the vast majority of families with whom we work and with whom the statutory authorities work do so co-operatively and with informed consent. We need to bear that in mind and to remember that there will be only a very small number of cases in which consent becomes a significant issue. We would do the system an injustice to suggest that the issue of consent will cause a lack of clarity across the system. The principles are about early intervention and saying "There's potentially something here that could help your child in one circumstance or another to get help." The vast majority of parents would accept that we need to share information as professionals in order to source that help, because parents, too, want to improve their children's lives. In the vast majority of cases, parents will see it as a good thing.

Colin Beattie: Given what you have said, are we making too much of the issues around consent?

Sally-Ann Kelly: I would not say that we are making too much of consent. It relates to a Supreme Court judgment and is an important thing that we need to sort out. However, we need to understand the broader context of when we will require to apply it.

Colin Beattie: I was referring to what appears to be coming as a result of the GDPR and the impact that it will have on consent.

Sally-Ann Kelly: I do not want to comment on that.

Maggie Mellon: It is absolutely true that many families who approach services for help give their consent to receiving that help and to any sharing of information, but they might not realise the consequences of that. I gave the example earlier of a person talking to their health visitor, who might say "I'll make inquiries about getting some financial help for you", or whatever. However, has the person involved given informed consent to sharing of their information with a wide range of people? In a small community, that could mean that not only a teacher, for example, but everybody in the community might know information that might be very sensitive.

Confidentiality is the absolute guarantee of trust between professionals and the people whom we serve. People have to be sure about confidentiality, information not being shared without their knowledge or permission—which we know has happened—and informed consent, with the GDPR. People have been giving consent to share information without realising—neither have the practitioners—that it can last for years and years throughout a child's life, to the extent that when they apply to do a nursing course or a care course, for example, there could be soft information about them that says that they behaved in an inappropriate way when they were eight, or that they were thought to have behaved in that way. At the moment, such information follows children through their lives.

We are in danger of creating huge databases that people do not know they are on, with information about them following them through their lives. That is what the GDPR and informed consent is meant to be about. We all need to take very seriously the question of what happens when we record information. Where does it go? Who owns it? Can it be removed? The problem is that if that information protection is breached, people do not have the money to go to court for redress. Once information is out there, we cannot have redress, because our privacy has been breached. We have to ensure that we do not do any harm through the intention of doing good.

Daniel Johnson: I want to follow up on something that Sally-Ann Kelly said. You said that in the majority of cases that you work on there is consent, and that it is about early intervention to ensure wellbeing. However, given the Data Protection Act 1998, is it ever possible to share information without consent on the basis of wellbeing alone if the child protection criteria have not been met?

Sally-Ann Kelly: Sharing information without some kind of consent would be complicated and difficult to do. On what Maggie Mellon just said, we need to give credit to the multitude of professionals in Scotland who already work with a level of complexity.

Maggie Mellon mentioned the situation in small communities; I have lived and worked in such communities. People who are employed by statutory authorities and the third sector broadly understand their responsibilities in relation to data protection. It would be unfair to suggest that there is a party of information sharing going on in communities, because that is simply not what I see in practice.

10:45

The Convener: We are about to hear from an existing practitioner.

Clare Haughey: Thank you, convener. I was about to make the very point that has just been made: professionals and third sector organisations are bound by professional guidelines on information sharing, and there is no huge database somewhere with everyone's data on it. I am somewhat concerned that some of the information that we have heard this morning might make people concerned about approaching professionals and disclosing to them difficulties or problems that they have for fear that that information will be recorded and come back to haunt them in years to come.

Johann Lamont: I refer back to my earlier point. The challenge for us is to decide whether the bill addresses the problems that the Supreme Court identified and whether, in doing so, it makes it better or worse for delivering the policy intention. Are the problems fixable through the bill? Can the bill meet the original policy intention of the 2014 act, or is there another way to do that?

Maggie Mellon: The bill does not solve the problems that the Supreme Court identified. A bill that says that parents and children and young people should be able to approach services to get help and that services have a duty to help them would be more useful. The concept of the named person comes from mental health legislation; the patient says, "I want this person to represent and act for me and to have the information that psychiatrists and others have shared." That is a completely different concept of a named person—the individual actively chooses the named person to act for them.

The problem that we need to address is whether the bill is about telling parents what is good for them and telling them to act in the way that we all think is good for them instead of listening to what they want. Families—children and parents—are not objects of concern; they are active in their own lives. They need to be the ones who decide to ask for the help that they want and they need to be listened to.

Johann Lamont: From your organisation's point of view, the policy does not work, so whatever is done to fix the problems that the Supreme Court identified will not really satisfy you. That is an entirely legitimate position.

For those who argued for the named person legislation, but who have seen the problems with it and have heard the suggestion that there might be defensive practice, will the bill solve the problems that have emerged, or do we need to do something else to achieve the policy aim of protecting families and identifying early young people who might be at risk?

Sheila Gordon: I would not like to comment on the legalities of whether the bill addresses the

Supreme Court's ruling, but we are generally supportive of the bill, the GIRFEC principles and the named person policy. However, there is work to do to make sure that the policy works in practice. We have already talked about the importance of the guidance being specific and about the support that is needed for people working in universal services, the third sector and various other services across the country to allow them to understand their duties.

Johann Lamont: Do practitioners feel that they are now in a more complex place, with more complicated decisions to make as a consequence of the bill? Is there an argument for going back to first principles with regard to the purpose of the 2014 act to see whether there is another way of achieving the original policy intention, instead of managing what now feels like a very complex process, with defensive practice perhaps overlaying it?

Sheila Gordon: This is what people on the ground do on a daily basis. People who work with children have concerns for them and see their successes and achievements. People are already working on this on a day-to-day basis—we just need to get this right.

Johann Lamont: Will the bill make things more complex for the person making the decision?

Sheila Gordon: The process is already complex. I do not think that I can say that the bill will make it more so.

Sally-Ann Kelly: We were curious about that. In our submission, we ask—this was a genuine question—whether the bill meets the needs of the Supreme Court ruling. What we understand from further conversations with the bill team is that introducing the new obligation to consider sharing information is a step in the right direction. Our view is that we need to be clear even about that duty to consider. I have already talked about the need to be more specific about wellbeing, and training will help in that respect.

The issue is how we implement the named person scheme. We, too, are very supportive of it and the GIRFEC principles. None of that has changed, but we need to be confident and honest in our discussions with regard to getting the implementation right.

Johann Lamont: Do you accept that there might be unintended consequences that might mean our having to start again? This is what the committee is wrestling with. Are there any unintended consequences of moving to a duty to consider sharing information—and the requirement for people to provide evidence of how and what they had considered—given the legislation and the judgment that has to be made? Do those unintended consequences with regard to time, energy, resources and defensive practice outweigh or, indeed, overshadow the original principles of the legislation?

Sally-Ann Kelly: The coalition did not go far enough in making comments on that. If we go back to first principles on why the measure was introduced, my professional judgment is that there was not enough consistency throughout the country in the judgments that were being made about when and whether to share information. If we can come up with a piece of legislation that provides a framework for considering the circumstances in which information should be shared, and the legal framework for sharing it, we should do so because we need to have a consistent approach throughout the country. What we had historically—and, to an extent, what we still have—is inconsistency.

We also need to think not only about information sharing but about its purpose. To be frank, there is no point in sharing information if nothing positive is going to be done with it. We need the network of early intervention services to support families.

Johann Lamont: So having consistency is actually about support for families and the resources that are available rather than some theoretical argument about information sharing. It makes more of a material difference to families. After all, we all know that defensive practice happens.

Sally-Ann Kelly: The central principle is getting the right support to the child at the right time.

Ross Greer (West Scotland) (Green): There has been a debate among people who support the principle of the named person scheme about the necessity for further legislation. Where would the lack of an information-sharing provision leave the scheme? To what extent can it function without the proposed duty to consider sharing information?

Sally-Ann Kelly: Earlier in my evidence, I alluded to the need for culture and practice shifts within the system. Such shifts will be required with or without an information-sharing component to the named person scheme, but an information-sharing component will provide an impetus to the cultural and practice shifts that we as a country need to make. I also hope that it will reorient our provision towards early intervention and prevention rather than crisis-driven services.

Maggie Mellon: On confidentiality and professional judgment, the problem with the named person provisions in the Children and Young People (Scotland) Act 2014 was that they told everybody to breach their duty of confidentiality and that they had to share information. Because it was a duty to share information and did not mention consent, it was not compliant with the Data Protection Act 1998.

We now have a bill that tells people that they have a duty to share information but which puts the responsibility on practitioners to comply with a range of legislation. I can see that it gets the Government itself out of a potential problem, but it pushes the problem on to the people on the front line, and that is not helpful.

The issue is whether we go back to first principles and look at what families need. For years now, parents of children with special needs have been asking for someone in a public service to be appointed as their champion in order to help sort things out, but they have still do not have that. It might be useful to look at the named person provision in the mental health legislation, because it is voluntary and involves the parent asking someone they trust to get services co-ordinated and sorted out.

The Convener: You have made that point before. Thank you.

Sally-Ann Kelly: Given the complexities, it is important to be clear about what the bill says and what it does not say. It sets out a duty to consider whether information should be shared and allows for professional judgment to be made on and due consideration to be given to whether to share. It is not a duty to share all information automatically.

Ross Greer: I want to follow up Ms Kelly's earlier point on the need for a public information campaign to explain what a named person is. If we cannot make progress on this legislation, is there a danger of that being perceived by the public as a defeat of the named person policy overall and of its hampering delivery?

Sally-Ann Kelly: There is certainly a danger of that. However, the implications for children and families are the important thing. As a coalition of charities, we support the named person scheme and, more important, the principles of GIRFEC. On the public information campaign, we are very clear that we need clarity in the public realm about what the named person scheme is and what it is not.

Liz Smith: You are right to seek clarification. It is our understanding that there is an obligation on institutions to make provision for named persons, but there is no obligation on families necessarily to accept the advice from named persons. Do you agree with that? If so, do you feel that the point has been spelled out well enough so that there is good public understanding?

Sally-Ann Kelly: The coalition has argued from the outset that families should have the right to some type of redress on the named person's decisions. We would support children and families' rights.

Liz Smith: To be clear, do you support their right not to accept the advice of a named person?

Sally-Ann Kelly: Yes. People have the right to do that, but there needs to be a proper process through which they can be supported in doing just that.

There has been no proper clarity in communicating the named person scheme to the public, and that is something that the Government needs to pay a lot of attention to following the committee's deliberations about how these decisions should be taken forward. The Government needs to front that public information campaign.

Gillian Martin: Following on from that, do you agree that the media have a responsibility to make sure that they do not use hyperbole over this? That has affected public opinion.

Sally-Ann Kelly: I am sure that the media has responsibilities here. However, we need to accept that we have a free press and that it will give its own interpretations of stories. The most eloquent challenge would be a clear, concise and precise campaign from Government on what sections 4 and 5 of the Children and Young People (Scotland) Act 2014 are about, especially with regard to the named person.

Daniel Johnson: The joint submission from the children's charities states that the bill does not change the legal landscape on what information can be shared. Given our discussion about thresholds, early intervention and wellbeing criteria, does the panel agree that the bill does not change what information can be shared and that that aspect will still essentially be governed by the Data Protection Act 1998 and its successors such as the GDPR?

11:00

Sally-Ann Kelly: We posed the question, because we were genuinely unclear. The bill team's response was in relation to the introduction of the duty to consider, which changes the information sharing part of the 2014 act but not data protection legislation.

Daniel Johnson: So the bill does not change what information can be shared.

Sally-Ann Kelly: I alluded earlier to the discussion that needs to take place between the lawyers. I am no legal expert, but the lawyers need to look at information sharing and Parliament needs to listen really carefully to what they say about its implementation.

Maggie Mellon: I just want to make the point that the bill will not change the law. The Human Rights Act 1998 and the Data Protection Act 1998 will prevail and provide the framework for information sharing, so it seems a bit pointless to have a bill that just says that practitioners should have regard to the law. Given that they can share information only in accordance with those laws, I am not quite sure why the Government thinks that this bill solves a problem.

Daniel Johnson: Given that what can be shared is really determined by the Data Protection Act 1998 and its successive legislation, and that what this bill is saying is that practitioners need to consider whether to share information on the basis of wellbeing, we will have one act setting out what can be shared and another act and set of criteria asking practitioners to consider whether to share information. Does that not create a conflict or tension between the criteria that professionals are using to assess what information they may or may not share?

Maggie Mellon: Absolutely. That is the central problem.

The Convener: Please speak through the chair.

Maggie Mellon: Sorry.

Sally-Ann Kelly: Again, I am no legal expert, and I think that there are varying views on the matter. We have posed a question and have heard the bill team's justification; it now becomes a matter for Parliament and for you with regard to the advice that you give on this very complex issue.

Daniel Johnson: Finally, and briefly, we have talked a lot about the code of practice, its legal standing and the parliamentary process. I think that this is a matter for Parliament but, from your perspective, do you think that you will be in a position to judge this legislation before you have received the final code of practice from the Government?

The Convener: We are back to where we started with the first question about the code of practice, are we not?

Sally-Ann Kelly: We have been very clear about this. In our submission, we encourage the committee to return to the broader context within which we are trying to implement information sharing. We will judge the matter not on the bill alone but in relation to everything that goes with it. The code of practice, the statutory guidance, any investment that we make in the training of the workforce and any look at how we invest in early intervention services in communities will be relevant to what the act looks like in the final analysis.

Maggie Mellon: Unless we have a clear definition of wellbeing that fits with the existing legislation, that will be the big problem with the act, and it is likely to end up back at the Supreme Court. Indeed, the fact that there was no such definition was one of the key things that were pointed out. Previously practitioners were told to share information and now they are being urged to consider sharing it, but if they do that, they have to take everything into account. As a result, the definition of wellbeing is central.

Sheila Gordon: It will be really important for the statutory guidance to be available, if the bill progresses.

Clare Haughey: I want to make a point for clarity and, in doing so, I refer members to my entry in the register of interests as a mental health nurse.

Ms Mellon made reference to the named person provision in the Mental Health (Care and Treatment) (Scotland) Act 2003, but the named person under that act is completely different. A person who has been detained under the act or for whom there is an application for detention can nominate someone to act on their behalf, but that does not apply if someone is voluntarily admitted to hospital. It is a complete misnomer to say that the two named person provisions should be conflated.

The Convener: Ms Mellon, do you want to come back on that?

Maggie Mellon: I just want to say that the issue is whether the named person is somebody who is trusted and appointed by the person. I have gone no further than that—I am simply saying that that is the other way in which the term "named person" is used and pointing to the voluntary nature of that and the fact that it is somebody whom the person trusts and who is charged with getting services for that person. What was happening before—

Clare Haughey: But that is not what the named person under the 2003 act is.

Maggie Mellon: I was pointing to it as a voluntary concept.

The Convener: Everything should come through the chair, please.

Maggie Mellon: I am sorry.

Clare Haughey: Sorry, convener.

The Convener: Okay. The points have been made. Thank you very much for that.

That brings us to the end of this evidence-taking session. I thank the witnesses very much for their attendance. We will suspend for a moment or two to allow the witnesses to leave before we move on to the second panel.

11:05

Meeting suspended.

11:09

On resuming—

The Convener: I welcome the witnesses for our second panel: Kirsten Hogg, head of policy for Barnardo's Scotland; Alison Reid, principal solicitor at Clan Childlaw; Professor Nancy Loucks, the chief executive of Families Outside; and Eileen Prior, the chief executive of the Scottish Parent Teacher Council. I thank them for attending. As I mentioned to the first panel of witnesses, if a witness would like to respond to a question, they should indicate to me and I will call them to speak.

We will go straight to questions from members.

Daniel Johnson: I will address my question in the first instance to Alison Reid, but other witnesses may want to join in. The Clan Childlaw submission says that the bill

"does not permit any more information to be shared".

I ask Ms Reid to clarify a point that I raised with the previous panel of witnesses: is it, or is it not, permissible to share information based on wellbeing without consent?

Alison Reid (Clan Childlaw): The bill does not alter the circumstances in which information can lawfully be shared, so that comment is correct. Your question concerned the duty to consider sharing information. That duty does not change the threshold for sharing information. It is just about considering whether to share information rather than being about when you can share it.

The bill does not change the current legal framework, unlike the 2014 act, which did. It cannot, because it sits beside human rights law and data protection law, which it does not affect.

Daniel Johnson: Is it your opinion that, if sharing information did not meet the child protection criteria that are set out in the Data Protection Act 1998 but a professional had concerns about wellbeing, they would need to obtain consent to share that information?

Alison Reid: If we put aside the issue that the Information Commissioner's Office raised, which was described as a little area where that might not be the case and which concerns statutory functions, a safe approach would be to consider the child protection criteria threshold unless you have consent.

Daniel Johnson: Do any of the other witnesses have a view on that?

Kirsten Hogg (Barnardo's Scotland): In our written submission, we questioned how much the bill develops the existing legal landscape. We were thinking about our own practitioners, who are often in receipt of information and have to consider whether to share it. From that point of view, we did not see what the bill added. However, having had conversations with the bill team about the policy intention of the duty to consider sharing information, we have thought some more—I speak here on behalf of Barnardo's, not the rest of the coalition—about what the duty can contribute.

Although the bill does not change what information can be shared or in what circumstances it can be shared, we are supportive of the policy intention of helping to provide greater consistency throughout the country. Our experience on the ground as a national organisation is that, in areas where GIRFEC is well embedded, information sharing with and by the named person happens but, in other areas of the country, there are children and families who are not supported in the same way by the GIRFEC system.

The bill is not the only answer. There is a need for other support—which I have no doubt we will come on to talk about—around the code of practice, the statutory guidance and training. However, we are supportive of the policy intention. Therefore, although the duty to consider sharing information does not add anything to what information can be shared, it is important.

Professor Nancy Loucks (Families Outside): We have specific questions about consent. Our submission was specific because our organisation supports children and families who are affected by imprisonment. As I said in it, the question is, whose information and whose consent do you need to get? When a parent goes to prison, is that the parent's information or is it the child's?

Obviously, the imprisonment of a household member is something that affects a child's wellbeing—indeed, it is recognised as an adverse childhood experience. The question is whose consent we would need to obtain. Imprisonment is technically a matter of public record, but there will be other occasions, for example to do with a parent's substance misuse or a parent being sectioned under the Mental Health (Care and Treatment) (Scotland) Act 2003, when there will be a question about whose information it is and whose consent we need. That raises wider questions.

11:15

Daniel Johnson: I want to follow up what Kirsten Hogg said. I completely agree that consistency is vital, but can we really have consistency if we have one set of criteria that dictates what we can share and we are asking practitioners to consider what to share on the basis of another set of criteria? I am struggling slightly with how having two sets of criteria can help with consistency.

Kirsten Hogg: I think that what we meant was that we are looking for consistent implementation of the named person approach and the information sharing aspect of it. The wellbeing criteria are subjective, and practitioners really value that. They value being able to use their professional judgment as they think about individual families and children and their different needs, so we are not looking for consistency in that regard, necessarily. We need a consistent approach, rather than consistent decisions.

Alison Reid: The difficulty is that the bill introduces a duty to consider sharing information based on wellbeing, which we think is disproportionate and unnecessary and will cause a number of difficulties.

As has been discussed, it causes difficulties because “wellbeing” is such a broad concept. Also, practitioners must already consider that in the context of child protection issues, and already do so, under their legal and professional duties. The Royal College of Nursing Scotland commented specifically on that. The RCN said that it is worried that the provisions will result in “defensive practice” and concluded that they are unnecessary.

We also think that the proposed approach causes confusion, because it creates another step in the decision-making process around wellbeing, as Daniel Johnson said, and that is not the threshold at which information is to be shared—that threshold is set in relation to data protection, human rights and confidentiality. That potentially leads us into more difficulties with being human-rights compliant.

The other issue is the purpose of the duty to consider, which is set out in the policy memorandum as being to encourage or prompt information sharing. In my view, legislation is not the way to encourage or prompt information sharing. That could well have unintended consequences, as I think that the committee’s earlier witnesses today pointed out.

We do not need further legislation. We have a legal framework within which the information sharing aspects of the bill could operate. What we do need is clear, robust and accessible national guidance that is not on a statutory footing. Such an approach would simplify all sorts of issues with which the committee has been grappling, because then there would be no need for a code of practice under new legislation.

The Convener: Ms Hogg said that what we are looking for is going on, but not consistently across the country. At the end of the day, is not the purpose of the bill to achieve consistency?

Kirsten Hogg: In our experience, there are areas in the country where the GIRFEC approach is well embedded and information sharing, with consent and in accordance with what is set out in the bill, is happening. However, although information sharing around child protection concerns and with social work is well embedded, what is newer in some areas of the country is the sharing of information among universal services for the purposes of early intervention. That is where we are looking for consistency.

Professor Loucks: Although I think that we have established that the concept of wellbeing needs to be clarified, we disagree that child protection is enough, in that there are issues that will have a dramatic impact on child wellbeing that are not necessarily child protection issues, such as the imprisonment of a parent.

I want to follow up on the point about consistency. There is concern that if we do not have clear enough guidance on what “wellbeing” is, decisions about what information should or should not be shared might be swayed by capacity and resource across different areas as much as by the impact on the child.

Daniel Johnson: Following on from that point, we have already established that the bill does not change what can be shared without consent, so I am interested to find out whether the policy could proceed without the information-sharing provisions. The point about consistency is well made, but is that not a matter of policy? What might the named person policy look like and what might it be able to do if it proceeded without the information-sharing provisions that we are considering?

Eileen Prior (Scottish Parent Teacher Council): From way back, the Scottish Parent Teacher Council’s approach to the bill has been from the perspective of what it offers families. The case has always been put forward that the bill is about support for families rather than child protection. If it is about support for families, families’ participation and consent are a top-line requirement.

The committee heard from the previous panel that the majority of work with families is done on a co-operative basis. A member of the previous panel said that the majority of families look for support and ask for help; in other words, assistance is sought on a co-operative basis, with consent. It is only a tiny minority of families who do not take that approach, and that will be a child protection issue. We can clearly identify that. Most families who want support understand that information will need to be shared. The professionals and third sector organisations that work with them will explain that, in order to help them, they will need to speak to people. That is absolutely right, and families will almost certainly be completely happy with that.

We are getting to the nub of the issue. The bill is trying to solve a problem that does not really exist. There are children who are at risk in a small minority of families, and that is where we are struggling with the bill.

Alison Reid: Like other members of the panel, we are very supportive of GIRFEC and we can see some benefits of the named person scheme, particularly that of giving people a single point of contact. However, we have come to the view that the named person scheme could continue but without legislating on the information-sharing part of the 2014 act. We think that "wellbeing" might be an appropriate concept in informing the duties of local authorities, as is set out in the act. The difficulty that we have is with the use of "wellbeing" as part of the threshold in relation to information sharing. We think that the concept of "wellbeing" and the named person scheme could continue without legislating on information sharing.

Professor Loucks: I have concerns about whether the use of child protection criteria is enough. Eileen Prior said that a small minority of families are not happy to share information and that that is a child protection issue but, in the event of the imprisonment of a parent, that is not the case. That is not necessarily a child protection issue, but there will be a big impact on the child if that information is not shared, because there is such a stigma attached to that. It is extremely difficult to encourage parents to be willing to put themselves in that position.

Eileen Prior: I absolutely agree with that, but the reality is that the data protection legislation will require informed consent from whomever that data is about, whether it is the parent or the child. Informed consent will always be necessary.

The Convener: However, you made the point that when families who might require support do not seek it, that is clearly a child protection issue.

Eileen Prior: No. I was saying that if you look at the data, you will find that that is where the child protection issues are. Those are the families who are in crisis and whom professionals are looking at and saying, "We have to safeguard that child because there is a risk of harm." Risk of harm is a clear measure.

Liz Smith: Ms Reid, you have said that you would not legislate or have a code of practice. When the Deputy First Minister attended the Delegated Powers and Law Reform Committee, he was very keen for the code of practice to be obligatory and very much compulsory for those who would be named persons in order to ensure that their judgment was correct. Is it Clan Childlaw's advice that the Deputy First Minister should give that a bit of a rethink?

Alison Reid: It all comes back to the purpose of the bill. The bill as drafted will not alter the current legal framework. There seems to be some debate around the duty to consider, but it is just a duty to consider whether to share information and it refers back to the current legal framework on sharing. What is the point of creating legislation that would require a code of practice to sit underneath it, which is what the Supreme Court said that it wanted? However, if we do not legislate, we do not need a code of practice. That point takes away all the debate about what should be in the bill, the code of practice and statutory guidance. We just need to say that we have the current legal framework and do not need another bit of law that says, "Apply the current legal framework." We could just withdraw the bill and give practitioners what they need: clear, robust and accessible national guidance and a way forward that everybody can follow.

Liz Smith: What would be your advice to the considerable number of practitioners—many of whom are supportive of getting it right for every child and the named person policy—who have come to this committee and said very clearly to us that they want that code of practice to be crystal clear so that they understand their responsibilities? If your argument is that we do not need that code of practice, what safeguard—an important word in this context—can be put in place to ensure that practitioners have the confidence, understanding and ability to decide when to share information? What would be your advice to them? A lot of them are feeling very exposed on the issue of sharing information.

Alison Reid: I can understand everybody wanting a clear way forward, but legislating and putting a code of practice into the legal framework would be difficult. Janys Scott QC has talked about how difficult it would be to draft that code of practice; I think that she said that it would be extraordinarily difficult to draft it to make it human rights compliant. The problem is that the bill will make the legal framework more complex because all that it will do is add a layer to what we already have and try to introduce different concepts of wellbeing. It is complex law, but trying to restate it will not make it simpler; it will just make it more convoluted.

Liz Smith: Would you accept that, as Maggie Mellon said earlier, in order to do our best for the most vulnerable children, which is the most important aim, it would be better if there was a duty on institutions and local authorities to make provision, but not enforced in the way that the named person policy has evolved?

Alison Reid: I am not so sure about the whole named person policy. I have been concentrating much more on information sharing and how the bill will affect that. I can see the attraction of trying to put it in a code of practice and clarifying the law in that way, but we cannot really do that because we have to comply with data protection and human rights, so it does not help. I am also worried about imposing a duty to consider, because professionals are working under those legal and professional duties anyway and would carry that out.

11:30

The Convener: What difference would it make then? If professionals are already working under those conditions, what difference would it make?

Alison Reid: The difference is that it makes it less compliant with human rights because—

The Convener: The point that you made was that you were concerned about the workers who are already working under those duties. In practical terms, it would not make any difference to the workers because they are already doing that work, according to what you just said.

Alison Reid: Yes, that is right. The problem is that, once you introduce any kind of information sharing legislative scheme, you have to overcome all the issues around human rights and the complexity of the system, which then has to be compatible with human rights.

The Convener: That would not be an issue for the individual worker, but for the organisation that they worked for.

Alison Reid: Yes, Janys Scott QC talked about that and section 19(8) of the Children and Young People (Scotland) Act 2014 covers it. It would be unusual for an individual practitioner to be held liable unless it was very serious.

The Convener: Liz Smith, are you finished with your questions?

Liz Smith: Ms Prior wants to come in.

Eileen Prior: I want to take you back to what the 2014 act was about. It was about providing support for families and not about information sharing. The purpose was to ensure that vulnerable families and, let us face it, poor families, because this is mostly a poverty issue, had the support that they and their children needed.

I am sorry, but am I saying something funny?

The Convener: Excuse me; talk through the chair.

Eileen Prior: It was just the smile on Ms Maguire's face there.

The Convener: People are entitled to make whatever facial expressions they wish in the committee.

Eileen Prior: I do not think that it is particularly funny that we have a lot of children—

The Convener: And I do not think that Ms Maguire was in any way making any humorous faces.

Ruth Maguire: I grimaced at the expression "poor families"; I did not smile. There is nothing funny about it at all. I am very clear about what this is about.

The Convener: You did say what it is about in your first answer, Ms Prior.

Eileen Prior: Sorry?

The Convener: You mentioned what the act was about in your first answer to Liz Smith.

Eileen Prior: Yes, but we also have to think about the impact of the 2014 act, which is to oblige services to provide support to families. At the end of the day, that is its purpose. However, we are seeing services shrinking. Going back to what the earlier panel said, the services that are available to families are shrinking and we are now providing families with less support than we were when the act was introduced. I really struggle with that.

The Convener: We are here to discuss the bill and not the budget for local authorities and the country. I accept that all these things are difficult.

Gillian Martin: I want to come back to the code of practice. It has been interesting to hear what you have said about consistency across the country. Some areas will already be doing things well and children will not be falling through the gaps, and that is what this is all about. Other areas of the country will be having their issues.

As representatives of agencies for people who will have to work every day with the named person policy, what are you looking for in a code of practice?

Kirsten Hogg: The primary concern of the coalition with which we provided evidence is clarity for practitioners.

It is important to give a bit of background to that. Since 2013, practitioners have had two sets of guidance from the Information Commissioner's Office about information sharing in this context. They were ready to go with implementation of the 2014 act in August 2016. Everyone understands the current lack of clarity and the reasons why people sometimes feel unsure about information sharing. Our priority is to consider the best mechanisms by which to provide that clarity for practitioners.

We would really like to focus on the statutory guidance for parts 4 and 5 and section 18, because we think that that would help to put information sharing into the wider context of the named person scheme. It would also help people to understand why it is important and not just a technical issue. Our understanding from the bill team is that the code of practice will be binding on everybody who falls under the scheme. Therefore, it needs to concern itself with the legalities of information sharing—how people comply with the Data Protection Act 1998 and the Human Rights Act 1998 and with whatever other legal gateways there might be.

We would really like there to be something in the guidance that helps practitioners to interpret that for their own situations. That is crucial. I have concerns about practitioners potentially having to consult two different documents—the code of practice and the guidance. Such a situation would not be insurmountable, but it needs to be taken into consideration. Other witnesses have spoken about flow charts, practice examples and things that will help practitioners to understand how information sharing might look in their own contexts.

It will not be possible to provide black and white examples that say, “In this situation you must do this.” Practitioners must always be able to use their professional judgment, and different families and children will always find themselves in different situations. The guidance needs to provide a framework that helps practitioners to think that through on an individual basis. It is really important that the guidance does not stand alone; it needs to be supported through training.

I very much agree with the points that have been raised by the centre for excellence for looked after children in Scotland—CELCIS—on the need for supervision arrangements within organisations or other ways for practitioners to have conversations with others who can help them to think things through if they feel that they are complex.

There needs to be a whole range of stuff—a suite of materials—that people can consult. We hope that that will provide the clarity that practitioners are lacking at the moment.

Gillian Martin: Other people might want to say what they would like to see in the code of practice.

Alison Reid: I will be brief, as I have already said that I do not think that we need a code of practice. I agree with everything that Kirsten Hogg says about the clarity that is required, and I think that it could be in the guidance.

Gillian Martin: The code of practice would not preclude individual organisations from having their own relevant materials.

I am struck by the points that Professor Loucks has been making about her particular situation, which has been slightly different in many cases. I take it that you would have a code of practice at the top level and adapt it for your practitioners so that it was relevant.

Professor Loucks: That is the type of thing that can be incorporated into guidance. Some of the discussion has been about what we should not share, but part of it is about what we should share and about ensuring that people recognise that.

The issue is addressed in our written submission. There is a contradiction with some existing legislation, such as the Criminal Justice (Scotland) Act 2016, in which we say specifically that the information must be shared. That is not recognised as having an impact on child wellbeing at the moment, so we should ensure that any guidance takes such issues into account.

I agree completely with what Kirsten Hogg just said about the code needing to be backed up by training and information for practitioners.

Gillian Martin: Last week, our panel of witnesses, which included representatives from the police, spoke about working in partnership with those in other sectors to develop an understanding of those sectors and of how you can work together with them. What do you feel about that?

Professor Loucks: That is essential, and it is one reason why our organisation supports the role of the named person and having someone with an overview of a number of the issues that will be relevant to supporting children and families.

Oliver Mundell: I have a couple of questions for Alison Reid. I understand that you do not think that a code of practice is necessary. However, I am interested to note what you say in your written submission. You state that

> “the illustrative Code cannot be regarded as sufficient to overcome the clear concerns of the Supreme Court.”

Given the central importance of the illustrative code, do you think that it is essential that Parliament sees the content of the final version before the bill is passed?

Alison Reid: Yes. If you are going to proceed with the bill, the code of practice is key. The code is part of the legislative scheme that is going to be tested or questioned in terms of its human rights compatibility. It is important that the code is seen and scrutinised, as has been discussed.

Oliver Mundell: Given the history of the legislation, the fact that it has been to the Supreme Court, the considerable public and media interest in it and the interest that practitioners have shown in it, do you share my concern that passing the bill without seeing the final code of practice would expose the Scottish Parliament to considerable further reputational risk?

Alison Reid: Yes, I do. We have not talked much about the decision in the Supreme Court. One of the key things that the court wanted people to be able to do was regulate their own conduct so that they were able to decide what was to happen to the information that they had. That is one of the key things that need to happen to make the legislation compliant with article 8 of the European convention on human rights. If the Parliament does not see the code and how the framework will work, it will be difficult to make the call on whether that has been achieved.

The Supreme Court's other key point was about accessibility and how easy that is to understand. Accessibility is a difficult concept to codify. The law is complex as it is, never mind with the addition of further layers. It is important that scrutiny of the code of practice takes place, if that is the route that is taken.

Oliver Mundell: I have one final question for all panel members. In the previous evidence session, the committee heard a suggestion from a witness that, if the bill were passed as it is currently drafted, there is a reasonable likelihood that some of the issues would be tested again in court. In the long run, does subjecting the legislation—whether the whole act or how it is implemented by individual practitioners—to continual legal testing help or hinder the culture of information sharing that has been talked about positively?

Alison Reid: Clearly, that is not going to be helpful. Practitioners need to know what is going on, and all the dialogue is just confusing. The sooner that this can be sorted out, the better for those who are trying to work the system.

Ruth Maguire: We have spoken quite a bit about wellbeing and have heard differing opinions on whether there needs to be a tight definition of it.

What are the panel's reflections on the value of a subjective approach, particularly for practitioners? Situations will be different for different families and there cannot necessarily be a checklist of points to suggest whether a child needs further assistance. We have covered the issue already, but is there anything to add?

Kirsten Hogg: Barnardo's and the other charities with which we provided written evidence have been using the SHANARRI indicators for some years, and staff feel comfortable using them to make decisions about their own professional practice. Staff feel comfortable that the wellbeing indicators allow them to consider the needs of a particular child or family and to think about how best to support that family.

Practitioners feel less confident on the law's understanding of those indicators, and we hear concerns that there are sometimes grey areas around where practitioners would share information. There are no grey areas in considering how we could support families, but there are grey areas around whether the sharing of information supports those families.

As a group of charities, we did not come down on one side or the other; we simply present to the committee that there is a catch-22 situation. Practitioners are telling us both things: that they value the flexibility of those indicators and being able to use their professional judgment to think about individual circumstances but that there are times when they feel that it leaves them a little exposed.

11:45

Ruth Maguire: What would help to improve that?

Kirsten Hogg: I was struck by what Sally-Ann Kelly said in the previous evidence session about finding ways to help practitioners to understand and interpret the code. That would help a lot with practitioner confidence, although it might not help with the question of whether decisions would stand up to legal scrutiny, which remains a question.

Professor Loucks: I agree completely. There will always be areas where discretion is inevitable. The issue is about ensuring that that discretion is defensible, because we do not want people not to share information for fear of litigation. In most cases in which people already support families, they can have those conversations, discuss whether information sharing is appropriate and get consent for that. It is in relation to cases in which families might object to the sharing of information that the threshold for what can be shared without consent might need to be raised, and that is where we head into the child protection concerns. The issue certainly needs further definition and discussion.

Daniel Johnson: On that point, do you accept that the bill does not change that threshold, which is set down by the DPA? As much as we might want to change the threshold, the bill cannot do that.

Professor Loucks: That is my understanding.

Liz Smith: I want to go back to the dilemma that Kirsten Hogg has just enunciated for us. If practitioners are to do their best for our most vulnerable children, they need to know categorically when they can share the necessary information. If something is below the threshold of intervention for child protection reasons, they want an assurance, when they make a decision to share or not, that they have done the right thing. Is it possible to give them that confidence and legal authority if we do not have a greater definition of wellbeing and an explanation of the purpose of the wellbeing argument in the legislation?

Almost everybody who has come to the committee, including those who are in favour and not in favour of the policy, has asked for that clarity and feeling of security and doing the right thing by the law. It is all very well to say that certain aspects of the law do not change anything, but people feel that those aspects do change things, because they do not know where they stand. We have heard that message time and again. Do we need more clarity in the law on what practitioners can and cannot do?

The Convener: Does anybody want to answer that? Ms Reid does—I suspected that she might.

Alison Reid: The difficulty is that practitioners cannot share information at that level, because any sharing has to be done within the human rights and data protection legislation. I do not think that putting something in a code rather than putting it into guidance helps to provide clarity. The issue is all about giving professionals the confidence to use their experience in making decisions. It is about setting out clear guidance with examples so that they can do that.

In the past, we have provided training relating to underage sexual activity, on which subject it is very difficult for people to decide what their approach ought to be. There is good guidance, including from practitioners who have made video clips on how they would address case studies, that tries to give people confidence to use their professional judgment. The difficulty of putting something into law is that we then have all the other problems that we have discussed, which are to do with making the whole framework human rights compliant. If we do not do that, we do not have to face that level of issue.

Liz Smith: I accept that. The committee is trying to do the best by practitioners and ensure that they are given the necessary support to support the families. However, the strong message that is coming to us is that, at the moment, they feel uncertain and do not know where they stand, and we are desperately searching for a way to give them certainty. That is the nub of the issue. As Tavish Scott rightly said, that matters from a legislative point of view because the Parliament must be informed about the right way forward to ensure that we do the best by families. At the moment, I am not convinced that we are able to do that, because we have an illustrative code of practice that has been criticised by many witnesses. I am interested in how we can get round that.

Kirsten Hogg: There are two factors in play: clarity and confidence. It is important to consider them as two different things, as practitioners' confidence in their ability to know what to do about information sharing has taken a knock because of the context that I described earlier involving the different pieces of information that have been given to them. Some of that will never be solved by writing something down. Some of it is about the training, the professional development and the support and supervision that practitioners need to rebuild their confidence that they are sharing the information in the interest of getting support for the families, that consent is part of the conversations that they have with people anyway and that, in many cases, it is not a huge change in practice.

Nevertheless, there is a case for a much greater degree of clarity. Our problem with the illustrative draft code of practice is that it says, for example, that there may be other legal gateways by which we could provide information without consent. I am not an information professional but my understanding is that, by and large, if a practitioner does not have consent, those other legal gateways are incredibly limited to the point of it being almost possible to say that, if they do not have consent and the information does not address a child protection concern, they should not share. Practitioners would value a message of that directness.

It should be possible to provide certainty, but it must not be simply something written down. It must come with a lot of other support for practitioners as well.

Liz Smith: Thank you. That is helpful.

Colin Beattie: We are talking a lot about wellbeing and consent. What impact will UK and European data protection law, such as the introduction of the GDPR, have? We have some anecdotal evidence from previous witnesses that there is already a degree of defensive working in anticipation of that legislation coming through. How will that impact on the bill and working practices?

Kirsten Hogg: My concern is that, for practitioners, it is another set of acronyms and another unknown. We need to ensure that we time the information about the requirements correctly so that, when it goes to practitioners, they are fully cognisant of the GDPR and it is not that, six months down the line, the GDPR comes into force and things change for practitioners again.

As I said, I am not an information practitioner, but I understand that in some circumstances, for organisations such as ours, the GDPR will turn consent on its head, so there could be fundamental questions about what it means to share information. Therefore, it is important that, when information is given out to practitioners, they are cognisant of that.

Eileen Prior: We have looked at the GDPR from the perspective of parents and children in schools, because that is the area in which we work. We are clear that informed consent will be required for the holding and sharing of data. As we said earlier, that does not just mean a tick in a box on a form; it means parents and young people fully understanding the context in which that information may be used. There is no doubt that it will make the scenario a good deal more complicated.

Professor Loucks: I reiterate the concerns that I expressed at the beginning about consent. I know that we have moved on from the consent discussion, but the points are very related if we look at international conventions such as the United Nations Convention on the Rights of the Child, which states specifically in article 2 that children should not be discriminated against on the basis of the legal status of their parents. That is information about the parent but it pertains to a child, so whose data is it? Whose information is it and who has to give consent for that? I am still not clear about that.

Colin Beattie: Based on what we have seen about the GDPR and the question of consent, and the emphasis on the disparity between the person giving the consent and the local government authority or the organisation that might be receiving that consent, how will that work? It seems to be an incredibly difficult hurdle to satisfy.

The Convener: There do not seem to be any simple answers coming from the panel. Ms Reid, do you want to comment?

Alison Reid: It is a really good question. I do not know the answer. The Information Commissioner's Office raised that as an issue and if it cannot answer the question, I am not sure that I will be able to. There is certainly an issue around the balance of power but I am not able to help clarify that.

Johann Lamont: Previous witnesses have talked about the financial memorandum and the extent to which they can deliver on the expectations around the legislation. I wonder what the practitioners on this panel think. Kirsten Hogg spoke from Barnardo's perspective about the importance of training—on-going training, training for new staff and so on. Have you been able to quantify what that would mean for your organisation?

Kirsten Hogg: We have not been able to do that at this stage because that will depend to a large extent on what information is forthcoming from the Government. If it provides us with a fantastic training package and some training for a couple of people, we can start to cascade that through the organisation. If that is not available and we have to start from scratch, that will be different. We are not in a position to quantify that until we know what it looks like.

From memory, I think that the third sector is not included in the financial memorandum; it relates only to those who serve the purpose of the named person. However, a significant number of third sector organisations will be in a position to share information with the named person and will therefore require that training and support. At the moment, I do not think that third sector organisations are considered in the financial memorandum.

Johann Lamont: If it is going to be done properly—and it is complex—would you expect to bear some significant cost?

Kirsten Hogg: Absolutely. There will be costs attached.

Johann Lamont: We have largely heard Alison Reid's view on this, but we are in the position where we have the legislation and it looks as though there are unintended consequences—I am interested in the witnesses' comments on that—and there may be defensive practice. Should we try to make the bill fix the problem, or is there a danger that we will end up making life more difficult for practitioners without necessarily having any more confidence that we are supporting young people and their parents?

Does the bill make things better or worse? That is what we are wrestling with. Does it sort out the unintended consequences or would it be better, in terms of the principles of the original idea, not to have it? You can make things work but is it a difficult thing to do? Would it be better to go back to relying on the judgment of practitioners?

Eileen Prior: From our perspective, the bill does not add anything. I have alluded to the reality in relation to the resource that we are not able to give to families. In fact, our perspective has always been that when it comes to that cross-local authority, cross-service, cross-health board connection and ensuring that there is proper care and support for families who are perhaps moving about or whose children are moving about, that is the role of the lead professional not the named person, because although the lead professional role is not within the legislation, it is within the guidance.

If a child or a family asks for support and multi-agency support is required, a lead professional would be appointed. That lead professional is the key role in supporting a family when there are multiple agencies and perhaps different local authorities and different health boards. That is where the fix is, because that is the role that will really provide comprehensive support for families; it is not the named person.

12:00

Alison Reid: I do not want to repeat myself, but from where I am coming from, the bill makes it more complex and it does not add anything. We would be better off putting our energy and all our expertise into trying to get good guidance that will help practitioners through this in the best way that we can.

Kirsten Hogg: People have mentioned defensive practice a few times. For us, that comes less from the bill and more from the context of the last four years of uncertainty. From anecdotal experience, people are sharing less information. We need to get to a position in which people feel able to share information. Whether that is done through the bill or by some other means, the important thing is that we get to a point of clarity for practitioners because the defensive practice is coming more from that general feeling of uncertainty than from concerns about the bill in particular.

Johann Lamont: Would practitioners be more comfortable with professional expectations and standards rather than their actions being tested in a duty in legislation?

Kirsten Hogg: I think that both come into play.

The Convener: I thank the witnesses very much for their attendance and for their answers to our questions. I now close the public part of our meeting.

12:01

Meeting continued in private until 12:11.

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