



Law Society  
of Scotland

# Written Evidence

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

August 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Family Law and Privacy Law Sub-committees welcome the opportunity to consider and respond to the Scottish Parliament's Education and Skills Committee's call for evidence on the Children and Young People (Information Sharing) (Scotland) Bill. The Sub-committees have the following comments to put forward for consideration.

## Background

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The decision of the Supreme Court in *Christian Institute v Lord Advocate* considered the terms of the Children and Young People (Scotland) Act 2014, in particular Part 4, the provisions around the 'named persons service', and whether these were compatible with the rights of children and parents.

The Court held that, although the underlying policy of the Act was benign, Part 4 as drafted was not sufficiently clear and did not have sufficient safeguards to prevent breaches of Art 8 ECHR (right to private and family life) and to meet the requirement that any interference with Art 8 is in accordance with the law. This Bill seeks to remedy those issues.

We continue to have concerns about the Bill, and believe that further work is required to ensure that it is clear, effective, and compatible with the rights of children and parents.

## General Data Protection Regulation

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The Bill and draft code both make reference to the Data Protection Act 1998. However, from 25 May 2018 the rules of the new General Data Protection Regulation (GDPR) will come into effect. As the named person service is expected to come into effect after this date, it would be sensible for the Bill and for the associated code to be drafted to take account of the GDPR requirements, rather than focusing on what will soon be an outdated system.

## Information sharing

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The Bill establishes information sharing powers for three different scenarios:

- Section 23 – An outgoing named person service provider passing information to the new named person service provider (for example, transition from pre-school to school or on moving schools). This includes a requirement to provide the name and address of the child or young person and their parents, and a power to share certain other information.
- Section 26(1) – A service provider in relation to a child or young person wanting to pass information to other service providers or relevant authorities (for example, where authority X appoints the named person but wants to share information with the health board).
- Section 26(2) – A service provider or relevant authority (not the appointing body) wanting to share information with the service provider in relation to a child or young person (for example, where authority X appoints the named person and authority Y knows something they want to pass to the named person).

Sections 26(1) and 26(2), but not section 23(2) (provision of names and addresses by an outgoing service provider), set out the requirement to consider whether providing information would promote, support, or safeguard the wellbeing of the child or young person, and whether it can be provided in a way that complies with data protection and other relevant law. If these conditions are met, information may be shared.

In addition, section 26A expressly states that information may not be shared if it would be in breach of data protection or other relevant law, or if sharing the information would prejudice a criminal investigation or a prosecution.

The move from a duty to share to a power to share information, and an emphasis on the need to consider whether information is relevant and can be shared, is a helpful safeguard from the perspective of ensuring proportionality.

From the perspective of clarity, it is not obvious why each scenario has been dealt with separately, and how the considerations required within sections 23 and 26 are intended to interact with the additional limitations of section 26A. It may be clearer to have one general provision requiring that, where a service provider or authority is considering transferring information under the Bill, consideration must be given to:

- Whether the information could promote, support, or safeguard the wellbeing of the child or young person;
- Whether the information could be shared in compliance with the relevant data protection and other laws; and
- Whether sharing the information could prejudice a criminal investigation or prosecution.

In particular, the relationship between section 23(2), which is the only situation where no considerations are required and there remains a duty to share information, and the general limitations of section 26A is unclear.

If it is intended that the name and address of a child or young person and their parents should be shared without reference to any of the considerations and limitations provided for other information sharing within the Bill, this should be expressly stated.

## **Consent and notification**

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The Bill removes the requirement to have regard to the views of the child or young person, instead relying on the Code of Practice to cover issues around consent to information sharing, and notification that information has been shared. Given the importance of these issues, and the role that they can play in providing a safeguard and building a relationship of trust with the service providers, consideration should be given to incorporating these principles into the Bill itself.

## **Illustrative Draft Code of Practice**

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We support the creation of a Code of Practice, setting out clarifications and guidance on the operation of the information sharing provisions of the Bill.

However, the key safeguards and information should be contained within the Bill itself, and subjected to full Parliamentary scrutiny.

As the Code of Practice currently available is only illustrative, we will not comment in detail on its provisions, although we believe there are a number of issues with the content at this stage.

In general, we would suggest that it would be helpful for the Code to include examples and case studies for people carrying out the named person functions of how the different provisions apply in practice, including, for example, situations where it may be appropriate to share without consent.

In addition, as discussed above, the Code will need to reflect the new GDPR regime.



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