



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

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

The Faculty of Advocates, as the independent referral bar in Scotland, is pleased to offer its comments on the Children and Young People (Information Sharing) (Scotland) Bill, which arises from the decision of the Supreme Court in *Christian Institute v Lord Advocate* [2016] UKSC 51. The issues identified in the Supreme Court decision reflect some concerns expressed by the Faculty of Advocates at the time of the initial consultation on the Children and Young People (Scotland) Act 2014.

The Supreme Court identified two principal issues with the legislation, as originally drafted. The first was that there was a serious lack of clarity for those implementing the legislation and the second was the lack of safeguards for those affected. Neither of these issues is easy to resolve and some of the criticisms of the Supreme Court will continue to apply if the Bill as drafted is passed and the accompanying Code of Practice is approved.

The Bill states that no information may be shared unless in compliance with the Data Protection Act 1998. This was the case in respect of the original legislation. The problem identified by the Supreme Court was the complexity of the relationship between the 2014 Act and the Data Protection Act. The information sharing provisions will require to be operated by teachers, health visitors, social workers and other non-lawyers, and therefore the rules must be clear and accessible.

This is in part to be addressed by a Code of Practice and a draft has been produced, the intention being that such a Code will be utilised by the relevant professionals in interpreting the statute as it is implemented. It should be remembered that a Code of Practice is not a substitute for legislation. A Code is not debated and passed by the Parliament. Where there is any conflict between the statute and the Code of Practice, the statute will prevail.

The draft Code itself illustrates the complexity of the issues to be faced, and dealt with by busy professionals focused on other aspects of provision for children. A professional considering information sharing is required to carry out a proportionality exercise. This is identified by the Supreme Court, who were particularly concerned that any person considering sharing information should consider:

“... whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (i.e.

whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure).”

We remain concerned that this is an exceptionally difficult requirement to impose on professionals in respect of every child in Scotland. Its imposition risks making their job considerably more difficult and undermining the trust of families and the willingness to share information with the professionals concerned.

In our view, the Code of Practice itself would benefit from being phrased in more accessible language. A glossary or definition section at the end of the Code which provides a readily accessible definition of the technical terms used, and provision of a flowchart for the steps to be considered in relation to sharing of information, is likely to prove helpful to those professionals who will rely upon the Code to interpret the legislation. Given the complex exercise being expected of those professionals, they should also in our view have access to an advice service or helpline to provide assistance when they are uncertain how to deal with information sharing.

At paragraph 100 of the Court’s judgment in the *Christian Institute* case, the court identified as central problems of the legislation:

“the lack of any requirement to obtain the consent of the child, young person, or his or her parents to the disclosure, the lack of any requirement to inform them about the possibility of such disclosure at the time when the information is obtained from them, and the lack of any requirement to inform them about such disclosure after it has taken place.”

The issue of informing a child or young person, or parent, that information is to be shared, and the issue of obtaining that person's consent, are discussed within the Code of Practice, but are not mentioned within the Bill itself. In our view, these issues are sufficiently fundamental to be referred to within the legislation itself, rather than simply being dealt with in the Code of Practice. We suggest that the following paragraph (c) be added as sections 23(3)(c), 26(1)(c), and 26(2)(c);

“(c) consider whether the child or young person, or his or her parent, should be informed about, or his or her consent sought for, information regarding the child or young person being shared.”

We note that the draft Code of Practice has a section which relates expressly to what is termed “the law of confidentiality”. This is said to derive from common law. It is not clear to what this section refers. This is not a point which is, to our knowledge, canvassed extensively in case law. There are rights to confidentiality in a commercial context, but that is not what is at issue here. There are duties of confidentiality arising in particular relationships, such as between lawyer and client and between medical practitioner and patient. These are largely based on rules of professional practice. If this is the point then the guidance should be more specific about the way the duty arises, who is affected by it and in relation to which information. Article 8 of the European Convention on Human Rights requires respect for private and family life and will protect personal information for which there is a reasonable expectation of privacy, but that will arise in the section on “Human Rights” rather than requiring separate treatment under the heading of confidentiality.