Children and Young People (Scotland) Bill

Privacy Impact Assessment Report

Update: 19 November 2013
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1. Context and Background

Purpose of a Privacy Impact Assessment

1.1 A Privacy Impact Assessment (PIA) is a vehicle for assessing and managing privacy risks and issues arising from a project or scheme involved in data-sharing or use of communications technology, and communicating these with data subjects and other stakeholders, to determine the business justification for privacy intrusion/data sharing; and to assess the acceptability of the project, provide assurance and support transparency and trust. The Information Commissioner’s Office, as the public body chiefly concerned with data protection and information privacy, has produced guidance on the use of PIA.¹

1.2 On 17th April, 2013 a PIA was published by the Scottish Government based on a number of proposed legislative duties outlined in a consultation on the Children and Young People (Scotland) Bill, which ran between 4th July to 25th September 2012.

1.3 This document has been produced to update that PIA, in light of further detail being available in respect of Information Sharing duties.

Children and Young People (Scotland) Bill

1.4 The Children and Young People (Scotland) Bill was introduced to Parliament on 17th April 2013. The proposed draft legislation can be found at:

[http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd.pdf)

1.5 The Bill introduced a number of provisions relating to the sharing of information. Some of the written and oral evidence to the Education and Culture Committee questioned whether these provisions may, in some circumstances, lead to a potential impact on privacy. This updated PIA report examines the issues raised in the evidence, considers whether there are any potential risks and explores how information sharing can occur within the bounds of the Bill with as little risk to privacy as possible. The specific sections addressed through this update will be:

**Part 4 – Provision of Named Persons**

Section 19 – Named Person Service
Section 26 – Information Sharing
Section 27 – Disclosure of Information

**Part 5 – Child’s Plan**

Section 38 – Assistance in relation to child’s plan

Part 7 – Corporate Parenting

Section 58 – Directions to Corporate Parents

Part 11 – Adoption Register

Section 68 – Scotland’s Adoption register

2. Assumptions

2.1 There are a number of assumptions that need to be made when reading the sections of the Bill which refer to information sharing. It has always been the intention to further address and reinforce these assumptions through comprehensive Statutory and other Guidance rather than place the detail required on the face of the Bill. These include:

- All information sharing must occur within the existing bounds of the Data Protection Act (DPA) 1998 and the European Convention on Human Rights (ECHR) in that it should be proportionate, relevant and appropriate for the purpose it is being shared. Only that which is necessary to promote, support and safeguard a child’s wellbeing should be shared.
- All sharing must be evidenced, accounted for and recorded.
- Sharing should, where possible, take place within the bounds of agreed Data Sharing Agreements.
- Each undertaking of sharing requires a decision to be made – so it is expected that information will not follow the child unless completely necessary.
- Confidentiality and respecting a child’s right to privacy will be the default position of the Named Person in respect of any decision by them to share information with others.
- The Named Person will share information that is subject to a presumption of confidentiality only when they judge there is no other option available to secure the child’s wellbeing. Such decisions will not be made in isolation of the child and the service the child has made the disclosure to, and will require to be evidenced.
- There is no assumption that such information that is shared with the Named Person will be further shared with other services or within the Named Person’s Service.

2.2 All assessment of risk to privacy will take full cognisance of these assumptions.

3. Approach

3.1 In risk terms it is normal to:

- Identify the risk;
- Understand the risk in the context of the objectives and the benefits the change is intending to achieve;
• Assess and evaluate the risk; and
• Plan to respond to the risk, this can be by:
  ▪ Treating the risk i.e. doing something to lessen its impact or likelihood;
  ▪ Transferring the risk – usually achieved through a form of insurance (this response is not appropriate to the subject matter of this assessment);
  ▪ Terminating the risk – change policy to completely negate any risk;
  ▪ Tolerating or accepting the risk as it stands, continuing to monitor it should it increase.

3.2 It is common for risk responses not to be fully effective in that they don’t remove the risk in its entirety. This results in residual risk remaining. If the original risk was significant and the risk response was only partially successful, the remaining risk can be considered and planned for accordingly. In an attempt to address the areas that appear to be provoking most comment, this update to the Privacy Impact Assessment will aggregate issues raised to the high level headings as set out in section 3.4 below. Many of the issues around privacy were raised within written evidence submitted to the Education and Culture Committee. All of the evidence submitted can be accessed here:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66626.aspx

3.3 Each area will be examined as to the privacy risk that those giving evidence have suggested exists and, if there is a potential privacy issue, what could be done to treat or terminate that risk, whilst adhering to the overall aim of the Bill.

Issues raised in evidence to the Committee

3.4 The issues that have been raised, or criticisms that have been made, by some stakeholders in their evidence to the Committee include:

**Named Person**

That the provision of a Named Person for every child:

i) May dilute the legal role of parents, whether or not there is any difficulty in the way that parents are fulfilling their statutory responsibilities; and

ii) May provide a potential platform for interference with private and family life in a way that could violate Article 8 of the ECHR.

**Information Sharing**

That the Information Sharing duties within the Bill:

i) May be too wide and require to be tightened through amendment;
ii) May fall outwith the scope of the Data Protection Act 1998 and/or ECHR;

iii) Do not prioritise consent;

iv) Do not take fair processing as described in Schedules 2 and 3 of the Data Protection Act 1998 into consideration;

v) Are such that information may be shared inappropriately;

vi) Are such that information may follow the child inappropriately; and

vii) Are such that information may be stored inappropriately.

**Confidentiality and Privacy**

That the Information Sharing duties within the Bill:

i) May adversely impact on the balance between information sharing, which is necessary to ensure the child's wellbeing, and the right to privacy;

ii) Fail to ensure that the child’s views will be listened to where appropriate;

iii) May mean that the trust between professionals and children could be damaged as a result of the duty to share information with the Named Person; and

iv) May allow the Named Person to share information received in confidence inappropriately with others.

**Child’s Plan**

There needs to be clarification that information shared under Section 38 should be relevant.

**Corporate Parenting**

That Section 58 – Directions to Corporate Parents fails to specify the level of information that is expected to be shared and that it needs to be relevant to the needs of the child.

**Adoption Register**

That in Section 68 in changing aspects of Section 13D of the Adoption and Children (Scotland) Act 2007, it is not clear that information shared for research purposes requires to be anonymous.

3.5 Representatives of the following organisations, many of whom raised the issues above, have been consulted during this PIA refresh:

3.6 They have provided a range of different views in a productive and helpful manner, helping the Government to identify the issues and potential risk mitigations outlined in the table at Appendix 1. Their involvement has been greatly appreciated and they are thanked for their participation.

4. Consideration of issues raised

Named Person Service

4.1 Every enquiry into the death of a child over the past 40 years has highlighted that pieces of information were known by some but were not connected or acted upon. The role of the Named Person is designed to ensure that all relevant information is received by a trusted individual who is able to analyse the significance of the information in line with their knowledge of the child and family. They will be in a position to use this information to make connections and act on them by offering parents support. This support will address emerging concerns, or where there is concern that these risks may lead to harm, to intervene early to prevent further harm and crisis. Appropriate information sharing is key to making the role of the Named Person work in this way. With the correct information they will be able effectively to fulfil their duty to promote, support and safeguard the wellbeing of children.

4.2 Until recently practice and culture in Scotland has been based on the assumption that information can be shared only:

- When the individual consents; or
- If the individual doesn’t consent, when the situation is one of child protection i.e. a child is at risk of significant harm.

4.3 Getting it right for every child (GIRFEC) practice is designed to offer support at an earlier stage, and not only in the context of child protection. In other words, GIRFEC practice supports the Scottish Government’s principles of early intervention/prevention. It is now accepted in practice that, where there is a risk to a child’s wellbeing and as a result that child is on a pathway to harm, information should be shared to ascertain how best to support the child and the family. This has been assisted by a statement from the Information Commissioner’s Office (ICO) providing clarity in such situations. The statement can be accessed at:
4.4 In addition, the ICO has advised that in situations where the decision is likely to be to share in any case, to safeguard the wellbeing of the child, then consent should not be asked for as it gives the subject a false impression that they have control over the decision. The ICO advice is impacting on practice and culture which is slowly changing. Harm is no longer regarded as predominantly physical - bullying, disrespect, non-inclusion, mental cruelty, and emotional neglect are all but not definitive examples where risks to wellbeing can lead to significant consequences which can on occasion be catastrophic. These changes are to be reflected in guidance to accompany the Bill and have been discussed for some time with practitioners.

4.5 Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) requires state parties to protect and care for each child, taking into account the rights and duties of parents. GIRFEC recognises that parents and carers will always be the key people in their child’s lives and are likely to know their child best. However, public services also have a duty to support, promote and safeguard a child’s wellbeing and if legitimate concerns emerge, regardless of their source, they need to ensure the necessary help is available to do this.

4.6 Section 19 of the Children and Young People (Scotland) Bill provides that every child in Scotland will have a Named Person up until they are 18 or leave school (whichever is later). The Named Person will be provided by the Health Board until the child reaches school age and the Local Authority thereafter.

4.7 For children who are not educated through Local Authority education services, such as gypsy traveller children or young people who are under 18 but have left school, the provisions set out arrangements to ensure they have access to a Named Person.

**The Named Person Role**

4.8 The Named Person will:

- Be available to the child/family for help and support where required – for most children the Named Person is very likely to be a midwife (for the earliest period), then a health visitor (up to the age of 5 in most cases), then a head/deputy head/guidance teacher (for those children going into public or independent schools). If the family needs assistance the Named Person will use their professional contacts to link them with suitable help. Every child and family will know who their Named Person is but do not need to make use of this service if they do not wish to do so; and

- Act as a focal point for gathering concerns – this includes concerns expressed by a family member or by other professionals (such as the police or GPs) to ensure a holistic view of what is happening in the child’s
life is available and determine whether any further action is required to safeguard the child’s wellbeing.

Concerns about Wellbeing

4.9 If a concern about wellbeing has been brought to the attention of the Named Person, they will either:

- Resolve this in discussion with the child and family (sometimes with the help of other professionals) – this may involve creating a Child’s Plan, outlining what the concern is and which interventions are being put in place to help resolve it; and

- Consider in the light of the information they have, whether, if the family is unwilling to engage, the concern is significant enough to activate their obligations under law to promote, support and safeguard the child’s wellbeing. This decision will be based on the individual’s needs and risks.

Myths and Misconceptions about the Role of the Named Person

4.10 Recent media coverage has indicated there are some misconceptions about the role of the Named Person. These include:

“The Named Person will collect data on every child and store this in a national database which could be accessed by every professional”:

This is not the case. There is no intention of storing information on a single, national database. Although there are provisions for more coordinated planning around a child or young person through the Child’s Plan, this aims to bring together existing information to support professionals for individual children, not to create new information systems.

“The Named Person will be a social worker, resulting, therefore, in every child in Scotland being appointed a social worker”:

Again, not the case. The Named Person role will typically be carried out by a professional from universal services, who would ordinarily have a role in the child’s life, for example, a health visitor or head teacher – consequently, the Named Person role would not be carried out by a social worker.

Issues raised about a Named Person for Every Child

4.11 It has been suggested that only vulnerable children should have a Named Person. This does not, however, recognise the early intervention and preventative role required. Many children from all backgrounds can need help and support at different stages in their lives. The Named Person should be in a position to identify where there are concerns in a child’s life, assess those concerns through discussion with the child and family and consider all other
aspects known to them. They can then reach solutions that are proportionate and appropriate.

4.12 Information will be shared with the Named Person when a relevant authority has a concern about a child’s wellbeing. This differs from current practice only in that there will be a clear, single point of contact for the concern to be raised with. Without the Named Person role in place, a concern can either be raised with Social Work, the Police or the Reporter to the Children’s Panel. Often this formal approach is not appropriate or proportionate; or the reported concern is triaged, with any concern less than child protection discarded, even though it may be an indicator of a problem that needs to be addressed.

Issues raised about the impact of Sections 26 and 27

4.13 Every inquiry into a child’s death in the UK over the last 40 years, and the 2001 report of the audit and review into child protection practice across Scotland, has demonstrated clearly that effective sharing of information within and between agencies is fundamental to improving the protection of children and young people. All have shown that some services had elements of information but none had the full picture. In all cases, early indications of a threat to wellbeing were missed, or not responded to at the earliest opportunity. Unfortunately recent tragic cases have continued to indicate that either information is not shared, or is shared but no one knows who should act on it or that communication lines have failed. Matt Forde, Director of NSPCC Scotland recently commented:

“the NSPCC has long argued for the need for professionals to share information for the protection and wellbeing of children. This issue – the failure to share information that if it were communicated, may have prevented serious harm or death - has been a feature of numerous tragic cases. Children’s rights - to protection from abuse and to wellbeing - are crucial and require that the child’s best interests are accorded paramount importance in every matter concerning the child. The younger the child the more it is the case that they rely totally on adults for their protection and wellbeing; in the case of, for example, an 18 month old child with disordered attachment subject to neglect and emotional maltreatment, no single incident may indicate the true level of harm; it may be that such a child has learned not to cry, since the consequences are too frightening and unpredictable, so for that child, sharing information is the only way that the picture can be pieced together sufficiently for the child to be protected.”

4.14 The fact that information can be known and at times shared with many, but no single agency takes responsibility and acts, was highlighted during the recent Serious Case Review of the tragic case of Daniel Pelka.²

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Common Law Confidentiality

4.15 Some professions are covered by a common law duty of confidentiality and professionals adhere to that duty in relation to their dealings with clients. The most common examples are Medical Practitioners and Solicitors. The general position is that, if information is given in circumstances where it is expected that a duty of confidence applies, information cannot normally be disclosed without the information provider's consent.

4.16 In practice, this means that all client and patient information, whether held on paper, computer, visually or audio recorded, or held in the memory of the professional, must not normally be disclosed without the consent of the patient or client. It is irrelevant how old the patient is or what the state of their mental health is; the duty still applies.

4.17 The circumstances that make the disclosure of confidential information lawful are:

- Where the individual to whom the information relates has consented;
- Where disclosure is in the public interest; and
- Where there is a legal duty to do so.

4.18 In respect of a legal duty, Section 26 clearly introduces an express legal obligation to share where certain conditions are met. Section 27 provides that such information can be shared without being in breach of any confidentiality code. It stipulates that the person providing the information makes the Named Person aware that the information that is provided would in normal circumstances be in breach of their code of confidentiality.

4.19 Section 27(3) places a restriction on the Named Person further sharing that information unless permitted to do so under this or any other enactment. Section 19(5)(iii) allows the Named Person to discuss a matter about the child and Section 23(3) allows the information to be shared with another service provider at transition. Both stipulate that in such circumstances the sharing must be relevant to the Named Person function. Under current legislation the Data Protection Act 1998, sets out in Schedules 2 and 3 conditions where personal and sensitive information may be lawfully processed.

4.20 Some stakeholders have submitted evidence claiming that the provisions:

- By including the phrase ‘might be relevant’ in Section 26 (2) (a), could be open to misinterpretation and may lead to inappropriate information sharing;
- Could significantly lower the threshold where it is expected that information should be shared;
- Could impact heavily on circumstances where confidentiality is essential and should only be overridden in the interest of the child or of others;
- Could, as a consequence, discourage children from seeking support and assistance from services who offer confidential advice; and
• Could significantly impact on the trust that children have in services.

4.21 The latter of these issues raised appear to be mainly focused on older children, who are capable of decision making. There is always a difficult balance to be achieved in ensuring that younger children are protected from harm but that older children can access advice and assistance without the issue they are seeking advice about being immediately disclosed to others, including their parents. Equally there will be circumstances where, in the best interests of the child or of others, confidentiality will need to be overridden. In every case it is important that, where possible, the child’s views are sought and considered in the decision making process. At times, decisions will require to be made, which do not concur with the views of the child. However, such decisions should not be taken lightly and the consequences of the decision considered fully.

4.22 The balance between protecting and safeguarding a child’s wellbeing whilst also protecting the child’s right to privacy is often complex and difficult.

4.23 Appendix 1 outlines: issues raised by those giving evidence in relation to the Children and Young People (Scotland) Bill; the view on that issue held by the Scottish Government; and steps which may be considered to mitigate further any risk to privacy.

4.24 Appendix 2 deals with some frequently asked questions about Section 26 and 27 of the Bill.

5. Conclusion and Recommendations

5.1 The introduction of the Children and Young People (Scotland) Bill to Parliament prompted stakeholders to raise a range of issues as outlined above. It is timely and appropriate that the Privacy Impact Assessment has been refreshed to help explore the issues that have been raised and offer potential actions, which may mitigate any risk to privacy.

5.2 It is recommended that this Privacy Impact Assessment is further refreshed in light of any agreed changes to the proposals during its passage through Parliament.
### Appendix 1

**Risks and suggested mitigation**

Children and Young People (Scotland) Bill - Issues raised about Privacy, ECHR and The Data Protection Act 1998

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<th>No</th>
<th>Issue raised</th>
<th>Scottish Government View</th>
<th>Potential Mitigation(s)</th>
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| 1. | That the provision of a Named Person for every child may dilute the legal role of parents, whether or not there is any difficulty in the way that parents are fulfilling their statutory responsibilities. | In most cases, parents and carers will provide children with what they need, but for many children and families periodically, and some more regularly, support from services will be needed. When this happens, it is often unclear to whom they should turn. Providing universal early access to support can prevent difficulties from escalating and act as facilitator to more intensive or targeted services where required. Individual professionals may not always pick up which children and families face escalating concerns. A universal approach, building on the existing duties of the key universal services in health and education, supports an early intervention approach. Having a single point of contact for all children reduces any potential for confusion for families and professionals in the raising of any issues around a | i) Statutory Guidance - that clear guidance is provided to Named Person providers in relation to:  
  - Engagement with families;  
  - The role of parents;  
  - The right of confidentiality.  
 ii) That Service Providers instigate dispute resolution policies to cover all disputes.  
 iii) That service providers ensure that all matters involving inappropriate action and involvement in family life are investigated and dealt with.  
 iv) That Service Providers put in place suitable training and/or support mechanisms/networks to assist Named Persons with decision making. |
child's wellbeing and prevents excessive sharing of information about children. It also helps to reduce duplication for professionals and for families having currently to repeat the same concerns to a range of different individuals at a variety of meetings.

Unless the Named Person function is for all, we will be less able to respond when a child needs early intervention/ preventative support. The suggestion that it should only be for vulnerable children fails to recognise that we don’t have any structured framework across services to know who is showing signs of vulnerability.

A historical criticism is that when parents need support they don’t know who to turn to and there is a lack of response to escalating concerns. A Named Person provides clarity around whom to contact and a clear responsibility to respond to a request for assistance.

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<th>v) That Service Providers fully inform children and parents about the role, duties and responsibilities.</th>
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| 2. | Part 4 of the Bill may provide a potential platform for interference with private and family life in a way that could violate Article 8 of the ECHR. | Article 8 protects the right to respect for private and family life. It provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8(1) does not provide an absolute right to private and family life but only a right to respect for such life. The right contained in Article 8(1) may be subject to “interference” in accordance with Article 8(2). The consideration of any alleged violations of Article 8 first involves determining whether there is interference with the individual’s right to respect for their family life. If that is decided in the affirmative, then the second question is whether that interference is justified. This second question has 3 aspects to it:

1. Are the measures which prompted the interference in accordance with the law?
2. Do the measures which constitute the interference justify the interference?

i) Statutory Guidance - Provide clear guidance to Named Person providers and children and families as to the right conferred by Article 8, interference criteria and the tests necessary when making decisions that override that right.

ii) Through Statutory Guidance ensure that Service Providers provide adequate awareness to persons performing the Named Person role in respect of the rights of children and adults conferred by ECHR and UNCRC.

iii) Through Statutory Guidance ensure that all data sharing takes place within the bounds set out through Data Sharing Agreements as per the ICO Data Sharing Code of Practice.

iv) Through Statutory Guidance ensure that all decisions reached, and the rationale behind them are:

- Discussed with the subject of the information sharing;
- Recorded appropriately; and
- Stored and managed securely.
interference have a legitimate aim?
3. Are the measures necessary in a democratic society?

In considering this 3rd aspect it should be examined whether the interfering measures are relevant and sufficient for the purpose of Article 8(2). The necessity test means that the interference must be in pursuit of a pressing social need and proportionate to the legitimate aim pursued. There is also a procedural element in the necessity test in terms of any interference arising from proper decision-making.

3. The Named Person provision is not focused on the children for whom the measure would be helpful and it does not cohere with other similar measures for such children.

The Named Person service will be supplied through the universal services that all children and families use. Where there are no concerns raised by the family, the child, the Named Person or another body, and where the family chooses not to use the Named Person for advice purposes, then the Named Person will do no more or less than their position as a Midwife, Health Visitor or Head Teacher demands. Identifying ‘those children for whom the measures would be helpful’ would undoubtedly focus on those children who are already being provided with additional support but would fail to identify those who currently exist in an escalating state of need but are ‘under the radar’ of services. What the Named Person role will assist in

i) Through Statutory Guidance ensure that Service Providers and Named Persons are aware of the scope and purpose of the role so that there is no unnecessary interference.

ii) Through Statutory Guidance ensure that Service Providers put in place and publish complaint procedures should it be felt that there has been unnecessary and unjustified interference in family life.

It should be noted however that when concerns exist and are shared, the Named Person and/or the Lead Professional will
is the early identification of these children, putting together pieces of the jigsaw, through becoming aware of concerns others may have, their own observations and assessment and most importantly the views of the child and family. It is not possible to predict all of ‘those children for whom the measures would be helpful’. Children can require additional support on any scale regardless of their background, their parent’s lifestyle and economic circumstances.

The ability of the Named Person to respond to precursor signs of need in a child’s life will go far towards achieving a culture of early intervention and greatly enhance the life chances of children.

**SECTION 26 - INFORMATION SHARING**

4. That the information sharing duties within the Bill may be too wide, in particular the use of 'might be relevant'.

There can be no expectation that public bodies as defined in Schedule 2 will know whether the information they will share will be relevant to a child’s wellbeing. This would be unreasonable and would require an insight into the circumstances of the child. They should however use all of the information that they have to hand to consider if the child’s wellbeing may be at risk as a result of the circumstances and if so share that which is proportionate and relevant to the child’s situation.

The Information Sharing provisions set a constraint on the information that should be shared by adding

| i) Ensure through Statutory Guidance that Schedule 2 bodies are clear as to what information is appropriate, proportionate and relevant to share – that is, information, which is in relation to a circumstance or circumstances that would normally indicate that there may be a risk to a child’s wellbeing.  
| ii) Assist decision making through Statutory Guidance and providing ‘Decision Making guidance’ to be used as appropriate. |
that – **it ought to be provided for that purpose.**

This means that the sharer of the information has made a judgement based on the situation and the likely or potential risk to a child if that situation persists or occurs again. It also sets out three tests which must be for information to be shared. Not all the information that the sharer holds about a subject should be shared but only that information they consider to be proportionate and relevant to the functions of a Named person in dealing with that situation. There would be an expectation that the sharer has applied the test of proportionality and relevance prior to providing the information.

### 5. That the information sharing duties within the Bill:

1. **May be outwith the provisions of the Data Protection Act 1998 and/or ECHR;**
2. **Do not prioritise consent; and**
3. **Do not take fair processing as described in Schedules 2 and 3 of the Data Protection Act 1998 and/or ECHR;**

There are a number of assumptions that need to be made when reading sections of the Bill, which deal with information sharing. It has always been the intention to further address these assumptions through detailed Statutory Guidance rather than place the detail required on the face of the Bill.

- All information sharing must occur within the existing bounds of the Data Protection Act 1998 and ECHR, in that it is proportionate, relevant and appropriate for the purpose it is being shared.
- Only that which is necessary to promote, support

### iii) Ensure through Statutory Guidance that Community Planning Partners and Data Sharing Partners have established and agreed Data Sharing Agreements in place.

Or

As the Bill will be open to further scrutiny and consideration during its Parliamentary journey, the option to amend certain sections may be considered.

### Ensure that Statutory Guidance reinforces the fact that the proposed legislation is subject to the provisions of the Data Protection Act 1998 and ECHR.

Ensure through Statutory Guidance that there is no doubt that all sharing as a consequence of the proposed legislation is proportionate, necessary and relevant and falls within the constraints of Schedules 2 and 3 of the Data Protection Act 1998.

Through Statutory Guidance re-enforce the need to communicate, discuss and seek the views of the child and family prior to
and safeguard a child’s wellbeing should be shared.

Schedule 2 of the Data Protection Act 1998 clearly sets out the circumstances where information can and should be shared:

- Consent;
- Contract;
- Legal obligation;
- Vital interests;
- Administration of justice;
- Public function/interest; and
- Legitimate interests of the data controller and third party but not prejudicial to individual.

Should any one of these circumstances apply, then it is lawful to share information.

Schedule 3 of the Data Protection Act 1998 clearly sets out the circumstances where sensitive personal information can and should be shared, that is if any of the following are satisfied in addition to condition of Schedule 2:

- Explicit consent;
- Employment law;
- Vital interests;
Not-for-profit/religious/political/philosophical groups;
Already in public domain;
Legal proceedings/advice;
Administration of justice; and
Public functions
  ▪ Anti-fraud activity
  ▪ Medical purposes
  ▪ Equal Opportunities Monitoring
  ▪ Substantial public interest (SI2000/417)

Consent, therefore, is only one of a number of conditions necessary to permit lawful information sharing.

Advice from the Information Commissioner’s Office states that consent should not be asked for if the circumstances are such that the decision, regardless of consent, will be to share, as this unfairly misleads the subject into believing that they have control over the matter. Where possible the subject should be made aware that information will be shared, what it is and with whom.

6. That information may be shared inappropriately and will flood the Named Person with ‘white noise’ rendering them ‘White noise’ currently exists in areas not practising GIRFEC. Concerns are still raised but can be inappropriately channelled either to Social Work or the Children’s Reporter. This volume channelled to single points prevents the appropriate identification i) Ensure through Statutory Guidance that Schedule 2 bodies are clear as to what information is appropriate, proportionate and relevant to share. That is:
incapable of identifying justified concerns. of children who do require compulsory measures. In many cases a triage system exists where any concern which falls below a level, usually that which requires Social Work intervention, is discarded and no action is taken. This means that children with emerging needs are not being provided any support.

The risk of sharing inappropriately can be addressed through clear guidance and training.

i) That information which is in relation to a circumstance or circumstances that would normally indicate that there may be a risk to a child’s wellbeing.

ii) Assist decision making through Statutory Guidance and providing a ‘Decision Making Model’ to be used as appropriate.

iii) As the Bill will be open to further scrutiny and consideration during its Parliamentary journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider.

7. That information may follow the child inappropriately. As a child journeys through life there will be set points where the Named Person routinely changes: Midwife to Health Visitor; Health Visitor to Primary Head Teacher; Primary Head Teacher to Secondary Head Teacher or guidance teacher; and Secondary Head Teacher to Local Authority Officer where appropriate.

In addition to these planned transitions other events such as: Child and family move to another catchment area; Named Person moves on to another post or leaves an organisation; Named Person is changed due to operational requirements; or Named Person is abstracted and the function is temporarily transferred to another.

Through Statutory Guidance – Ensure that Named Persons are aware that only information that is proportionate, relevant and necessary to a child’s wellbeing should be shared at all points of transition.

Ensure that transition points are viewed as decision making points in relation to information that should or should not follow the child.

Ensure that at any transition point the information is considered necessary to be shared with the new Named Person is
At any transition point a decision will be required as to what information is passed to the incoming Named Person. This decision will be made by the outgoing Named Person, with guidance as required from their organisation. As always **only** information that is proportionate, appropriate and relevant to promote, support and safeguard the wellbeing of the child or young person should be shared. Information should not be shared unless it is judged to be such.

The transfer of information from one Named Person to another should relate to information, which is of current relevance to the child, or is considered likely to be relevant to support, promote or safeguard the child’s wellbeing in the future.

| 8. | That information may be stored inappropriately. | It is important that information shared with a child's Named Person is stored securely and that no one other than the Named Person can view it, unless a decision has been made to further share. Therefore:  
- Additional security in respect of storage may be required;  
- Information should only be shared securely;  
- No unauthorised access to Named Person is discussed with the child and/or parents. | i) Through Statutory Guidance ensure that wherever possible sharing takes place within established and agreed Data Sharing Agreements, which stipulate what can and should be shared, with whom, how it will be shared, stored and disposed of. In line with the ICO Data Sharing Code of Practice the Data sharing Agreements will agree standard for Data handling, security, retention and disposal.  
ii) Through Statutory Guidance ensure that |
information should be allowed;
• Information shared in terms of Section 27 can only be further shared if it is permitted to do so through legislation (Schedule 2 of the Data Protection Act 1998 outlines when information can be processed/shared)
• Where there is expected to be information sharing, parties should have entered into a data sharing agreement.

The Data Protection Act 1998 requires organisations to have appropriate technical and organisational measures in place when sharing personal data. The Information Commissioner has published a Data Sharing Code of Practice, which provides guidance in respect of the handling and sharing of personal data. It is expected that all relevant aspects of the code will be followed by organisations, which are affected by parts of this Bill. The code can be accessed at:


Service Providers supply appropriate guidance and training to all staff re Data Security.
<table>
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<th>SECTION 27 - DISCLOSURE OF INFORMATION</th>
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<td>9. That the Bill may adversely impact the balance between information sharing and the right to privacy.</td>
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Information that is considered confidential is usually of some sensitivity; is neither lawfully in the public domain nor readily available from another public source; and is shared in a relationship, where the person giving the information understood that it would not be shared with others.

This duty of confidentiality is not absolute but should only be overridden if the information sharer can justify the information being shared as being in the public interest (e.g. to protect wellbeing and/or others from harm).

Section 27(3) places a restriction on the Named Person further sharing that information unless permitted to do so under this or any other enactment. Sections 19(5) (iii) allows the Named Person to discuss a matter about the child and:

i) Ensure through Statutory Guidance that Schedule 2 bodies are clear as to what information it is appropriate, proportionate, and relevant to share – that is, information, which is in relation to a circumstance or circumstances that would normally indicate that there may be a risk to a child’s wellbeing.

ii) Assist decision making through Statutory Guidance and providing a ‘Decision Making Model’ to be used as appropriate.

iii) Ensure through Statutory Guidance that when receipt of confidential information the default position of the Named Person will be to:

- Respect that confidentiality;
- Discuss and take cognisance of the views of the sharer; and
- Discuss and take cognisance of the views of the child.

Only where there is a further risk of harm to that or another child should they override
Section 23(3) allows the information to be shared with another service provider at transition. Both stipulate that in such circumstances the sharing must be relevant to the Named Person function. Under current legislation the Data Protection Act 1998, permits the sharing of information if it is in the public interest e.g. functions of a public nature exercised in the public interest or in the legitimate interests of the data controller.

In receipt of such information the default position of the Named Person will be to:

- Respect that confidentiality;
- Discuss and take cognisance of the views of the sharer; and
- Discuss and take cognisance of the views of the child.

Only where there is a further risk of harm to that or another child should they override that confidentiality.

| 10. | That aspects of the Bill fail to ensure that the child’s views will be listened to. | The child at the centre is the key principle of the whole GIRFEC approach. Arrangements for the voice of the child to be heard will be set out in detail in regulation and guidance. Regulations and guidance will be worked up in consultation with all that confidentiality. Or

iv) As the Bill will be open to further scrutiny and consideration during its Parliamentary journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider.

<table>
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<th>i) Through Statutory Guidance ensure that the Named Person discusses:</th>
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<td>- Any wellbeing concern;</td>
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<td>- Instances where their information is</td>
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key stakeholders including statutory and third sector partners, parents and children.

Sections 33 and 37, which deal with the preparation and management of a Child’s Plan specifically state that where reasonably possible the Managing Authority will pay regard to the views of the child and parents.

Guidance will ensure that information held by the Named Person will be discussed with the child and parents, their views sought on its relevance and any action likely to be taken.

| 11. | That the Child’s Right to Privacy as conferred under UNCRC Article 16 may be breached. | Article 16 of the UNCRC states: Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes. There is no absolute right to privacy and it is accepted that the right to privacy and confidentiality can be competently overridden in respect of public interest. Public interest can be directly linked to other Articles of the UNCRC i.e.

Article 19 - Governments should ensure that children are properly cared for, and protect them from violence, abuse and neglect by their

likely to be shared;

- Any action considered with the child or where it is deemed that due to the child’s capacity that it would not be reasonable with the parents (it must always be considered that in certain circumstances this may not be possible as it may place the child at further risk or compromise an on-going criminal investigation);
- Has a transparent approach making all records and information held available to the child and family; and
- Records the views of the child and evidences any decision to disregard that view.

i) Through Statutory Guidance ensure that Data Sharing Protocols are established giving clear guidance as to confidentiality and instances where it may be over ridden.

Through these protocols establish clear procedures as to what can be shared with whom, when and how.

ii) Through Statutory Guidance ensure that all professionals are completely honest with children as to their professional responsibilities and do not guarantee confidentiality as in cases of on-going harm
parents or anyone else who looks after them.

Articles 28, 31, 34, 35 and 36 all cover the rights of children that may be viewed as over ridding privacy in specific situations. Above all, children deserve to be valued and their wellbeing protected. At times it is difficult to balance the right of privacy with the need to protect.

and risk to the child disclosing or others this would be unacceptable and contrary to their best interests. By making children aware that where there is a risk to wellbeing then the professional must by law share that information with the child’s Named Person. The terms of engagement will be fully understood and there should be no issues of mistrust.

Through time children will understand that their Named Person will:

- Regard confidentiality as a default position;
- Not share their information before they have discussed the matter with them; and
- Always have their best interests at heart.

In addition, develop training or build on existing training in UNCRC suitable for use by all professionals.

Or

iii) As the Bill will be open to further scrutiny and consideration during its Parliamentary
| 12. | That the trust between professionals and children may be damaged as a result of the duty to share information with the Named Person. | There may be some initial mistrust but this can be avoided by professionals being completely honest with children as to their professional responsibilities. At present professionals should not be guaranteeing confidentiality. In cases of on-going harm and risk to the child disclosing the information or others this would be unacceptable and contrary to their best interests. By making children aware that where there is a risk to wellbeing then the professional must by law share that information with the child’s Named Person, then the terms of engagement will be fully understood and there should be no issues of mistrust. | journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider. 

i) Through Statutory Guidance ensure that all professionals are completely honest with children as to their professional responsibilities and to not guaranteeing confidentiality. 

By making children aware that where there is a risk to wellbeing then the professional must by law share that information with the child’s Named Person, then the terms of engagement will be fully understood and there should be no issues of mistrust. 

Through time children will understand that their Named Person will:

- Regard confidentiality as a default position;
- Not share their information before they have discussed the matter with them; and
- Always have their best interests at heart.
ii) Through Statutory Guidance ensure that Data Sharing Protocols are established giving clear guidance as to confidentiality and instances where it may be overridden. Through these protocols establish clear procedures as to what can be shared with whom, when and how.

| 13. | That the Named Person may share information received in confidence appropriately with others. | Section 27(3) places a restriction on the Named Person further sharing that information unless permitted to do so under this or any other enactment. Section 19(5)(iii) allows the Named Person to discuss a matter about the child; Section 23(3) allows the information to be shared with another service provider at transition. Both stipulate that in such circumstances the sharing must be relevant to the Named Person function. Under current legislation the Data Protection Act 1998, permits the sharing of information if it is in the public interest e.g. functions of a public nature exercised in the public interest or in the legitimate interests of the data controller.

In receipt of such information the default position of the Named Person will be to:

- Respect that confidentiality;
- Discuss and take cognisance of the views of the sharer; and

i) Through Statutory Guidance ensure that when in receipt of confidential information the default position of the Named Person will be to:

- Respect that confidentiality;
- Discuss and take cognisance of the views of the sharer; and discuss and take cognisance of the views of the child.

ii) Through Statutory Guidance further ensure that the Named Person always acts in the best interests of the child, evidencing and recording their actions and reasoning.
- Discuss and take cognisance of the views of the child.

Only where there is a further risk of harm to that child or another should they override that confidentiality.

14. That Section 27 of the Bill may be unnecessary and inappropriate and may overrule orders of the court.

The inclusion of Section 27 will give professionals the confidence to share in circumstances where at times the decision is in doubt due to a misunderstanding of when confidentiality can be overridden.

Subsection (1) gives a legal protection for those who provide information under Part 4 of the Bill. However, a person providing information and relying on this protection will have to consider other potentially relevant rules of law because of the provisions of subsections (2) and (3).

Subsections (2) and (3) provide that the person who receives information (the recipient), if it was provided to them in breach of a duty of confidentiality in accordance with subsection (1), is not then to provide that information to anyone else (a third party), if the person who provides them with the information informs them of the breach of duty unless they are permitted or required to provide that same information to the third party by virtue of any

It is perhaps a misconception that Section 27 provides protection already provided by the Data Protection Act 1998 and Common Law. Whilst the DPA allows for lawful processing through conditions in Schedule 2 and 3 it does not provide any protection should information be shared in the belief it meets the conditions but is later found that it doesn’t. The DPA does not cover communications that are not recorded, so if information was passed verbally, would have no impact. Common Law allows for confidentiality to be breached if the duty is outweighed by the public interest. This definition is open to interpretation and not clearly defined. In addition subsections 2 and 3 add additional restraints on the further sharing of such information not provided elsewhere.

The options available are:

i) Ensure through Statutory Guidance that
enactment (including Part 4) or any rule of law.

Section 27 provides cover where there is a need in exceptional circumstances to share information in breach of an order (e.g. by a court or a hearing). For example, in an emergency situation where it may be necessary to disclose this information to secure the wellbeing of the child – e.g. for urgent medical procedures.

The full intent of Section 27 is understood and that it is not taken as a ‘blanket approach’ allowing inappropriate information sharing in breach of confidentiality as the conditions as set out in Section 26 need to be satisfied before Section 27 has any relevance.

Or

ii) As the Bill will be open to further scrutiny and consideration during its Parliamentary journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider.

**SECTION 38 - CHILD’S PLAN**

| 15. | That clarity is required that all information shared under Section 38 of the Bill should be relevant. | Section 38 falls within the intention that all information sharing will be compliant with the Data Protection Act 1998 and that as a consequence all information shared should be relevant to the purpose and proportionate. |
| | Ensure that Statutory Guidance makes it clear that only information that is relevant and proportionate should be shared. |
| | Or |
| | As the Bill will be open to further scrutiny and consideration during its Parliamentary |
| authorities have to prepare a child’s plan in relation to any child with an identified wellbeing need that is not being addressed by the general services provided by that authority. This provides a legal basis for the sharing of personal information but, notwithstanding subsection (3), the disclosure of such information by a responsible authority must fully comply with the data protection principles. Section 38(2) provides some reassurance that Principle 3 will be adhered to but it may be appropriate to amend sub-section (1) to require that any such disclosure must be of relevant information.) | journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider. |

**PART 7 SECTION 54 - CORPORATE PARENTING**

16. Section 54 of the Bill promotes collaborative working among corporate parents and subsection (2)(a) indicates such collaboration may include the sharing of information. It is not clear as to what extent (or if at all) personal information relating to the children and young people for whom the Section 54 is designed to safeguard or promote the wellbeing of children and young people to whom this part applies. In such circumstances they would have ‘looked after’ status and have a recognised need for targeted interventions and be the subject of a child’s plan as outlined in Section 5 of this Bill. All information sharing is likely to take place within the confines of such a plan with Corporate Parents being recognised partners to that plan.

This section is aimed at Corporate Parents working to safeguard or promote the wellbeing of children and young people. In order to recognise this responsibility it will be necessary that information is through Statutory Guidance or through order making regulation as outlined in Sections 57 and 58 ensure that it is clear that any information shared is relevant to the purpose.

Or

As the Bill will be open to further scrutiny and consideration during its Parliamentary journey, the option to amend certain sections may be considered. This however is a decision for Parliament alone to consider.
corporate parent is responsible would be shared. For the avoidance of doubt, it would be helpful to clarify whether it is envisaged that personal data would be shared and, if so, to include similar provisions relating to the handling of personal information as are included within Parts 4 and 5 (and having regard to the comments made previously). shared and this sharing will in most cases be with the knowledge and consent of the child or young person, however in all cases the information that is shared should be proportionate and relevant.

**PART 13 – SCOTLAND’S ADOPTION REGISTER**

| 17. | That any disclosure for statistical or research purposes made under the proposed Section 13D(2)(b)(iv) of the Adoption and Children (Scotland) Act 2007 should be required to be anonymised. | It is intended that the regulations under Section 13A(2) will include the requirement for information to be anonymised. | That Regulation made under Section 13 (A) (2) of this bill will address the need for anonymity when disclosing information for statistical and research purposes. |
| pseudonymised prior to disclosure. |  |  |
Appendix 2

The Children and Young People (Scotland) Bill
Information Sharing Frequently Asked Questions

Q – The term ‘might be relevant’ used in Section 26 is open to interpretation. Could it apply to anything?

A – No, “might be relevant” refers to information that the Named Person would require to support, promote and safeguard a child’s wellbeing. It means something that you would normally consider to have relevance to a child’s wellbeing. In any case, there is a three part test in Section 26 as to what should be shared.

Q - What is meant by a three part test?

A - The first part is to consider whether the information ‘might be’ relevant to the exercise of the Named Person functions in relation to the child/young person.

The second part is to consider whether the information ‘ought’ to be provided for that purpose.

The third part is to consider whether provision of the information would prejudice the conduct of any criminal investigation or prosecution – if it would, then the information must not be shared.

Only if all three aspects of the test are met should information be shared.

Q - So what ‘ought’ to be shared mean?

A – This part introduces a number of considerations together with a degree of professional opinion. It means that any information shared should be:

- Proportionate
- Relevant
- For a purpose

If confidentiality is a factor the sharer should have considered:

- The views of the child
- The best interests of the child
- How sharing information further will impact on the child's wellbeing

Only after these considerations and to if it is necessary to promote, support or safeguard a child’s wellbeing, should information be further shared.
Q – So if the tests under ‘ought to be shared’ should be applied by anyone sharing information with the Named Person - will the Named Person have to consider the same tests before they share that information further?

A – Yes, the same considerations apply, in fact when the information has been shared with the Named Person in circumstances where a duty of confidentiality applies there are further constraints placed on the Named Person under Section 27.

Q – Doesn’t Section 27 not provide the same protection that already exists under the Data Protection Act and Common Law.

A – No, the Data Protection Act 1998 only covers information that has been recorded and in the main such breaches of confidentiality are currently subject to an application of common law, which can be unclear and open to interpretation.