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

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This bill makes changes to information sharing in relation to named persons and child's plans. These were legislated for in the Children and Young People (Scotland) Act 2014 but the relevant provisions have not been commenced. The current bill is the Scottish Government's response to the Supreme Court ruling that the information sharing provisions of that Act are outwith the competence of the Scottish Parliament. The bill does not make any changes to the requirement to have a named person, or their functions.



**1 September 2017**  
SB 17-59

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# Executive Summary

The Children and Young People (Information Sharing) (Scotland) Bill was introduced in the Parliament on 19 June 2017. It seeks to amend the information sharing provisions in the Children and Young People (Scotland) Act 2014. This follows the Supreme Court decision in *Christian Institute v. Lord Advocate* [2016] UKSC 51 which found these provisions to be outwith the competence of the Scottish Parliament.

The requirement that certain organisations must provide a named person for every child remains the same. The functions of the named person also remain unchanged. That is: to advise, support and inform the child, young person or their parents; to help them access services and to discuss matters concerning the child's or young person's wellbeing with other organisations.

In order to fulfil these functions the 2014 Act provided for information sharing between the named person and other organisations. It was these provisions (principally sections 23, 26 and 27 of the 2014 Act) which the Supreme Court found lacked essential clarity and safeguards and therefore breached human rights requirements.

The bill changes the requirement to share information to a requirement to consider whether to share the information, and a power to share information in certain circumstances. It removes the reference to sharing information in breach of a duty of confidentiality and requires compliance with an information sharing code of practice which ministers must publish. An illustrative code of practice has been published with the bill documents.

The bill also amends the duty to co-operate in relation to the child's plan, which although not part of the court's decision, also required information sharing. The bill retains a duty to co-operate (which can extend to information sharing) in relation to the child's plan in certain circumstances, but information may only be shared in compliance with an information sharing code of practice which Ministers must publish.

# Background: named person and child's plan in the 2014 Act

Parts 4 and 5 of the Children and Young People (Scotland) Act 2014<sup>1</sup> make provision for the named person and child's plan. The amendments in the bill relate only to information sharing under parts 4 and 5. However, to put these amendments in context the following describes the requirements which the bill does not amend.

## Named person

Under part 4 of the 2014 Act a "named person" is to be made available to every child from birth to age 18,<sup>i</sup> or beyond if still in school. Named persons will exercise various functions in order to promote, support or safeguard the "wellbeing" of a child.<sup>ii</sup> These functions are: providing advice, information and support to children, young people and their parents; helping them to access appropriate services; and discussing or raising a matter about the child or young person with various specified public authorities and service providers (for example, health boards, local authorities, NHS services and the police).

The 2014 Act does not enable the named person to compel anyone to accept advice or support.

## Who can be a named person?

Generally, the named person will be someone in the health board, or someone at the child's school. However, the detail of who provides the named person service and who they nominate to be the named person for each child is explained below.

The table below sets out who is responsible for providing the named person service in different circumstances. These are termed "service providers" under part 4 of the 2014 Act.

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<sup>i</sup> with the exception of a person under 18 who is in the regular armed forces

<sup>ii</sup> child is defined as a person under 18 (s.97). In part 4, young person is a person over 18 who is still at school.

**Table 1: Responsibility for providing named person service**

Child/young person's circumstance	Responsibility for named person service for that child or young person
under school age or has deferred starting school	the health board in which the child lives
attending local authority school	the local authority which manages the school
attending a grant aided school	the managers of the school
attending an independent school	the proprietors of the school
in secure accommodation	the local authority or other person who manages the residential accommodation
in legal custody	Scottish Ministers (in effect, the Scottish Prison Service)
18 or over but still at school	the managers of the school (i.e local authority, managers of a grant aided school or proprietors of an independent school)
in armed forces	no requirement for named person
everyone else under 18 (eg. home educated or left school)	the local authority in which the child lives

The named person service provider may identify an individual to act as named person. This can be an employee or anyone exercising a function on their behalf. So, in addition to the above organisations, anyone contracted to provide services on their behalf could also be a named person. However, an order <sup>2</sup> (made following consultation <sup>3</sup> and now revoked <sup>4</sup> ) would have restricted who could act as a named person.

This revoked named person order would have required that:

- only those who had undertaken training on named person functions would have been able to act as a named person. (The financial memorandum in support of the current bill suggests that those identified as named persons should have one day's training in relation to the impact of the bill on information sharing practice – see below).
- only certain types of staff would have been able to be named persons (see table below).
- in exceptional circumstances, a school pupil's named person might have been someone in the local authority rather than a teacher. The policy note to the order explained that this was included for:

“ situations where the relationship between a school-age child, young person, or their parent, and the named person has broken down and it is not possible to identify an alternative named person in the school.”

The Named Persons (Training, Qualifications, Experience and Position) (Scotland) Order 2016. no. 16. Policy note, n.d.<sup>5</sup>

**Table 2: Who could be a named person under SSI 2016/16 (now revoked)**

Child	Named person	Experience or training required
pre-school child	midwife	training on named person functions, and undergraduate, post-graduate or professional training in:
	nurse	
	medical practitioner	child development
		assessing the speech, language and communication abilities and needs of children and adults
child in secure accommodation	head of unit	training on named person functions and training and experience of providing educational and personal support to children and young people.
child in legal custody	unit manager with responsibility for the care and support of children	
child at school	head teacher	training on named person functions, and experience of providing educational and personal support to pupils
	deputy head teacher	
	faculty head	
	principal teacher	
anyone else under 18	employed by the local authority	training on named person functions, and training and experience of providing educational and personal support to children and young people.

Similar secondary legislation will be required before bringing into force any amended version of part 4.

## What does a named person do?

The functions of the named person are to promote, support and safeguard the wellbeing of the child or young person by:

- advising, informing and supporting the child, young person or parent
- helping them access services
- discussing or raising a matter about them with a service provider or relevant authority.

Service providers must publish general information about the named person service as well as provide contact details to each child and young person who will have a named person, and to their parents.

To fulfil the named person function of discussing or raising a matter with a service provider or relevant authority, the 2014 Act included provisions on information sharing. The bill amends these. The 2014 Act also requires relevant authorities and service providers to help the named person fulfil their functions (s.25 2014 Act). The bill does not alter this section of the 2014 Act.

## Child's plan

Under part 5 of the 2014 Act, a child's plan must be developed for an individual child if they have a "wellbeing need" that requires a "targeted intervention". A targeted intervention

is one that is different to the services provided to children generally by health boards, local authorities, managers of grant aided schools or proprietors of independent schools.

The child's plan sets out the "targeted interventions" required, how they are to be provided, by whom and the outcome they are intended to achieve.

The "responsible authority" decides whether a child's plan is needed. Who that is varies depending on the circumstances of the child (see table below) but will be either: a local authority, health board, manager of a grant-aided school or proprietor of an independent school.

The "responsible authority" can prepare and manage the plan and deliver the targeted intervention themselves. Alternatively, it can agree with a different health board, local authority etc that they should prepare, manage and deliver the plan.

The body preparing the plan must have regard to the views of the parents and child. The plan must be kept under review by the organisation responsible for managing it. A review must consider:

- if the wellbeing need is still accurate
- whether the targeted interventions are still appropriate
- whether the intended outcomes are being achieved
- whether the plan should transfer to a different relevant authority

The table below sets out who the "responsible" authorities are in different circumstances.

In many circumstances, the "responsible", "relevant" and "managing" authority will be the same, and will also be the same as the named person service provider.

**Table 3: Responsible authorities for child's plan**

Child or young person's circumstances	Responsible authority
under school age or deferred starting school	health board where the child lives
under school age and living outwith their "home" health board following a decision by their health board or local authority	the "home" health board rather than the one where they are currently living
at independent or grant-aided school	the managers/owners of the school, unless the child is there as a placement made by the local authority - in which case the "home" local authority is the responsible authority
at a local authority school	the local authority managing the school
is detained in secure care or by the Scottish Prison Service	the "home" local authority
in armed forces	no provision to prepare a child's plan
other child under 18	the local authority where the child lives

"Relevant authorities" and "listed authorities" are required to co-operate with reasonable requests for information advice or assistance from organisations involved with the child's plan. This is discussed further under information sharing provisions.

Guidance on child's plans can be issued by Scottish Ministers under s.41.

As well as secondary legislation on the named person training requirements, other secondary legislation,<sup>6</sup> set out further detail on the child's plan and was also revoked<sup>4</sup> following the decision not to bring into force any of parts 4 and 5 of the 2014 Act. Requirements included:

- the information to be included in a child's plan, including details of any wellbeing assessment and the parents' and child's views on this
- a requirement for the managing authority to appoint a 'lead professional' in relation to a child's plan
- a requirement to include any wellbeing issues set out in other plans the child may have - such as a co-ordinated support plan under additional support for learning legislation or a looked after child's plan
- a requirement to review the plan initially within 12 weeks, and then at least annually.

Similar secondary legislation will be required before part 5 of the 2014 Act comes into force.

## Complaints

Similarly to the orders on the named person and the child's plan, an order setting out a complaints process<sup>7</sup> was made in March 2016, following consultation.<sup>8</sup> These were also due to come into force in August 2016 but revoked<sup>9</sup> in September. Similar secondary legislation will be required before bringing into force any amended version of parts 4 and 5.

The revoked regulations set out a process for children, young people and parents to make complaints to the named person service provider or authority managing the child's plan. Complaints could have concerned anyone exercising functions under parts 4 and 5 which included: health boards, local authorities, managers of grant aided schools, proprietors of independent schools and the public bodies listed in schedules 2 and 3.

Under the now revoked order, if the organisation could have determined the complaint without using the investigation procedure then they would have been required to do so. However, children, young people and parents could have requested that the investigation procedure be used.

If the complainer was unhappy with the outcome, they would have been able to refer the matter to the Scottish Public Sector Ombudsman. The policy note<sup>10</sup> stated that the amendments to the Scottish Public Services Ombudsman Act 2002 Act enabled the ombudsman to consider the merits of decisions as well as maladministration.

In its submission to the Education and Skills Committee, the SPSO discusses the overlap between this process and their existing jurisdiction for complaints. They suggest that the bill is amended to remove this duplication.<sup>11</sup>



## Parliamentary consideration of named person and child's plan

The 2014 Act was passed on 19 February 2014 by 103 votes to 0, with 15 abstaining.<sup>12</sup> The abstentions were all from Scottish Conservative MSPs. The named person provisions were amongst the most controversial aspects of the bill. At stage 1, the then Education and Culture Committee heard evidence from a range of organisations. In its stage 1 report, the committee discussed information sharing, noting support from children's organisations, such as Barnardo's Scotland who suggested that:

“ the lower threshold for sharing information would make it easier to identify concerns about a child at an earlier stage.”

Scottish Parliament Education and Culture Committee, 2013<sup>13</sup>

However, others had concerns about implications for privacy and lack of clarity in the drafting. For example Govan law centre described the bill as proposing:

“ a significant erosion of the right to privacy for children and families with few (if any) safeguards built in ”

Scottish Parliament Education and Culture Committee, 2013<sup>13</sup>

Professor Kenneth Norrie referred to a lack of clarity in the bill, in particular in relation to the terms "might be relevant" and "ought to be shared," that are used in section 26. (The term "might be relevant" was amended at stage 2, see below). The committee reported that he objected particularly to section 27 which:

“ provided a “blanket defence to the prohibition on disclosing information” which he felt, would significantly weaken the prohibitions included in other legislation.”

Scottish Parliament Education and Culture Committee, 2013<sup>13</sup>

The current bill seeks to repeal section 27. The committee's report summed up the views on information sharing as lacking clarity, but workable if clear guidance was provided.

“ There was general agreement from witnesses representing the interests of education and health professionals that the drafting in sections 26 and 27 of the bill would benefit from being “tightened up”. Overall, however, the witnesses felt that clear guidance would provide the necessary safeguards and give professionals confidence about what information they should and should not share.”

Scottish Parliament Education and Culture Committee, 2013<sup>13</sup>

The report stated that the committee expected that any necessary safeguards would be introduced at stage 2. The information sharing provisions were amended so that information would be shared only if:

- it is 'likely to be relevant' (rather than it 'might' be) and would benefit the child's wellbeing
- the views of the child are considered.

At stage 3, provision for a complaints process was added. Although amendments were proposed seeking to require explicit consent and otherwise restrict information sharing,

these were not passed. Proposing amendment 165 on explicit consent, Liam McArthur, MSP noted during the stage 3 debate on 19 February 2013 that:

“ As Clan Childlaw and the BMA have pointed out, if no attempt is made to seek a child’s or the parent’s consent before confidential information is shared, 'there is a significant risk that children and young people will be reluctant to access and engage with confidential services'.”

Scottish Parliament, 2013<sup>12</sup>

This issue of consent was central to the argument of the interveners (Clan Childlaw) in the Supreme Court case (discussed below). Arguing against the need for explicit consent to be provided for in the 2014 Act, the Minister stated during the stage 3 debate that the overall purpose of the provisions was framed within ECHR and data protection law:

“ We must ensure that appropriate information is shared when there is a reason to do so, and that we seek to respect the views of the child and their right to privacy with regard to data protection and ECHR legislation as well as seeking to promote, support and safeguard their wellbeing.”

Scottish Parliament, 2013<sup>12</sup>

The Minister's view was that the then bill already provided adequate protections:

“ The information sharing provisions in the bill as amended at stage 2 already provide that careful consideration be given to issues of confidentiality ”

Scottish Parliament, 2013<sup>12</sup>

During consideration of the then bill, and since, there has been a [high profile campaign](#) <sup>14</sup> arguing against the principle of a named person. Organisations supporting the campaign include the Christian Institute, Schoolhouse, Big Brother Watch, Christian Action Research and Education, Scottish Parent Teacher Council and the Family Education Trust. An online petition against the principle of appointing a named person to every child has achieved 36,955 signatures.

# Supreme Court ruling

The named person provisions in part 4 of the 2014 Act were challenged in the courts. In the *Christian Institute v. Lord Advocate [2016] UKSC 51*,<sup>15</sup> the Supreme Court found that overall, the establishment of a named person service did not necessarily breach human rights legislation. The court said:

“ by themselves, the functions in section 19(5)(a)(i) and (ii) of providing advice, information and support and helping the parent , child or young person to access a service or support would not normally constitute an interference with the article 8 rights of either the child or his or her parents. ”

para 78 *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, 2016*<sup>15</sup>

As a starting point, the Supreme Court accepted that the 2014 Act pursued a legitimate aim:

“ it can be accepted, focusing on the legislation itself rather than on individual cases dealt with under the legislation, that Part 4 of the 2014 Act pursues legitimate aims. The public interest in the flourishing of children is obvious. The aim of the Act, which is unquestionably legitimate and benign, is the promotion and safeguarding of the wellbeing of children and young persons. ”

para 91 *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, 2016*<sup>15</sup>

However, the provisions on sharing information which the court, at paragraph 78, described as “central to the role of named person” were found not to be “in accordance with the law.” These provisions – s.23, 26 and 27 of the 2014 Act therefore needed to change.

The court described how: “in accordance with the law” means much more than just being enacted in an Act of Parliament. The legislation must also be accessible and its effects foreseeable. The court explained, in paragraphs 79 and 80, that:

- the rule must be formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct
- it must be sufficiently precise to give legal protection against arbitrariness
- there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined.

The court held that guidance and codes of practice can be taken into account when deciding whether the rules are formulated in a way that enables “sufficient foreseeability.”

Because of the complicated way that the information sharing provisions interact with data protection, they “cannot be taken at face value.” The court stated that:

“ In several crucial respects, the scope of the duties and powers to disclose or share information set out on the face of the Act are, in reality, significantly curtailed by the requirements of the DPA and the Directive.”

para 83 The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, 2016<sup>15</sup>

The Act appears to impose various duties and powers to share information. However such duties and powers either cannot exist or are very limited because they are controlled by data protection law.

The court also found that there was a “lack of safeguards” to allow examination of whether there was a breach of human rights law. In particular:

“ There is no statutory requirement, qualified or otherwise to inform the parents of a child about the sharing of information.”

para 84 The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, 2016<sup>15</sup>

If the parents (or child or young person) do not know that information is being shared, they would be unable to challenge it.

## What did the court say was needed?

The court identified, at paragraph 100 of its judgement, the central problems as the lack of any requirement to:

- seek consent to disclose information
- inform a parent, child or young person that information may be disclosed
- inform them that a disclosure has taken place.

The court was clear that it was not its place to say how the law ought to be amended, but it did suggest, at paragraph 107, that the 2014 Act needs to have:

- clarity about how it relates to the Data Protection Act 1998
- subordinate legislation or binding guidance on
  - when people should be told that information is being shared
  - when consent should be sought.

# Scottish Government action following the Supreme Court ruling

Reacting to the Supreme Court judgement, Scottish Ministers said they: “remain absolutely committed to the named person policy.”<sup>16</sup> Although the judgement only related to the “information sharing” provisions within part 4 of the 2014 Act (sections 23, 26 and 27), the Scottish Government decided not to bring into force any of parts 4 and 5, pending reconsideration of the information sharing provisions. In a parliamentary statement on 8 September 2016 John Swinney said:

“ Although I accept that political support has not been universal, there has been, and continues to be, broad political and stakeholder support for the policy. [...] we want to ensure that there is a clear consensus across Scotland on how information sharing should operate. That must include the essential principle of consent, and the rare occasions when it is not appropriate to require or seek it.”

Scottish Parliament, 2016<sup>17</sup>

He announced a “three month period of intense engagement” saying:

“ We will take input from practitioners as well as from parents, from charities as well as from young people, and from those who support the named person policy and those who have concerns about it. I intend to involve the offices of the Children and Young People’s Commissioner Scotland and the Scottish Information Commissioner as we look to address the Supreme Court judgement effectively.”

Scottish Parliament, 2016<sup>17</sup>

Commencement of parts 4 and 5 had been planned for August 2016. The commencement order was revoked, as were the orders on the training, qualifications and experience of named persons, the child’s plan and provision for complaints (see [above](#)).

## Engagement and consultation

Consultation on the current bill took the form of meetings with groups, rather than publishing a consultation paper and inviting views from the public in general. The Scottish Government website notes that:

“ We sought input from those who support the named person policy and those who had concerns with it, but were also prepared to consider a revised way forward.”

Scottish Government, 2016<sup>18</sup>

The No2Named Person as a campaign group was not involved in these stakeholder meetings. However two of the organisations that support the No2NamedPerson campaign were involved in engagement meetings. These were: Christian Action Research and Education and the Scottish Parent Teacher Council.<sup>19</sup>

As there was no formal consultation paper, there is no formal analysis of responses. Notes of the meetings have been published.<sup>20</sup> Some of the documents record views while others note that a discussion took place as part of a wider meeting. Scottish Government officials provided an update to an “information sharing stakeholders” meeting in November

2016. The note of that meeting <sup>21</sup> summarised the views in the engagement process up to that point.

“ views have ranged from repealing all information sharing provisions to making the minimum changes possible. However the vast majority of stakeholders have so far expressed views somewhere in the middle [...] most are saying that it would be helpful to have something in part 4 and 5 of the Act to encourage information sharing when it can be shared under existing data sharing law[...] Some of the group suggested that some sort of central support should be available for a short period to support consistency in addressing challenging queries in relation to information sharing. ”

Scottish Government, 2016<sup>21</sup>

Of particular relevance to the bill is that there did not appear to be a consensus on whether information sharing provisions were required, but there did appear to be agreement that encouraging lawful information sharing would be helpful. Across most of the meetings there was a focus on obtaining consent, unless there was a child protection concern, and on the importance of professional judgement.

The privacy impact assessment, which accompanies the bill, states that:

“ Feedback from engagement with stakeholders told us that information sharing that was rooted in consent, engagement and empowerment of families was the best way forward .”

Scottish Government, 2017<sup>22</sup>

However, a statutory provision on consent was not considered necessary

“ Throughout the engagement process stakeholders expressed consistent views that an additional specific duty to seek consent was not necessary.”

Scottish Government, 2017<sup>22</sup>

The privacy impact assessment identifies four key themes which emerged from the engagement process, that:

- practice on information sharing is improving
- understanding could be improved on when to share where there are wellbeing concerns that fall short of child protection. Care Inspectorate reports show inconsistent practice in this.
- there is a desire for training and guidance
- there is agreement on the importance of professional judgement.

In March 2017, Mr Swinney returned to the Parliament. Describing the consultation process he said:

“ Over three months, that engagement involved more than 50 meetings and some 250 organisations and groups. It included about 700 young people; parents and carers; practitioners; professionals; and leaders from education, health, local authorities, police, faith communities, unions and charities. Importantly, we listened to those who had concerns about information sharing and were prepared to consider a revised way forward. We reached out to others including Christian Action Research and Education Scotland, CLAN Childlaw, Together and the Scottish Parent Teacher Council.”

Scottish Parliament, 2017<sup>23</sup>

In his statement, Mr Swinney updated the Parliament on the outcome of the engagement process and set out the policy for amending information sharing provisions. He said:

“ I believe that the aims of the policy justify broad support and that when the way forward on the implementation of information sharing is accurately understood, it too will command support.”

Scottish Parliament, 2017<sup>23</sup>

He outlined the policy intention in the forthcoming bill:

“ We must provide consistency, coherence and confidence in the approach to sharing information below the threshold of risk of significant harm, where the named person’s role is so important in supporting families to get assistance when they need it.”

Scottish Parliament, 2017<sup>23</sup>

and said that training would be available:

“ We will work with key partners to develop and deliver national training and capability-building programmes.”

Scottish Parliament, 2017<sup>23</sup>

Originally, the Government’s intention had been to legislate more quickly.

“ it is my ambition to work towards a commencement date of August 2017”

Scottish Parliament, 2016<sup>17</sup>

However, updating the Parliament in March 2017 Mr Swinney noted that:

“ The new provisions mean a longer timeframe for commencement than was originally anticipated, but I believe that, given the significance of the issues involved, Parliament must be given the full and proper opportunity to legislate on these issues.”

Scottish Parliament, 2017<sup>23</sup>

The current intention is to bring provisions into force in 2018. <sup>23</sup>

## Bill provisions

The bill seeks to amend the 2014 Act so that specified organisations would be required to **consider** sharing information in certain circumstances and could only do so in accordance with a code of practice issued by Scottish Ministers. An illustrative draft code of practice has been published.<sup>24</sup>

The bill also makes changes to the wording of the criteria for sharing, although the underlying idea of information sharing to promote wellbeing remains the same.

## How does this change the law?

Information can only be shared within the existing framework of data protection and human rights law. This was true before the 2014 Act, would have been true had the 2014 Act been commenced as enacted and will continue to be true regardless of the way in which the 2014 Act is amended.

As originally enacted, part 4 of the 2014 Act would have added a **requirement** to share information in certain circumstances if it was possible to do so within those frameworks. It also sought to over-ride the common law duty of confidentiality.

The amendments in this bill mean that this would now be a duty to **consider** whether to share, rather than a duty to share. Therefore even if it is legally permissible within data protection and human rights law to share information, there would not be a requirement to do so.

The tables below show how the relevant sections would be amended by this bill. The Supreme Court discussed s.23, 26 and 27 of the 2014 Act and the bill amends these. The bill also amends part 5 on the child's plan. This was not discussed by the Supreme Court because the case was about named persons. However, the issues raised in relation information sharing by named persons would be relevant to information sharing in relation to the child's plan.

### Section 23: changing named person service provider

Section 23 of the 2014 Act provides for passing on information when a child's named person changes. The table below show how this bill seeks to change s.23 of the 2014 Act.



**Table 4: Amendments to s.23 of the 2014 Act**

	As previously enacted	Proposed amendment
power/duty to share	must share name and address	no change
	must share wellbeing information if likely to be relevant to exercise of named person functions.	must: i) identify other information which, if shared, could promote, support or safeguard wellbeing and ii) consider whether can be shared within data protection or other law.  May share information if can do so within data protection or other law.
trigger for power/duty arising	when the named person service provider changes	no change
who provides information	the old named person provider	no change
to whom?	the new named person provider	no change
limitations	can be shared in breach of a duty of confidentiality, but not in breach of any other law	may only share if can do so within data protection or other law
	views of children, young person and parents should be considered before sharing.	n/a (but see code of practice)
	only share if ought to be provided (i.e likely benefit to wellbeing outweighs adverse effect)	
	must not prejudice criminal investigation or prosecution	no change
	n/a	must follow code of practice, which must provide safeguards applicable to provision of information.

## Section 26: sharing information with named person service provider

Section 26 provides for sharing information between the named person provider and other organisations. The table below sets out how this bill seeks to change s.26 of the 2014 Act.

**Table 5: Amendments to s.26 of the 2014 Act**

	As previously enacted	Proposed amendment
power/ duty to share	<p>certain organisations must share information with the named person if "likely to be relevant" to named person functions</p> <p>named person must share information with certain organisations if "likely to be relevant" to functions affecting wellbeing</p> <p>named person may share information with certain organisations if sharing is "necessary or expedient" for named person functions</p>	<p>named person and certain organisations must consider:</p> <p>1) whether to share information that could promote, support or safeguard wellbeing and</p> <p>2) whether can do so within data protection or other law</p> <p>may share information if can do so within data protection or other law.</p>
trigger for power/ duty arising	<p>information held by named person, service provider or certain public authorities that is likely to be relevant to the named person's functions or,</p> <p>information held by named person, and providing it to a service provider or certain organisations is necessary or expedient for exercising the named person function</p>	information acquired by named person, service provider or certain organisations that could, if shared, (either by itself or with other information held) promote, support or safeguard a child's wellbeing
who can share?	service provider or certain organisations provide information to the named person and vice versa	no change
limitations	can be shared in breach of a duty of confidentiality, but not in breach of any other law	only share if can do so within data protection or other law
	must not prejudice criminal investigation or prosecution	no change
	<p>for information 'likely to be relevant' view of children, young person and parents should be considered before sharing.</p> <p>only share if ought to be provided (i.e likely benefit to wellbeing outweighs adverse effect)</p>	n/a (but see code of practice)
	n/a	must follow code of practice, which must provide for safeguards applicable to provision of information

## Section 27: limitation on breach of confidentiality

The bill provides for section 27 of the 2014 Act to be repealed. This section limited the passing on of information that was shared in breach of a duty of confidentiality. However, as the bill removes the ability to share in breach of confidentiality, s.27 is no longer needed.

## Section 40: duty to assist with child's plan

Section 40 of the 2014 Act requires organisations to co-operate with each other in relation to a child's plan. This co-operation includes provision of information. Therefore, although the child's plan was not addressed directly by the Supreme Court, the bill puts in place additional safeguards for information sharing related to the child's plan.

As mentioned, the bill would change the duty in part 4 to share information to a power to share. However, the bill does not change the duty in in part 5 at section 40 of the 2014 Act. Section 40 requires certain organisations to assist a named person by providing

information, advice or assistance in relation to a child's plan subject to certain limitations. The table below sets out how this bill seeks to change s.40 of the 2014 Act.

**Table 6: Amendments to s.40 2014 Act**

	As previously enacted	As amended
duty to share	must share if certain criteria are met	no change
trigger for duty arising	receives a reasonable request from someone exercising functions in relation to a child's plan	no change
who can share?	relevant authorities and listed authorities. i.e health boards, local authorities, managers of grant-aided schools, proprietors of independent schools and organisations listed in Schedule 3 to the 2014 Act	no change
limitations	can be shared in breach of a duty of confidentiality, but not in breach of any other law	only share if can do so within data protection or other law
	must not prejudice criminal investigation of prosecution	no change
	n/a	must follow code of practice
	cannot share if it would incompatible with a duty of the person asked to share, or would prejudice the exercise of the functions of the organisation	no change

# Code of practice

The bill requires Scottish Ministers to issue a code of practice on information sharing and requires that anyone providing information (or considering providing information) under the Act must do so in accordance with this code.

In *Christian Institute v. Lord Advocate [2016] UKSC 51*,<sup>15</sup> the court, at paragraph 97, described assessing whether to share information as a "daunting task".<sup>15</sup> This highlights the importance of the code of practice, guidance, staff training and other support which front line workers will need in order to implement the named person service within the law. The court said:

"It can readily be foreseen that in practice the sharing and exchange of information between public authorities are likely to give rise to disproportionate interferences with article 8 rights, unless the information holder carries out a scrupulous and informed assessment of proportionality."

para 88 *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, 2016*<sup>15</sup>

This raises the issue of the extent to which front line professionals will be equipped to undertake such an assessment.

The court's judgement, at paragraph 101, proposed that guidance was required on the assessment of proportionality when considering whether information should be provided. This should cover:

- circumstances in which consent should be obtained
- circumstances in which consent can be dispensed with
- if consent is not obtained, whether the affected parties should be informed of the disclosure either before or after it has occurred
- whether the recipient of the information is subject to sufficient safeguards to prevent abuse.

The court also said that: "the information holder needs to do more than 'have regard' to the guidance" and that: "guidance should also emphasise the voluntary nature of the advice, information and support."<sup>15</sup>

The privacy impact assessment acknowledges that: "assessment of compliance with data protection law may be complex," but continues:

"The code of practice will assist practitioners in taking a systematic approach to information sharing and in helping them to consider whether information sharing is justified and proportionate in a particular circumstance."

Scottish Government, 2017<sup>22</sup>

The Scottish Government issued an illustrative draft code of practice along with the bill documents.<sup>24</sup> The table below summarises how the content of that illustrative code addresses the court's suggestions.

**Table 7: How the illustrative code of practice reflects the Supreme Court decision**

Supreme Court	Illustrative code of practice	
para 95, 101, 107	para	
when to obtain consent	7 - 9	must seek consent unless exceptions apply: eg complying with legal obligation, protection of vital interests, exercise of function conferred by legislation or other paragraphs of schedule 2 Data Protection Act 1998 (DPA) applies. For sensitive personal information, consent must be explicit.
when to dispense with consent	11	possible if there is no breach of confidence, conditions of DPA are satisfied, it is in accordance with the law and proportionate in terms of article 8 ECHR
when to inform that information is shared	6, 13, 16	must inform that information may be shared, will be shared and /or has been shared unless it is not practicable to inform the person (eg unable to contact them) or it would be detrimental to:  protection/detection of crime  apprehension/prosecution of offenders  health and safety of the child or others  best interests of the child  or there is some other compelling reason not to inform. Code also refers to Information Commissioner's data sharing code of practice.
safeguards on recipient to prevent abuse	4	requirement to comply with code
voluntary nature of named person		not referred to explicitly in the code, but referred to at para 26 of the policy memorandum
requirement to do more than 'have regard' to the code	4	information holders must comply with the code.

The code goes on to give a brief overview of the relevant law on data protection at paragraphs 20 to 28, the law of confidentiality, at paragraphs 29 to 31, and article 8 of the European Convention on Human Rights (ECHR), at paragraphs 32 to 40.

The privacy impact assessment states that:

“ The code of practice on information sharing will provide clarity on how the information sharing provisions will operate lawfully in the context of other enactments and rules of law”

Scottish Government, 2017<sup>22</sup>

Ministers may issue guidance under sections 28 and 41 of the 2014 Act. The bill does not change this provision. Although the illustrative code does not contain case studies, the privacy impact assessment refers to this being included in the statutory guidance.

Many submissions to the Education and Skills Committee on the illustrative code consider it difficult to follow and lacking in clarity. The Information Commissioner's Office has made a number of criticisms.<sup>25</sup> These include:

- difficulties in the way the code describes consent, particularly given forthcoming changes in data protection due to the GDPR (see [below](#))

- that when setting out permissible reasons for deciding not to inform someone about data sharing, the stated exceptions of "best interests of the child" and "some other compelling reason" do not "provide a compliant rationale for not informing individuals about the processing of their personal information"
- that the code does not take the GDPR into account, and therefore does not describe all the relevant law

## Legislative status of the code

Although the code of practice itself would not be set out in legislation, the requirement to issue one and follow it is. The delegated powers memorandum sets out the reasons for not placing the code in subordinate legislation (such as regulations):

“ It is the Government's opinion that this would not be practicable given the nature and likely content of the code of practice, particularly the level of detail that will be included in the code of practice. In particular, setting this out in a legislative form would be too restrictive to allow for a full explanation of the relationship between the information-sharing provisions of the 2014 Act as amended by the bill and the relevant law”

Children and Young People (Information Sharing)(Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 17-DPM, 2017<sup>26</sup>

The bill requires that Ministers consult on the code, including giving the Parliament 40 days to comment on it. Ministers must have regard to any comments expressed by the Parliament, but are not obliged to make any changes to the code in light of these comments. The code may not be issued until 40 days after it is laid before the Parliament, but the code itself does not require approval by the Parliament before it is published, nor does the Parliament have any power to annul the code after it is laid.

# Training on information sharing

The financial memorandum estimates the cost of the measures in the bill at £1.2m. These relate entirely to providing training.<sup>27</sup> One day's training will be provided for those who will be in the named person's role. The financial memorandum<sup>27</sup> sets out costings for training for the following groups of staff:

- head teachers, deputy head teachers and principal teachers in local authority schools
- around 60% of midwives, health visitors, school nurses, family nurses and public health nurses
- two members of staff in each independent and grant-aided school.

Materials will be developed by NHS Education for Scotland and the Scottish Government, in collaboration with stakeholders. The financial memorandum notes that materials have already been developed by NHS Education for Scotland who are therefore:

“ Well-placed to produce generic learning and development materials to address this needs of this bill.”

Children and Young People (Information Sharing)(Scotland) Bill [as introduced] Financial Memorandum, SP Bill 17-FM, 2017<sup>27</sup>

The financial memorandum states that:

“ These new learning and development resources will give service providers and relevant authorities access to consistent tools to develop staff awareness, knowledge and understanding of the law, how it should operate and the effect of the law.”

Children and Young People (Information Sharing)(Scotland) Bill [as introduced] Financial Memorandum, SP Bill 17-FM, 2017<sup>27</sup>

It also notes that the Scottish Council of Independent Schools has developed training materials.

In addition to organisations providing named person services, other organisations, (“relevant authorities” in part 4), will also be required to consider whether to share information with the named person. These are listed in schedule 2 to the 2014 Act. The financial memorandum does not provide for any training costs for these organisations.

Many submissions to the Parliament's Finance and Constitution Committee and Education and Skills Committee stressed the need for guidance and training, with some (for example Police Scotland) considering that the Financial Memorandum has underestimated these costs.<sup>28</sup>

# Reaction to the bill

On publication of the new bill in June 2017, Scottish Labour and the Scottish Liberal Democrats focused on the level of public trust in the scheme. Labour said the Government needed a "clear plan to rebuild trust in the named person scheme" <sup>29</sup> and the Scottish Liberal Democrats said there was a:

“ Very real risk that the limited changes now being proposed won't be enough to regain the confidence of families across Scotland”

BBC, 2017<sup>29</sup>

The Scottish Greens said the changes meant that:

“ We are now back on track to ensuring children in Scotland are as safe and well supported as possible.”

BBC, 2017<sup>29</sup>

The No2NamedPerson campaign have described the bill as a ‘U-turn’, saying:

“ In effect they say the duty of a named person will be to consider whether sharing information is likely to promote, support or safeguard the wellbeing of the child or young person. They must also then consider whether sharing that information would be compatible with data protection law, human rights law and the law of confidentiality. That's a 100 per cent climbdown on their original plan of a statutory duty to share information about people's private lives almost without restriction.”

No2NamedPerson, 2017<sup>30</sup>

At the time of writing, 46 submissions on the bill had been received by the Parliament's Education and Skills Committee. <sup>31</sup> These reflected a general concern about the complexity of the decisions staff would be required to make. (This complexity already applies to decisions about information sharing. The difference the bill makes is perhaps that it would require staff to actively consider making these decisions). The general view of the code of practice was that it needs to be written in much clearer language and include practice examples. The main specific concerns related to the approach to seeking or dispensing with consent and the lack of coverage of the GDPR (see below).

Of the 28 submissions that commented on the bill, 11 considered that it did not meet the Supreme Court's concerns. On the other hand, around 10 submissions welcomed the bill. Across the submissions, the main concerns raised were; the complexity of the law in this area, with some of the view that this will make people reluctant to share information. Another common concern (nine submissions) was the lack of definition of "wellbeing."

Suggestions for amendments to the bill included adding: provisions on consent, provisions to clarify the voluntary nature of the advice and support offered by named persons, a requirement to consider the child's views and a definition of wellbeing.

Submissions were received from the No2NamedPerson campaign and those affiliated with it. <sup>32 33</sup> These considered that the bill does not solve all the issues raised by the Supreme Court, largely because the legal framework as a whole is complex. As the No2Named Person submission puts it: "this is demanding far too much of busy practitioners." The



group also wish to see far more emphasis on the fact that families are free to choose whether to accept the advice and support offered by named persons. The distinction between wellbeing and welfare is also discussed. The group opposes the bill's and 2014 Act's use of what they consider a subjective and undefined term.

Similar points are raised by the Faculty of Advocates who consider that:

“ 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 approved”

Faculty of Advocates, 2017<sup>34</sup>

Their main concerns are that the legal framework is complex for front line professionals to apply and that the bill doesn't make explicit reference to seeking consent.<sup>34</sup>

On the other hand, Alistair Sloan (a solicitor) considers that, in removing the apparent contradiction between the Data Protection Act 1998 and the Children and Young People (Scotland) 2014 Act, the bill; “sufficiently addresses the issues identified by the Supreme Court in its judgement.”<sup>35</sup>

CLAN Childlaw<sup>36</sup> were the interveners in the *Christian Institute* case. While they support GIRFEC and the named person scheme, they oppose the way that information sharing has been legislated for. As their submission states: "At no time [...] did we seek to challenge the entire Named Person scheme." However, they consider the bill unnecessary and disproportionate.

“ Our understanding is that the bill does not alter the current legal framework but instead attempts to restate it. This is unnecessary and could lead to confusion by simply adding another layer of legislation and more provisions for professionals who operate within a framework which is already complex. [...] It is an attempt by the Scottish Government to abdicate responsibility. It is their function to bring forward legislation that is compatible with ECHR, the laws of Data Protection and the law on confidentiality, and to make it clear to those with duties under that legislation what they are required to do. Instead it appears that the Scottish Government seeks to pass on the responsibility to the duty bearer.”

They consider that the bill should be withdrawn and recommend "clear, robust and accessible national guidance on information sharing accompanied by practice based training materials." They also note the absence of provision on consent and the removal of the requirement to consider the child's views.

A range of children's organisations made a joint submission.<sup>37</sup> They are clear that they, "remain supportive of the principle of the named person," but have concerns about the need for clear communication with families and professionals about the named person and how to share information lawfully. They seek assurances about when practice guidance will be provided for parts 4, 5 and 18 of the 2014 Act, and stress the need for training materials.

While the Information Commissioner's Office makes clear that there is: "nothing on the face of the bill that contradicts or conflicts with either the current data protection regime or under the GDPR," the submission makes a number of criticisms of the code of practice.<sup>25</sup> (See [above](#))

# New rules on data protection

Anyone sharing information must do so within the framework of data protection law. Currently contained in the Data Protection Act 1998, this will need to be updated to ensure consistency with the new EU General Data Protection Regulation <sup>38</sup> (GDPR) which will enter into force on 25 May 2018. It replaces the Data Protection Directive 95/46/EC and is designed to harmonise data privacy laws across Europe.

The GDPR was approved and adopted by the EU Parliament in April 2016. The regulation will take effect after a two-year transition period and, unlike a Directive it does not require any enabling legislation to be passed by government; meaning it will enter directly into force in the UK in May 2018.

In relation to Brexit, the UK Government has said the GDPR will apply in the UK from 25 May 2018.

“ The UK remains a member of the European Union until we leave and the full rights and obligations of membership will apply until then, which includes an obligation to implement the GDPR. ”

Department for culture media and sport, 2017<sup>39</sup>

As a result of the UK Government's proposals outlined in the European Union (Withdrawal) Bill, <sup>40</sup> all EU law, including EU Regulations, will be converted into UK law on the day the UK leaves the European Union. As a result, the GDPR will continue to be applicable in the UK following Brexit though the UK Government would have the option of amending the Regulation in the future if it wished.

Further information on Brexit, the GDPR and data protection is available in a House of Commons Library briefing <sup>41</sup> .

The UK Government plans to introduce a bill in the Westminster Parliament which will update the Data Protection Act 1998 in the light of the GDPR. Measures in the new data protection bill will include: <sup>42</sup>

- making it simpler to withdraw consent for the use of personal data.
- allowing people to ask for their personal data held by companies to be erased.
- enabling parents and guardians to give consent for their child's data to be used.
- requiring "explicit" consent to be necessary for processing sensitive personal data.

An overview of the current law on data protection is provided in the illustrative code of practice. <sup>24</sup>

In relation to named persons, one particularly relevant change relates to consent. Where consent is relied upon as the justification for processing data, the GDPR has more stringent conditions than the Data Protection Act 1998 for how that consent is obtained.

“ the request for consent must be given in an intelligible and easily accessible form, with the purpose for data processing attached to that consent. Consent must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language. It must be as easy to withdraw consent as it is to give it.”

European Union, n.d.<sup>43</sup>

The Information Commissioner's Office advises that:

“ if you rely on individuals' consent to process their data, make sure it will meet the GDPR standard on being specific, granular, clear, prominent, opt-in, properly documented and easily withdrawn. If not, alter your consent mechanisms and seek fresh GDPR-compliant consent, or find an alternative to consent. ”

Information Commissioner's Office, n.d.<sup>44</sup>

Discussing the basis for legal sharing under the current Data Protection Act 1998, the policy memorandum states that:

“ Information sharing under parts 4 and 5 of the 2014 Act will sometimes be done with consent, but may rely on other bases, such as compliance with a legal obligation or protection of the vital interests of the person to whom the information relates”

Children and Young People (Information Sharing)(Scotland)Bill [as introduced] Policy Memorandum, SP Bill 17-PM, 2017<sup>45</sup>

# Glossary

**responsible authority** is responsible for deciding if a child's plan is required under part 5 of the 2014 Act. They can be: local authorities, health boards or directing authorities.

**service providers** are required to provide a named person service under part 4 of the 2014 Act. They can be local authorities, health boards or directing authorities.

**managing authorities** manage a child's plan under part 5 of the 2014 Act. They can be a local authority, health board or directing authority.

**directing authorities** are proprietors of independent schools, managers of grant aided schools, the local authority managing secure accommodation

## **relevant authorities:**

In part 4, a relevant authority is an organisation listed in schedule 2 to the 2014 Act. These include: special health boards, Skills Development Scotland, Care Inspectorate, Scottish Police Authority, Scottish Sports Council, Scottish Fire and Rescue, colleges and universities and the Children's Commissioner. These organisations can share information with the named person.

In part 5, a relevant authority can be a local authority, health board or directing authority. They can deliver a 'targeted intervention' set out in a child's plan.

**listed authorities** must co-operate with those preparing, managing or delivering a child's plan under part 5 of the 2014 Act. They are listed in schedule 3 to the 2014 Act. With the addition of Scottish Ministers, this is the same list as "relevant authorities" under part 4. It includes: special health boards, Skills Development Scotland, Care Inspectorate, Scottish Police Authority, Scottish Sports Council, Scottish Fire and Rescue, colleges and universities and the Children's Commissioner

**named persons** are employed or provide functions on behalf of a named person service provider

**child's plan** is established under part 5 of the bill where a child needs a 'targeted intervention'

**targeted intervention** is an intervention, provided by a "relevant authority" for children whose needs are not capable of being met by the services which are provided generally to children by the authority.

**child** in this bill is a person under 18 years.

**young person** in this bill, is a person over 18 who is still at school.

**wellbeing need** Under part 5 of the 2014 Act a child has a wellbeing need if the child's wellbeing is being, or is at risk of being, adversely affected by any matter.

**wellbeing** Part 18 of the 2014 Act provides that where, under the 2014 Act, a person is required to assess whether something would promote, safeguard, support or affect wellbeing, wellbeing is to be assessed according to the SHANARRI indicators and with regard to guidance issued by Scottish Ministers.

**SHANARRI indicators** Assessing a child's wellbeing with respect to the degree to which they are: safe, health, achieving, nurtured, active, respected, responsible and included. Further detail on SHANARRI and wellbeing is available at: <http://www.gov.scot/Topics/People/Young-People/gettingitright/wellbeing>

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