

GIRFEC Practice Development Panel - Legal Focus Group Update on Development of draft Code of Practice on Sharing Information

Introduction

This paper is to update the GIRFEC Practice Development Panel (the “Panel”) on the work of the Legal Focus Group (the “Group”) and current thinking in relation to the development of the draft Code of Practice (the “Code”) for Information Sharing pursuant to Parts 4 and 5 of The Children and Young People (Scotland) Act (“2014 Act”) . The Group’s considerations have included:

- I. the current legal framework in relation to information sharing, including specific consideration of the implications of the new data protection regime, introduced in May 2018;
- II. the objectives of the Panel;
- III. Panel feedback and advice on the drafting of the Code;
- IV. the Supreme Court judgment in the Christian Institute case of 2016 (“Supreme Court Judgment”) ; and
- V. evidence from the Education and Skills Committee proceedings.

Background

Early in its considerations, the Panel established the Group in order to support the development of the Code through consideration of the legal issues that needed to be covered in the Code. To this end, the Group has largely focused on the technical detail and legal aspects of drafting the Code.

The Panel and the Group’s aim is to support the production of a draft Code that:

- properly reflects relevant legal requirements;
- is workable;
- is comprehensive (*an authoritative draft*);
- is user-friendly for children and young people, parents and practitioners; and
- is founded on the information sharing experience, expertise and practical knowledge of those in public services and rights holders (i.e. children and their families).

Drafting of the Code of Practice

The Group and the Panel have been working towards the development of an authoritative draft Code that makes clear how the legal rules and safeguards must be applied in relation to Parts 4 and 5 of the 2014 Act. This includes how such provisions interact with other relevant rules of law. Further, the Group has been considering the wider framework required to ensure that such rules and safeguards in Parts 4 and 5 of the 2014 Act are presented in an accessible way to those to whom they apply and to those that will apply them.

Strengthening the detailed drafting of the Code to ensure transparency for the public

To ensure transparency, it is the view of the Group that, rather than partially relying on organisations’ guidance, policies, procedures and protocols to set out the detail of the law, it should explore how this detail could be clearly set out in the Code. This approach is necessary if the intent of the Code is to:

- ensure that there is precise direction on the application of the law and, in addition, ensure that safeguards which exist for the purposes of preserving rights under e.g. Article 8 of the European Convention on Human Rights (“ECHR”) are highlighted and explained;
- provide clarity; and
- ensure that there is consistency in the application of the law and safeguards.

Ensuring the Code is accessible and understandable

In the Group's view, arguably, the General Data Protection Regulation (the "GDPR") and the new Data Protection Act 2018 (the "DPA 2018") provide a number of new safeguards in relation to the processing of data which apply to the offering of services and the information sharing considerations in connection with same. These new safeguards could be helpful in ensuring that any potential for sharing information when engaging with a service is necessary, relevant and proportionate.

The Code will have to clarify how the safeguards in the GDPR and the DPA 2018 relate to the information sharing powers and duties of Parts 4 and 5 of the 2014 Act in the context of other law, including Human Rights law and the law in relation to confidentiality. It will be necessary to make these rules of law not just available in the Code, but accessible and understandable to the public and practitioners as to their application. It should be noted that there is an almost universally expressed desire from stakeholders for the Code to be clear, concise and accessible. Given the complexity of these areas of law, this is challenging, and is compounded by the low volume of guidance and case law on how the new data protection regime should be applied and how it interacts with other law. As guidance and case law develops, understanding of this complex area of new law will likely change over the coming months and years.

Consideration of "Consent"

Stakeholder Expectation

From the evidence presented to the Education and Skills Committee, it is clear that members of the public, practitioners, third sector organisations and members of the Committee are likely to expect the Code to recommend that consent be the main legal basis for sharing information. References to consent in the Supreme Court Judgement, as well as comments made by stakeholders (including rights organisations) prior to the GDPR coming into force, will have contributed to these expectations. Further, the UK Government recently (July 2018) issued updated advice on "[Information Sharing: Advice for practitioners providing safeguarding services to children, young people, parents and carers](#)", which promotes consent as the preferred basis for information sharing in safeguarding matters.

Consent and GDPR

The Group has discussed the implications of GDPR on the drafting of the Code. The Group notes that GDPR sets a higher standard for consent where it is used as the lawful basis for sharing information under data protection law. In practice, this makes it difficult for public authorities to rely on consent as the lawful basis for processing data. Recital 43 of the GDPR states:

*"In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, **in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation...**" (emphasis added)*

The Information Commissioner's Office (ICO) has issued guidance on this issue. This guidance suggests that in relation to performance of their statutory functions, public authorities should avoid relying on consent for the purposes of data protection law due to the perceived imbalance of power between a public authority and an individual. This is because some people may feel they do not have a choice but to agree to sharing information where they depend on the services of the public authority, or fear adverse consequences. In this type of situation, it cannot be said that consent is freely given. Accordingly, it is the Group's view that, in terms of the current data protection legislative regime, the most appropriate legal basis for sharing personal information under as part of the Named Person service is likely to be the performance of a task carried out in the public interest.

Consent and ECHR

While the GDPR suggests that consent may not necessarily be relied upon as the lawful basis to process personal data where a public authority is concerned, that does not, in the view of the Group, preclude the use of seeking consent for the purposes of Article 8 ECHR. The Group agrees that a human rights based approach should be taken here. As such, the Group considers that a transparency safeguard, such as a requirement for agreement to be given by the child / parent in certain circumstances before certain information is shared with relevant bodies, is a relevant factor to demonstrate that the law is accessible and foreseeable as to its effects.

The Group believes that it is vital that children and families know what information is being shared and have the ability to consider whether sharing that information is proportionate. The Group also believes that the Code should provide specific guidance in relation to circumstances in which consent should be sought for data sharing, and the circumstances in which consent need not and/or should not be sought. This will be an important factor in ensuring that the revised statutory framework in Parts 4 and 5 of the 2014 Act satisfies the requirements of Article 8 ECHR.

The Group, however, acknowledges that describing this, in a manner that is clear, concise and accessible, is not straightforward.

Current views on the draft Code

The Group and the Panel have found it challenging to develop a Code that is simple enough to be accessible but technical enough to meet the high legal bar required of a statutory code. The Group has considered complex issues such as consent, interactions with ECHR, and treatment of special category data under the new data protection regime.

Having reviewed the current draft of the Code, it is the opinion of the Group that further work would be needed to bring the Code up to the level of detail that would be required of an authoritative and accessible statutory Code. In particular, the Group feels that more work would be needed on the treatment of consent, for the reasons set out above. In addition, the Group considers that the Code should also provide further detail in relation to special category data. Both the GDPR and the DPA 2018 include additional safeguards around the sharing of special category data. In the Group's view, reflecting this level of detail within this Code would add additional layers of complexity for those looking to apply this in practice. Furthermore, in light of the current level of uncertainty surrounding the interpretation of the GDPR and the DPA 2018, the Group considers there to be difficulties with producing a draft Code which is "authoritative".

Discussion

The Deputy First Minister asked that the Code should be founded on the information sharing experience, expertise and practical knowledge of those in public services and children and their families. The representation of stakeholders on the Panel and their engagement with their representative groups has largely fulfilled this role.

It is the view of the Group that significant additional drafting will be required of the Code, supported by additional detailed guidance, to fulfil the Deputy First Minister's requirements in the current context. This will have direct implications for the Panel's work programme.

The Group recognises that Panel activity has stimulated a parallel programme of work to restate/refresh GIRFEC policy and practice guidance and that this work is being welcomed by stakeholders. Further, the Group is aware that stakeholders wish to have clarity as soon as possible on the way forward for information sharing in the context of GIRFEC policy as well as Parts 4 and 5 of the 2014 Act.

The Group requests that the Panel provide advice on how it wishes to proceed with drafting of the Code.