

Meeting to discuss Code of Practice (at Victoria Quay) – 8 May 2018

John Paterson (Scottish Government Legal Directorate) (chair) (“**JP**”)

Maureen Falconer (Information Commissioner’s Office) (“**MF**”)

Norma Shippin (Central Legal Office) (“**NS**”)

Peter Hessett (Society of Local Authority Lawyers and Administrators) (“**PH**”)

Alison Reid (Clan Childlaw) (“**AR**”) (guest)

Maria J. Galli (South Ayrshire Council) (“**MG**”) (guest)

SG officials

Welcome and approval of minutes of meeting held on 4 April 2018

The chair welcoming everyone to the third legal focus group meeting. Minutes of the previous legal focus group meeting (4 April 2018) circulated and legal focus group members agreeing on the content of the minutes.

Discussion on new draft of code of practice circulated in advance of meeting

AR saying that the new draft code of practice does not change her view, as it is still appearing really complicated. It is still not clear how you would combine the different areas of law together.

Some members of the group suggesting that perhaps you could simplify the draft code by stating that you could only share the information the child protection threshold has been met. AR saying that she doesn’t think that a grey area exists below the child protection threshold, as ultimately, you reach a point where an Article 8 ECHR test has to be met. It was noted that it would depend on how you interpreted the risk of significant harm. If you interpreted it widely then there would be no real gap.

Group agreeing that it is for the data controller to be satisfied that the legal obligations have been met and work out how they can be met.

The group discussed the aim of the new draft Code. It was commented that one view could be that this version of the code is continuing to re-state the law, and it may be that a different approach could be explored.

As an example, a suggestion was made that one potential new approach could be for each locality to come up with their own code. Each locality could then submit their code to the Scottish Government to be approved. It could therefore work as a framework that comes back to the Scottish Government. With this type of example, it would mean that the onus would be back on the Named Person Service Providers, and could ensure a level of consistency. The group did not agree that this should be the new approach taken forward, however, discussing the pros and cons of different approaches was considered to be helpful.

It was also noted that attempting to come up with an accessible code would be difficult, and that approaching this through guidance may be preferable.

Some group members commenting that by re-stating the law in a code of practice, the risk of legal challenge is increased.

Some members felt that as a result of the changes made in the Children and Young People (information sharing) (Scotland) Bill, some of the issues raised in the Supreme Court judgement are now less relevant. In particular, it was noted that moving to a duty to consider sharing information changes matters, therefore, the code may not have to address all of the issues currently being attempted.

Some panel members saying that it is this new duty to share information that should be addressed in the code of practice.

The need for a code was discussed by the group. AR stated that a code of practice would be necessary if the Scottish Government legislated on information sharing in this manner as, in her opinion, this is what the Supreme Court asked for.

Group discussed circumstances where information had not previously been shared when it should have been shared, and the serious consequences that resulted from this. The group discussed the importance of consistency when sharing information.

Power imbalance

Group then discussed the power imbalance issue with “consent”, which the draft code highlights. It was suggested that consent may be more about data processing rather than information sharing in children’s case, however some of the group noted that GDPR talks specifically about power imbalance for public authorities. It was noted that where public authorities are involved, there is considered to be an inherent power imbalance. It was commented that that was not to say that you could not put in mechanisms, like the supreme court judgement suggested, however, you would need absolute reassurance, otherwise consent would not be appropriate.

Specific suggestion on the drafting of the new code

The group agreed that the draft code should not be referring to any other guidance document, not even the ICO’s guidance.

The group also suggested that the code should simply reference data protection law generally, rather than break down the specific pieces of legislation. Group also noted that it clear that certain parts of GDPR will not apply at all. So the code could say that these are the areas of data protection law that will apply to children’s services.

Group noting that Art 29 guide on consent and GDPR has just been published and this could be considered further.

Discussion of high level legal considerations document and how this can fit in with the code of practice.

Generally, the group felt that the one sheet summary of the high level legal considerations was a good approach.

ACTION: Officials to circulate new draft code with the summary of comments from the committee evidence and legal focus group to provide written feedback on this.

ACTION: Officials to share new draft code with data controllers for feedback.

ACTION: next legal focus group meeting to be scheduled for second week in June. Officials to email a list of suggested dates.