

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **The Children Bill**

**Liberty briefing for the second reading in the  
House of Commons**

**September 2004**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

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Parliamentarians may contact Gareth Crossman, Director of Policy at Liberty.

Direct Line: 020 7378 3654

Email: [GarethC@liberty-human-rights.org.uk](mailto:GarethC@liberty-human-rights.org.uk)

## Introduction

1. We intend to restrict our comments to the data sharing proposals contained in Clause 9 in Part 2 of the Children Bill concerning Children's Services in England. Part 3 of the Bill deals with Children's Services in Wales. As the provisions are replicated (save for powers residing with the Welsh Assembly rather than with the Secretary of State) our comments relate equally to Clause 24 in Part 3.

2. The Bill follows from the Green Paper consultation 'Every Child Matters'. The Green Paper gave relatively detailed descriptions of the Government's intention to set up individual files on each child in England and Wales. Each file would contain detailed information which would be accessible by a wide range of public bodies. As stated in our response to Every Child Matters<sup>1</sup>, we appreciated the Government's intention to improve child protection by creating a framework for information sharing. Tragic deaths, such as that of Victoria Climbié, must be avoided. However, we were extremely concerned about a lack of balance. The Green Paper contained an apparent presumption that all data would be shared, with little consideration given to differing levels of access of the varying public bodies listed. Not only did this raise privacy issues but it also created a practical concern that so much information would be flowing to so many sources that children genuinely at risk might not be identified.

3. Throughout the process leading up to the original publication of the Bill the implication has been that Victoria Climbié's death was a consequence of the relevant bodies being unable to share information. This is not true. Information sharing abilities and procedures are already in place for children at risk. The most relevant statutory express provisions allowing information sharing in the Children's Act 1989 are under Sections 17 and 47 and in Schedule 2. The Data Protection Act 1998 (DPA) does not prevent information sharing as Schedules 2 and 3 of the act explicitly state that information sharing is permissible in order to protect the vital interests of the person about who the information is held. Data sharing is also permitted to assist with the prevention and detection of crime which, in an extreme a case as Victoria's, would certainly have also been applicable. If the purpose of setting up a children's database is to assist in the successful dissemination of relevant information to protect children,

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<sup>1</sup> Liberty's response was drafted by Alex Ruck Keane at 39 Essex Street Chambers

then existing provisions must be included in the debate. It is misleading to imply that proposals in the Bill will be the means by which data sharing is allowed. What Victoria's case did demonstrate was a serious lack of understanding by the care professionals involved. No database can solve these problems. In fact, the creation of a database could be counterproductive, in becoming a panacea for all ills. Liberty fears that without relevant training of those involved in care services and without adequate resources to allow people to work effectively, the proposals contained in the Bill will have little positive impact.

4. We are particularly concerned by the lack of detail in the Bill. Earlier this year Liberty was recently invited to discuss the issue of 'regulatory creep' with the Cabinet Office's Regulatory Impact Unit. Regulatory creep is the means by which the Government appears to avoid the rigours of Parliamentary scrutiny by using primary legislation as a tool to allow the passing of regulations. The detail of the powers will be contained in this secondary legislation. We were extremely critical of the Government's growing tendency to use secondary legislation in this way. Naturally, primary legislation cannot cover the full scope of powers needed to implement an Act. However, we believe secondary legislation should be mainly used to deal with the mechanics of implementation, rather than the policy issues. Full parliamentary scrutiny is vital for effective legislation.

5. Part 2 of the Children Bill is possibly the worst example of regulatory creep we have seen. We wonder whether it was presumptuous for the Secretary of State to make a declaration under section 19(1) (a) that the provisions of the Children Bill are compatible with Convention Rights as it is not yet apparent the extent to which the rights will be engaged. Clause 9, relating to information sharing, lists types of information that will be stored and categories of persons/bodies that will provide it. It also contains a subsection which would allow the inclusion of information 'as to the existence of any cause for concern'<sup>2</sup>. By regulation, the Secretary of State may allow the inclusion of 'information of any such other description...or other personal records'<sup>3</sup>, and require the disclosure of information by some 'other person or body'<sup>4</sup>.

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<sup>2</sup> Clause 9 (4) (g)

<sup>3</sup> Clause 9 (4) (h)

<sup>4</sup> Clause 9 (7) (f)

This makes it extremely difficult to pass comment on the Clause. It is not enough to respond to this criticism by saying that there will be parliamentary scrutiny of regulations through affirmative resolution. Affirmative resolution procedure cannot amend legislation but simply allows that it stand or fall. It is inconceivable that parliamentarians, especially when dealing with as emotive an issue as child protection, will vote against regulations. However, it is the ability to amend - to ensure that the correct balance can be drawn between child protection and legitimate privacy concerns - that will make the Bill a success. If Government is determined not to allow for the scope of sharing to be written onto the face of the Bill then one amendment to it becomes paramount. An ability to amend the relevant secondary legislation must be adopted. This is not a common device but can be used where the nature of regulation is likely to contain major policy decisions. An example is the Civil Contingencies Bill currently before Parliament. Clause 27 (3) of that bill allows for specified amendments<sup>5</sup>.

6. The inclusion of the ‘catch-all’ subsection, and power to specify further information by regulation, means that we must rely to a large extent on the proposals contained in the Green Paper when detailing our concerns. The Green Paper suggested the inclusion of sensitive personal data such as family imprisonment, mental health histories and substance misuse<sup>6</sup>. It is the absence of distinction between these differing levels of information that necessitate detailed Parliamentary debate. Sharing information about educational settings may well be reasonable proportionate and justified. Passing on information about parents’ mental health history may not.

7. ‘Every Child Matters: Next Steps’ did not give much other information about data sharing proposals other than to say, *‘Consultees were supportive of the proposals to improve and support information sharing. The main barrier identified to sharing information about children identified was concern about confidentiality and the impact of data protection legislation. Many stressed the need for a national lead on*

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<sup>5</sup> The Clause reads ‘If each House of Parliament passes a resolution that emergency regulations shall have effect with a specified amendment, the regulations shall have effect as amended, with effect from...’

<sup>6</sup> Every Child Matters para 4.6

*standards and system design.*<sup>7</sup> It is unfortunate that confidentiality and data protection are portrayed as barriers. The DPA was not mentioned in the Green Paper, while the right to respect for privacy under Article 8 of the Human Rights Act (HRA) was given a cursory mention. It is important that awareness of privacy issues is reflected in the drafting of regulations. If regulations are found to breach HRA privacy rights then, as secondary legislation, they would be struck down. Liberty cannot emphasise how strongly we support the Government's desire to prioritise child protection, but we fear that unless these concerns are addressed, regulations will be incompatible with the HRA.

## **General Issues**

8. As mentioned, the lack of specific powers in the Bill makes it difficult to comment in detail. Before we attempt to do so it will be helpful to identify some of the overarching issues that arise from the Green Paper and the legal framework. We believe that there are two guiding principles that should be applied to the data sharing provisions in the Children Bill:

- 'Information' about a child or its parents/carers cannot be treated as a block. Rather, detailed consideration needs to be given to the *nature* and *quality* of every piece of data that might be shared.
- The starting point for such consideration should be the presumption that each and every measure allowing for the sharing of information needs to be justified rather than the presumption that information sharing is an unqualified good to which exceptions must be justified.

9. Protection of privacy rights exist in legislation and through common law. The common law right of confidentiality gives protection to the individual who provides personal data in circumstances of confidence.<sup>8</sup> It is axiomatic that the ability to promise confidentiality is an important tool for professionals working with children,

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<sup>7</sup> Every Child Matters: The Next Steps para 2.36

<sup>8</sup> For example, information provided by a patient to a doctor is confidential (*W v Edgell* [1990] 1 Ch 359).

especially older children who are capable of making more informed decisions about how much information to reveal to those around them. It is clear that the Government intends to overrule the law of confidentiality, as Clause 9 (11) specifically provides that regulations will authorise breach of any common law duty to keep information confidential. While it is not unusual for statute to provide for the deletion of common law rules, this is usually with the intention of providing for codification in legislation. Confidence doctrine exists not to prevent appropriate passing on of information but to allow a relationship of trust between professional and client. Simply overriding such a duty risks undermining this relationship. Whilst the latest version of the Bill has removed the power to bypass the common law duty of confidentiality between the young person and their teacher<sup>9</sup>, it retains the Secretary of State's discretion, by regulation, to override any relationship of trust between the young person and 'a person or body of such other description'<sup>10</sup>.

10. The Data Protection Act 1998 provides the framework for the processing of personal data. As mentioned above, it is extremely unhelpful to think of the DPA as a barrier to be overcome to enable a free flow of information. The eight principles contained in Schedule 1 Part 1 of the Act and the guidance in Schedule 1 parts 2 and 3 provide sufficient flexibility to ensure that information contained on a child's file can be passed on where it is appropriate to do so. The DPA has come under a considerable amount of criticism over the past year. DPA obligations were initially suggested as the reason why police intelligence information about Ian Huntley, relating to a series of sexual assaults, was destroyed by Humberside Police. Subsequent evidence to the Richard Inquiry on the Soham murders has established that these allegations were untrue. The DPA did not necessitate any destruction and appears to have been effectively exonerated. However, damage may have been done and the DPA may now be perceived in the public consciousness as a bar to child protection. We believe it would be extremely unfortunate and inappropriate if this misconception were perpetuated during the progress of the Bill.

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<sup>9</sup> Clause 9 (11) appears to respect the common law duty of confidentiality between young person and teacher by excluding the educational persons and bodies listed in Clause 9 (7) via Clause 9 (6)(b) from the list who may bypass any common law which prohibits disclosure.

<sup>10</sup> Clause 9 (11) bypasses the common law duty of confidentiality of Clause 9 (8)(e) via Clause 9 (6)(c)

11. Section 7 of the DPA caters for subject access rights to information. Subject access is the means by which people can apply for access to information held about them. The DPA does not specify the age at which a child can apply for access to information held about them, but the guidance generally followed is that by the age of 12 a child has sufficient understanding to decide whether or not to make a request. Under the age of 12, subject access requests will generally be made by parents or carers. Exemptions to the right to subject access are allowed under the Act covering, among other subjects, health information, social work information and education information. The DPA allows the Secretary of State to make regulations restricting access and this has already occurred in all the areas above<sup>11</sup>. It is, of course, appropriate for some level of restriction to be in place both to protect the data subject (particularly when a parent or carer is making a request), and the person who has provided the information. However, as the regime is to be expanded so that the amount of information that can potentially be held will increase, it is likely that new statutory instruments will be necessary. Again, without knowing what information is likely to be held, is it difficult to make specific comments about limits on subject access. It is worth noting that some of the proposed ‘types’ of information do not sit comfortably with the subject access exemptions under the DPA. For example, familial imprisonment history cannot be obviously categorised. We hope the Government bears this in mind when considering the level of detail to be held on an information hub. The insertion of Clause 9 (13)(e), stating that guidance may relate to the giving of advice under the DPA, is insufficient protection without adequate resources to accompany any such guidance or training.

12. The Human Rights Act 1998 provides the other statutory guide for consideration of the legality of the Bill’s proposals. Article 8 provides the right to respect for privacy and family life. The sharing of information about children by public bodies engages this right. However, interference with privacy can be justified under Article 8 (2) if a number of criteria are satisfied. The interference must be in accordance with law; it must be for a legitimate aim; and it must be ‘necessary in a democratic society’ (usually referred to as ‘proportionate’ or ‘not using a hammer to crack a nut’). There are several legitimate aims that could be used to justify breaches

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<sup>11</sup> Under Statutory Instruments 2000/413, 2000/415 and 2000/414 respectively

of Article 8, for example: public safety; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms of others. The real issue as to whether information sharing under the Children Bill is justified is the question of proportionality. There is no doubt that a certain level of information sharing is both justified and desirable. As well as the information type (such as familial mental health history), the Green Paper envisaged an information hub leading to a large number of bodies, such as 'education' and the rather vague 'voluntary sector'. Unless detailed consideration is given to the two basic principles described in paragraph 7, there remains the unfortunate possibility that regulations will be struck down as being in breach of Article 8.

13. In relation to personal data the starting point is that properly informed consent is required before it can be shared, whether between or amongst agencies. Where sensitive personal data is concerned, the Data Protection Act 1998 rightly imposes an even higher threshold before such explicit consent can be dispensed with. We recognise that there are statutory and common law justifications for non-consensual information sharing. However, we maintain that explicit and informed consent must be sought wherever possible from (1) the child, when they are either over 16, or under 16 but with the capacity to understand and make their own decisions; or in other situations (2), from a person with parental responsibility. We appreciate that there will be situations in which it would not be possible or appropriate to obtain consent to share information about the child from either the child or their parents/carers. However, we do not believe that this should then serve as an excuse to avoid any scrutiny of the question of consent in the Bill or in regulations.

14. Over and above the purely legal problems posed by information sharing, Liberty has serious concerns about the practicalities of storing and sharing the proposed data. These concerns include:

- Errors in data-handling, including in the transfer from paper to computer;
- Infection with inaccurate data. There have recently been serious concerns over the accuracy of data held by public databases including the Criminal Records Bureau and the Census;
- Malicious provision of data from anonymous sources;

- Unauthorised access to, or disclosure of, personal information whether by staff or by hackers;
- Disclosure of ‘soft data’ in the form of professional opinions; and ‘overloading’ of the records on the hub.

15. The last two of these concerns arise out of Clause 9 (4)(g) that ‘information as to the existence of any cause for concern’ will be included on the database. It is difficult to see how such information could meaningfully be placed without at least a brief reference to the underlying rationale of the professional entering it. In many instances, this opinion will, of necessity, include reference to information obtained in confidence from a child. We believe judicial approval should be sought before disclosing any such confidential information by means of information sharing, if no legislative authority exists for such disclosure and where the requisite consent has not been obtained. There is the added worry that if too much information ‘of any cause for concern’ is recorded then the currency of such warnings is devalued and problems that may potentially become serious may then be overlooked.

### **Specific points arising from the Bill**

16. Clauses 9 (1) and 9 (2) allow for the setting up of information databases. These databases will either be run locally, by individual children’s services authorities, or centrally by a corporate body. It is not clear whether the Secretary of State intends to opt for a central database, a local database, a combination of the two, or whether this has been left open as there has not been a decision as to preference. The Green Paper proposed a series of local databases<sup>12</sup>. Proposing a central database does raise questions about whether that might be preferable. On a practical level, one could imagine arguments that a system of local databases might be preferred because they would allow local children’s services authorities to manage information closer to the point of contact with the children and/or to be able more easily to confirm the accuracy of information held on an individual child. However it could also be argued that it is better to have some form of direct central control over and standardisation of the type of information that is being held and disclosed. A nightmare scenario might

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<sup>12</sup> Every Child Matters at para 4.3

involve a raft of individual authorities all interpreting the requirements for databases and guidance issued under Clause 9 (12) in their own fashion.

17. As mentioned earlier, no attempt is made to define what could amount to a cause for concern under Clause 9 (4)(g). It might not be feasible to tightly define the parameters of what could be a cause for concern within the legislation. However, it would be helpful to attempt some categorisation in order to place some limitation, otherwise interpretation is utterly subjective. For example, excessive absence from school, evidence of physical abuse or frequent contact with police might be appropriate indicators. A desire to home educate, family illness or a disagreement with a service provider could all be causes for concern, but not indicators of risk. The basic directions on guidance contained in Clause 9 (13) do not provide any limitation or raise any issues of proportionality but simply describe the areas where guidance could be given.

18. It is not clear how, if at all, information would be disclosed between different authorities. The Green paper envisaged 13 different sectors feeding into and extracting information from each local database. Presuming that all would not have equal levels of access this will make each database exceedingly complex. Information will have to be graded as to relevance and as to who should have access. To do otherwise will raise proportionality issues under the HRA and could breach DPA principles. If there are to be a whole range of databases across and within children's services authorities all containing different, but potentially overlapping, types of information, this complexity will be greatly increased. Unfortunately, without clear guidance on what is being proposed it will be exceedingly difficult for Parliament to debate these issues. It is important that the Government clarifies its intentions at the earliest opportunity to allow proper consideration of the benefits and problems of local and central databases.

19. Clause 9 (5) empowers the Secretary of State to pass regulations. As mentioned previously these regulations may specify 'information of such other description...or other personal records.'<sup>13</sup> The Bill goes no further than expressing the

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<sup>13</sup> Clause 9 (4)(h)

possible scope of the regulations. For example: ‘Clause 9(6)(e) permitting or requiring any person to be given access to any such database for the purpose of adding or reading information’. Regulations may specify the conditions of access, length of time of retention of information, and procedures for assuring accuracy<sup>14</sup>, but there is no protection or guidance provided by the Bill. There is nothing to say whether any particular group of children will be included, or whether it is intended that files on all children should be contained on the database.

20. The Secretary of State’s retention of his power to specify by regulation the persons/bodies who must disclose information<sup>15</sup>, and their right to bypass common law rules prohibiting disclosure<sup>16</sup>, effectively ends the notion of client confidentiality. Though certain relationships appear to be protected, the power to make regulations undermines any faith in the strength of that protection. The removal of the doctrine of confidence will not only affect the child. We can easily imagine the situation where a parent suffering from depression does not seek assistance for fear that the information will be passed to officials, who may, by regulation, be excused from the common law duty of confidentiality. In *Coco v A.N. Clark (Engineers) Ltd*<sup>17</sup> Megarry J. said “The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust.” Liberty believe that undermining relationships of trust will do far more damage than good and urge the Government to reconsider its intention to end client confidentiality.

21. There is no mention in the Bill as to what will be done with files when a child reaches maturity. We hope the intention is that information on the file will be deleted. The Government has stated its intention to introduce a national compulsory identification card system in the coming years. It might seem appropriate to retain information contained on the database(s) for this purpose. However, this database is to be set up purely for child protection purposes. It will contain levels of sensitive personal information far beyond what is likely to be contained on an identity database. It would be highly inappropriate to treat data files as the template for an identification system.

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<sup>14</sup> Clause 9 (6) (f-h)

<sup>15</sup> Clause 9 (8) (e)

<sup>16</sup> Clause 9 (11)

<sup>17</sup> (1969) R.P.C 41 at 46

## **Conclusion**

22. Liberty is committed to the protection of children's rights. These rights relate not only to protection from harm, abuse and neglect but also to rights of privacy and protection for family life. Any bill dealing with the sharing of information must seek to balance these rights. The Children Bill makes no attempt to balance or even acknowledge that there are two important concerns that must be catered for. If there is to be a central database containing information about children it will be effectively useless unless adequate resources and training are allocated to those who will have guardianship of the information sources. Similarly, unless some attempt is made to address the complexities that are likely to arise when dealing with multiple databases with differing levels of access, there is real danger that the information sharing structure will be unworkable. The death of Victoria Climbié was not due to an inability to share data but due to over-worked and under-resourced care professionals missing warning signals. A degree of intrusion into family life can be justified if the result is a more effective regime for child protection. We fear that the Bill as it stands will allow excessive and unjustified intrusion into family privacy, yet will have little or no corresponding benefit in terms of child protection.

22. Liberty's particular concern is the lack of parliamentary scrutiny that will be afforded to data sharing provisions in the Bill. We cannot emphasise enough how important it is that the Bill, when it becomes law, complies with existing data protection and human rights regimes. If information-sharing powers were found to be incompatible with privacy rights under the HRA it would be extremely unfortunate. Only full parliamentary debate will allow proper consideration of the Bill so that the correct balance can be found.

**Gareth Crossman**

**Liberty**