

**Liberty's response to the Government
Consultation Paper:**

**Cross Government Guidance: Sharing
Information on children and young people**

November 2005

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

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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Introduction

1. *Cross Government Guidance: Sharing Information on Children and Young People* is a draft of the first cross-Government guidance on information sharing in respect of children and young people. It aims to cover all services including health, education, early years and childcare, social care, youth offending, police, advisory and support service and leisure. The Government is seeking the views of all adults who work with children and young people in the above mentioned services, whether they are employed or volunteers, and working in the public, private or voluntary sectors.¹

2. Liberty welcomes the opportunity to comment on the paper, which addresses the uncertainty felt by practitioners in deciding when and how they can or should share information. The draft guidance recognises that the decision to share information requires a professional judgment and as such aims to provide the knowledge and understanding practitioners need to inform their judgment.

3. Liberty is committed to the protection of children's rights and appreciates the Government's aim of improving child protection. Existing information sharing provisions in the Children Act 1989 and the Data Protection Act 1998 were recently extended by the provisions in the Children Act 2004 which creates a framework for information sharing. The current consultation aims to establish advice and guidance for practitioners on how information sharing can take place in practice.

The law as a 'barrier'

4. The information sharing provisions in the Children Act 2004 are broad. Liberty's concerns as to its impact on the right to privacy and protection of family life were set out in our briefings to Parliament during the legislative stages of the Act.

5. A number of our concerns raised at the legislative stages apply to the draft

¹ We will refer to such people as "practitioners" throughout this briefing.

guidance. Throughout the draft guidance there is repeated reference to the concept that the law is a barrier to child protection. References are made to “legal hurdles” (para 3.5), the Data Protection Act 1998 is referred to in terms that “it is unlikely the Act will be a barrier” (para 4.5), the Human Rights Act 1998 is referred to in terms that “the Human Rights Act is unlikely to be a barrier” (para 4.6) and there is a section aiming to “show how the law need not be a barrier to information sharing” (para 7.1). It is unfortunate that laws protecting rights to privacy, confidentiality and data protection are portrayed as barriers.

6. Such a misconception may be due to the initial allegations that the death of Victoria Climbié or the lack of information on Ian Huntley’s past sexual assaults were a result of relevant bodies being unable to share information because of the Data Protection Act 1998. Subsequent evidence entirely exonerated the Act. It is therefore inappropriate for this misconception to be perpetuated in the draft guidance, especially to practitioners who will be putting the broad powers of the Children Act 2004 into practice.

A balancing act

7. The decision on whether to share information is often a difficult judgment that will involve a considered weighing up of whether the public interest in sharing the information overrides the public interest in maintaining confidentiality. It is unhelpful to attach negative labels to one side of the balancing act in an attempt to persuade practitioners that maintaining the confidence of the child is necessarily a bad thing.

8. Although the common law rules on confidentiality are set out, there is an emphasis throughout the draft guidance that information sharing is ‘good’ and holding information back is ‘bad’. For example: “Lack of information increases the risk of children ‘slipping through net’” (para 3.5). If the practitioner is to give a considered view of the issues to be weighed in the balance, the reasons behind the confidentiality rules need to be highlighted in the draft guidance, in particular, in the case examples.

Confidentiality

9. The draft guidance comments that “Medical practitioners need to balance their duty of patient confidentiality with their duty of care” (para 8.1). Some instances of when there is an overriding public interest which justifies breaching the confidence of the patient are set out. This includes “encouraging everyone to seek health advice and treatment and to volunteer all relevant information” (para 8.5). We would suggest that, in fact, this is an argument for maintaining confidentiality.

10. The ability to promise confidentiality is an important tool for practitioners. The rules on confidence are not designed to prevent the appropriate passing on of information which could protect a child. They are aimed at allowing a relationship of trust to develop between practitioner and client.

11. The draft guidance suggests this in the statement at para 8.6 that “disclosure of health information is particularly likely to cause harm and/or distress because of its very personal nature. Any disclosures therefore need to be necessary and proportionate.” Liberty can imagine many situations where a vulnerable child, young person, or carer does not seek help from a practitioner for fear that their information will be passed on, which may lead to more harm than good. The concern that the carer may change doctors, disappear or withdraw a child from school is anticipated in case examples 2 (para 8.12), 3 (para 8.13) and 13 (para 10.2). However, the draft guidance does not draw particular attention to the importance of maintaining the trust of the client in such examples.

12. Liberty appreciates that practitioners are likely to be very conscious of the consequences of any breach of confidence as it is often a central pillar in their relationship with their client. However, we would like to see the importance of confidentiality indicated more clearly in each of the examples, as set out in case example 6 which deals with children with mental health problems. In that instance, the draft guidance underlines the importance for the practitioner to weigh up his duty of care to the boy “against the consequences for the young person of the therapist breaking confidentiality and the possible loss of trust in their relationship.” Such a consideration should be urged in each of the case examples.

13. Liberty agrees that it is appropriate to give case examples in order to show how the draft guidance can be used in practice. However, in each case, the example concludes that to not share information could result in harm to the child. While this may be the case in some instances, indicators which may raise concern leading to the sharing of confidential information, may in fact be due to benign reasons. Liberty would welcome a more balanced approach in setting out the case examples, showing due regard to the right of privacy, setting out the reasons for maintaining client confidentiality, and accepting that not all the consequences of failing to share information are negative.

Proportionality

14. The draft guidance highlights the need for practitioners to share information on a “need to know basis” and that it must “be proportionate to the purpose for which the disclosure is needed” (para 4.12). Liberty welcomes such statements, and the advice as to practical questions that a practitioner should ask him/herself in deciding whether disclosure would be proportionate (para 4.15). We suggest that consideration should also be given as to whether there are alternative measures to disclosure which would protect the child from harm but be less invasive of privacy.

15. The draft guidance sets out that “the amount of information, and the number of people with whom it will be shared, should be no more than is necessary to meet the public interest in safeguarding and promoting the welfare of the a child” (para 4.18). Liberty suggests that clear guidelines should be set out highlighting the fact that information about a child or its carers should not be treated as a block. Rather, detailed consideration needs to be given to the nature and quality of every piece of information that might be shared.

16. The starting point for such consideration should be the presumption that the sharing of each piece of information needs to be justified. Statements such as “a failure to share information may put someone in danger” (para 4.32) and “information sharing between practitioners is best practice” (para 10.1) makes the disproportionate presumption that information sharing is an unqualified good to which exceptions must

be justified.

17. The draft guidance also touches on the continuing nature of the confidential relationship between child and practitioner and encourages the practitioner to have regard to the “continuing obligation to ensure that any initial and subsequent disclosure is a necessary and proportionate response to the situation” (para 8.8). This is welcome advice and should feature more strongly in the case examples. Practitioners need an understanding that consent to disclose some information is not a blanket justification for all future disclosure.

Accuracy

18. There is little emphasis in the draft guidance on establishing whether information which gives rise to a concern over child welfare is accurate. Establishing the accuracy of a report is especially important in cases where a third party is raising concerns about a family or where a child is reporting the concerning behaviour of an adult. For example, in case example 20 (para 12.1), a housing manager, on a tip-off from a neighbour, is advised by the draft guidance to approach the tenants about the concerns that have been reported to him and to seek consent to share information with agencies which may include the police. Liberty is concerned that the draft guidance offers this advice without urging the housing officer to establish for him or herself the accuracy of the report, which at this stage is only hearsay.

19. Liberty has similar concerns over the guidance given in case example 21 (para 12.2), regarding a report provided by two young girls of the behaviour of the swimming pool attendant. While the draft guidance urges that the receptionist at the pool should record accurately the names of the girls, there is no advice to ensure that the report itself is accurate or how the receptionist can establish for himself or herself whether the report is likely to be accurate. The draft guidance should include suggestions as to how the practitioner can satisfy himself or herself that the suspicions of the neighbour, or of the girls, have some basis in evidence.

20. Liberty appreciates that allegations of children being neglected or possibly being groomed for future abuse should be taken seriously. However, the

consequences for the subject of the report, who may simply be the victim of a grudge borne by the reporter, are also serious including loss or reputation and/or livelihood. The draft guidance should therefore: anticipate the possibility that the report may be being made less out of concern and more out of spite and; give practical guidance of how the practitioner can establish for him or herself, as far as possible, the likelihood of the accuracy of the report.

Conclusion

21. Appendix 1 is a helpful summary of the relevant legal provisions governing information sharing. While the facts of the legal framework are accurately set out, the emphasis on sharing information is not accurate. The common law duty of confidentiality, the provisions of the Data Protection Act 1998 and article 8 of the Human Rights Act 1998 all set out the basic rule that information should not be shared *unless* the circumstances correspond to the exceptions to the rule.

22. There is no doubt that a certain level of information sharing is both justified and desirable. Liberty is committed to the rights of children to be protected from harm, abuse and neglect. Liberty is also committed to protecting children's right to privacy and protection for family life. The draft guidance on information sharing must seek to balance these rights.

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