BACK TO 1984

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Allan Norman explains how a Supreme Court ruling on Scotland's Named Person scheme is a warning that information sharing can put social workers in breach of human rights originally created to protect citizens from the creep of Orwellian-style state control

For social workers, there has long been tension between the ethics of confidentiality and the belief – driven by countless enquiries into social work tragedies – that good practice involves more and better information sharing.

Social work places an emphasis on human rights and as such we need to understand how information sharing initiatives, including those within our own profession, can potentially breach such rights.

In 2014 Supreme Court judge Lord Reed warned of this danger when he said: "The United Kingdom has never had a secret police or internal intelligence agency comparable to those that have existed in some other European countries, the East German Stasi being a well-known example. There has however been growing concern in recent times about surveillance and the collection and use of personal data by the state."

He went on to say: "...in many other European countries... for reasons of history, there has been a more vigilant attitude towards state surveillance. That concern and vigilance are reflected in the jurisprudence of the European Court of Human Rights in relation to the collection, storage and use by the state of personal data."

Lord Reed was in effect warning us that Britain's lack of history of the kind of authoritarian state control that crushed individual rights in other European countries could make us less vigilant to its creep here.

Pertinently, the judge was making his comments in the wake of two cases in which individuals were denied employment after information about previous convictions was disclosed to potential employers by state agencies.

In each instance legal challenges were mounted – and won – on the grounds that the right to a private life enshrined under Article 8 of the European Convention on Human Rights had been violated.

Lord Reed's warning – issued after an appeal by the Home Office to overturn the court's decision – explained how human rights limit the jurisdiction of the state to share information and monitor the population. It also indicated why this is necessary, which is to serve as a bulwark protecting the citizen against the kind of over-authoritarian states that emerged out of the tumultuous events of the mid 20th century. He also went on to list examples where the UK has fallen short of human rights standards in this area.

Fast-forward to this summer and the Supreme Court declared another legislative information sharing scheme to be in breach of human rights – the so-called 'Named Persons' scheme in Scotland. This judgement is, I believe, of momentous significance for social workers wherever they practice in the UK.

The Scottish scheme appoints a Named Person for every child in Scotland to be a single point of contact for parents and facilitate support services. But this person is also tasked to receive and act upon concerns about a child's wellbeing. It is this sharing of information that falls foul of data protection and human rights law, something I warned about back in 2013 in a legal opinion still available on the Scottish Parliament website.

To understand why, there are a couple of key concepts we need to explore. The first is known technically as a 'statutory gateway'. Information sharing is lawful where it is necessary "for the exercise of any functions conferred on any person by or under any enactment". So, the idea goes, if we pass legislation which creates new functions that

allow or require information-sharing, then that legislation is itself a statutory gateway to lawful information sharing.

Except it isn't. Pointing to a specific piece of legislation as the authority for what we do seems reassuringly simple. The Scottish scheme aimed to provide this kind of a statutory gateway.

But it doesn't absolve professionals from responsibility for assessing the need to share information, nor from the human rights principles that constrain the right to do so.

Is anyone going to give balanced advice about when we should not be sharing information, as well as when we should? The Supreme Court judgment was heavily influenced by an assessment that guidance given to professionals was too woolly, and that woolly guidance undermined the lawfulness of the whole scheme.

The other key concept is wellbeing. The Scottish scheme attempted to set the threshold for information sharing around concerns about a child's wellbeing. But it set the threshold too low. It was plain that as a legal threshold, concerns about wellbeing arise much sooner than concerns about the risk of significant harm.

In Scotland, the campaign against Named Persons made hay with an example in guidance about children not having a say in the decoration of their room or their TV viewing choices. While the author of such ridiculous guidance clearly made themselves a hostage to fortune, they also neatly highlighted that wellbeing is a Humpty Dumpty concept – it means no more nor less than what you want it to, and the real question is who is to be the judge?

But if you think that can be readily dismissed as an isolated absurdity, it is worth taking a closer look at the new paragraph 5.2 of the Standards of Conduct, Performance and Ethics issued by England's social work regulator, the Health and Care Professions Council earlier this year. It allows professionals to breach confidentiality and share information in a service user's "best interests".

Like wellbeing, this is a threshold lower than significant harm, and just as vague. My advice is clear: do not rely on your regulator's ethical standards as justification for information sharing. Paragraph 5.2 of our regulatory code is unlawful for the same reason as the Scottish scheme.

This demonstrates how difficult it is to get authoritative guidance on when and why you should or should not share information.

So if the mere existence of a statutory gateway, and of wellbeing concerns, does not make information sharing lawful, the wider implications for social work are apparent.

Can you share information within a multi-agency safeguarding hub without consent? Not until you have conducted a proper evaluation of the risk, need and alternatives. Moreover, the Supreme Court made clear that where the subject of the information being shared does not even know it is happening, this creates its own unlawfulness. Which means sharing information, even within a 'sealed hub', is no defence.

Another question that arises is whether you can share information in the context of a child-in-need assessment. There is a framework for mandatory co-operation and information-sharing in child protection matters. But how often do you exchange information outside of that framework because you have all proceeded on the assumption of a right and duty to share?

> 'The first thing a totalitarian regime tries to do is get at the children and distance them from their families'

And what about mandatory reporting of abuse or neglect? Much depends on the exact terms of any legislation, since incompatibility is likely to arise where thresholds are set too low, or where there are insufficient procedural safeguards.

Both the scheme to share information about criminal records considered by the Supreme Court in 2014, and that to share wellbeing concerns considered by the Supreme Court this year, were contained in legislation but are incompatible with human rights.

In 2007, Professor Eileen Munro wrote in relation to confidentiality and information sharing that "the introduction of a screening programme for a social problem needs to be measured against the same scientific criteria as screening for medical problems, such as screening for cervical cancer. There are three key criteria against which to judge a screening programme: predictive accuracy, treatability, and the level of damaging effects."

These wise words about evidence-based practice also provide a clear framework for reflecting upon the ethical basis for information sharing. Predictive accuracy refers to the need to address both false negatives (we failed to detect a risk of harm when there was one) and false positives (we predicted a risk of harm when there was none). Simply put, statutory schemes that extend information sharing tend focus on eliminating false negatives, while the human rights protections serve as a reminder of the ethical risks of false positives.

Munro's second criteria of treatability sounds a bit medical, but it links to familiar social work concerns. If we do not have the resources to provide the supportive input that will benefit families who are struggling, what is the point in recognising and recording that their children's "best interests" might not be being served?

Finally, what of the damaging effects of such information sharing? Professor Munro invited us critically to reflect that it is not only a failure to spot risk of harm that has damaging effects – unwarranted intrusion, intervention without consent, breaches of confidentiality also do.

Many parents understand the harmful risk of over-intervention. Who will seek information from professionals in confidence who routinely breach that confidence? Who will be comfortable at the idea that their minor misdemeanours as a child, their childhood experiences of harm, mental health difficulties, or educational needs are even now being weighed up in a multi-agency forum to which they are not party?

If professionals cannot be trusted with information, service users will choose not to share it and that will cause harm. A vicious circle will develop, where ever less trusting relationships lead to ever fewer consensual interventions. Ultimately, this may not look so very different from the kind of totalitarian state some European countries have already experienced.

Which is why the Supreme Court in its judgment on the Scottish Government's Named Person scheme warned: "The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."

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