

Memorandum to the Education and Skills Select Committee in respect of the committee's enquiry into Every Child Matters

Background

1. The Information Commissioner is an independent officer who is appointed by Her Majesty the Queen and who reports directly to Parliament. The Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998, Freedom of Information Act 2000, and associated regulations.
2. In September 2003 the Green Paper **Every Child Matters** put forward Government proposals for local authorities to set up and maintain databases covering all children living in the local authority area. These databases were to contain basic identification and contact details for the child and their carers, contacts with the universal services of education and health, and contacts with other child care professionals who were dealing professionally with the child. It was also proposed that child care professionals would be able to put on an individual child's record flags indicating that they had concerns about that child.
3. The Information Commissioner responded to the consultation in December 2003. The Commissioner agreed that the welfare of children was paramount and supported a change in legislation to **clarify** that information about children could be shared even when, taken on their own, concerns about the child were low level. However the Commissioner also voiced concerns about the justification for setting up a universal database covering 100% of children, irrespective of whether or not there were any concerns about individual children. In setting up and maintaining such a universal database the Government has to comply with Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life. The universal database has to provide a proportionate response to the pressing social need it is addressing. The Information Commissioner was concerned that the argument had not been made that a universal database was a proportionate response.
4. Finally the Commissioner expressed practical concerns, relating to the administrative effort of keeping up to date contact information on all 11 million children in the country.

5. The Government introduced the Children Bill into Parliament earlier this year and at the time of writing it is being considered by the House of Lords. During the Bill's transition through Parliament the Government's proposals in this area have been firmed up. Clause 12 of the Bill as amended in standing committee B gives the Secretary of State the power to require by regulations children's services authorities in England (and also by way of other clauses, in Wales) to establish and operate databases containing prescribed information, specifically in respect of a child, specifically:
 - a. His name, address and date of birth
 - b. An identification number
 - c. Name and contact details of anyone with parental responsibility or who has care of him at any time
 - d. Details of any education being received by him including the name and contact details of **any** educational establishment attended by him
 - e. The name and contact details of any person providing primary medical services
 - f. The name and contact details of any person providing him with services of such description as may be described in regulations
 - g. Information as to the existence of any cause for concern in relation to him
 - h. Information of such description as the SoS may specify by regulations.
6. The Bill also provides details as to the organisations which will would be required to (or allowed to) provide information to be included on the databases.
7. In respect of the purpose behind the databases, the Bill provides that the information sharing powers in clause 12 are in support of clauses 10 and 11. These clauses seek to promote cooperation to improve wellbeing and to ensure that arrangements to safeguard and promote welfare are in place. These are wide ranging purposes, however, in a paper prepared for the Information Commissioner's Office, the Department for Education and Skills has sought to clarify the intended purpose of the databases to the Information Commissioner. The Department's objectives (as stated to the Information Commissioner) for the databases are:
 - To help practitioners quickly identify a child they have contact with, and to check whether that child is getting the universal services (education, primary health care) to which she or he is entitled;

- To enable earlier identification of needs and earlier and more effective action to address them by providing a tool for practitioners to identify who else is involved with or has a concern about a child; and
 - To be an important tool to encourage better communication and closer working between different professionals and practitioners.
8. The Department also explained that the universality of the databases was necessary because it was not possible to predict which of the 11 million children up to the age of 18 would need additional services. The Department cite the figure of 3 to 4 million children as being vulnerable, that is in having needs for additional services, at some time in their lives. In addition it was suggested that universality was required because **all** children have a right to universal services of education and health, and the databases would allow children not receiving those services to do so.
9. The Government has also just launched a consultation on two aspects of the information sharing databases:
- how practitioners working in services which may be regarded as sensitive should record their involvement with a child or young person on the databases; and
 - how and when practitioners should record on the databases that they have a concern about a child or young person.

The Government are seeking views on these two aspects by Wednesday 19th January 2005 and the Information Commissioner will respond. The consultation is welcome however in that it is seeking to firm up on privacy issues which have been a matter for concern.

10. Since commenting on the Green Paper last year the Information Commissioner and his officials have had discussions with both officials at the Department for Education and Skills about the proposals for universal databases, and with local authorities involved in the Information Sharing and Assessment pilots; pilots designed to look at different ways of identifying children with needs and addressing those needs. The Commissioner is also aware of the debates in Parliament and the views expressed by the Joint Committee on Human Rights and the Delegated Powers and Regulatory Reform Select Committee about the Bill as it progressed through Parliament.

11. He recognises that there is strong support for the proposed universal databases from many, including importantly those actively providing services for children. However anxieties have been expressed about the proposals, specifically in relation to:
 - a. compliance with the ECHR,
 - b. the administrative burden from having to capture information on all children and the resources required to follow up concerns,
 - c. the cause for concern indicator and the danger of a “tick box” mentality,
 - d. the possible threat to a child’s privacy, and
 - e. the security of children’s information.

12. These anxieties are shared by the Information Commissioner, and to them he would also add the danger of function creep. Function creep is where the use made of databases widens over time from that originally envisaged. From recent discussion on the proposed Identity Card and the allied National Identity Register and the proposed population register (the Citizen Information Project) his office is well aware of the issues and problems arising from setting up and maintaining universal databases, and the need to put clear limits on the use of information held. He is concerned that similar issues are reflected in the proposals contained within the Children Bill.

13. More generally the Commissioner draws attention to the views of the Home Affairs Select Committee in its July 2004 report on Identity Cards (paragraph 186/187) about the “proliferation of large scale databases”, including the database of all children. In August the Commissioner voiced his fears in terms of the danger of “sleep walking into a surveillance society”.

Compliance with the Data Protection Act 1998

14. The above areas of concern relate directly to compliance with the Data Protection Act 1998 and the data protection principles laid down in the Act. For example personal data has to be accurate, relevant, secure, and not kept longer than necessary. It also has to be processed fairly and lawfully. The Information Commissioner wishes to emphasise therefore that it is not just a question of a child’s and their family’s privacy which has to be considered but also, in respect of the detailed operation of these databases, of compliance with the Data Protection Act. These issues are dealt with in more detail below.

Compliance with the European Convention on Human Rights

15. The Joint Committee on Human Rights has commented on the proposed databases in their report on the Children Bill¹, raising questions about compliance with the ECHR. The Information Commissioner shares the Committee's concerns.
16. The setting up and maintaining of databases on all of the children in England and Wales may be an interference with Article 8 of the ECHR; the right to respect for private and family life. Such an interference can be justified in many circumstances relating to the protection of children, however the interference needs to be clear in law, to be in support of a pressing social need, and be proportionate.
17. The anxieties about compliance with Article 8 are twofold. Firstly the lack of detail on the face of the Bill as to the purpose of the databases and uncertainties in the way in which the databases will work, makes arguments as to the justification for any interference with Article 8 difficult. Clauses 10 and 11 of the Bill provide broad purposes to which the data sharing powers in clause 12 can be used for, and the Government has yet to evaluate pilots set up to investigate different ways of identifying children with needs and addressing these needs. It does appear therefore that the legislation has been enacted before evidence has been collected to justify the proposals in general or to provide the detail as to how the databases are to be run. In support of this view the Joint Committee on Human Rights report states that Parliament was being asked to authorise in advance a major interference with Article 8 rights without the evidence demonstrating it is necessary².
18. Secondly there are concerns about the proportionality of a universal database. A database containing information on **just** those children about whom concerns had been expressed seems to be a proportionate response to the need to identify those children where active intervention is required and to share information on these children. But what is proposed is a universal database covering 100% of children, and a major justification for such a universal database is the provision of the universal services of health and education. The Joint Committee on Human Rights stated³:
 - We are concerned that, if the justification for information-sharing about children is that it is always proportionate where the purpose is to identify children who need child welfare services, there is no meaningful content left to a child's Article 8 right to privacy and confidentiality in their personal information.

¹ HL paper 161, HC paper 537

² Para 110 of HL paper 161, HC paper 537

³ Para 113 of HL paper 161, HC paper 537

19. The Information Commissioner shares these anxieties. Children do have a right to privacy and family life and interference with this right has to be justified. It is worth adding that privacy and family life are not just abstract concepts. For example should a teacher of a sixteen year old girl have access to the fact that the girl is in contact with a teenage pregnancy advice service? The teacher might be friends of the girl's parents and tell them of this, before the girl tells her parents she is pregnant herself. The recent publicity about a woman seeking judicial review of Department of Health guidance stating that children might have abortions without their parents knowing illustrates the difficult balances between a child's right to privacy, parental responsibility and the child's welfare. And in respect of universal services what involvement should the state have with a family who have not registered their child with the local NHS GP practice? It is not a legal requirement that children be so registered.
20. To summarise, in respect of compliance of the proposals with the ECHR, the Information Commissioner is concerned that:
- a. the lack of detail in the Bill and the lack of any evaluation of the pilots as to the effectiveness of information sharing makes judgements on compliance with Article 8 difficult, and
 - b. a universal database covering 100% of children, not just those children about whom concerns have been expressed, seems difficult to justify as a proportionate response.

Administrative burdens and lack of resources

21. The proposal is for each local authority to set up and maintain a database of all children living in their area, with an overarching "transient" database which will act as a clearing house for children moving from one local authority to another. This will not be an easy task.
22. Local authorities have to be able to uniquely identify children from information provided by the health and educational services, and in the case of the educational services not just the state system but **any** educational institution. On the whole matching such databases will give rise to anomalies, for example children at the same address with the same date of birth with different names, or children with two addresses. Similarly, with family break up, children can live at different addresses during a week, and be known to different service providers by different names. Children might also be travellers, not be registered with a doctor, or be educated at home. And the provision of educational and health services does not necessarily follow local authority borders; for example a school in a large metropolitan area might have children attending who live in one of a number of local authority areas.

23. To work as a universal database such discrepancies will need to be resolved to a high enough level of accuracy at operational cost both to the local authority and to the other child service providers. High degrees of accuracy are also required under data protection requirements and more generally by society at large. The requisite costs may be balanced by efficiencies, in service providers having accurate information and in being able to share this information when providing services, however whether or not this is the case will not be known until the pilots are evaluated. Pending an evaluation of the pilots it has to be a concern that the setting up and maintaining of these databases will be costly and divert resources from the actual provision of services.
24. The provision of information by a variety of agencies to a local authority for inclusion on a central database raises concerns about whether the contributors will keep information up to date, particularly where any concerns become resolved. The Commissioner has previous experience of where a local multi-agency child protection database has become clogged with inaccurate and out of date information. Often entries on the data base were created on the basis of the merest suspicion by an agency but were not corrected or deleted by them as concerns were resolved. This had a detrimental impact on the privacy of the child and the wider family but also, over time, the confidence of the child protection professionals was undermined with the result that the entire database was not trusted with the effect that genuine concerns were also ignored.

The “cause for concern” indicator

25. The Government intends that service providers can place a cause for concern indicator against a child’s record. This would indicate to other child care providers who look at the child’s entry, because they have their own concerns, that some one else is concerned and who this other person is. The aim of the indicator is to trigger the sharing of information about children at a lower level than might otherwise happen and to allow early intervention with a child. The Information Commissioner understands that the threshold at which indicators will be set will be agreed locally.
26. The Information Commissioner is concerned about the cause for concern indicator for several reasons. This is expressed in very broad language, for example it could be a “cause for concern” that a child is not progressing well towards their French GCSE. There is a danger that child care professionals add a concern as a defensive measure; ie they do not have real concerns but are covering themselves. Such over-reporting will have resource implications as erroneous cause for concern indicators will trigger superfluous work and may lead to undue interference in a child’s life, possibly having quite damaging consequences. For example in a case brought to the Information Commissioner’s Office’s attention a small child’s totally innocent comment overheard in a school play ground was misconstrued by staff and led to

serious concerns of abuse by the father being entered in official records and despite the initial concerns having been thoroughly investigated and considered to be totally unfounded the records were not updated or deleted. In this case the agencies concerned placed great emphasis on the prompt recording of concerns but gave little importance to the need to maintain the records once created.

27. It is worth noting however that how practitioners should indicate a concern about a child on the databases is subject to a Department for Education consultation exercise launched on the 27th October 2004. The Information Commissioner is considering his response to this consultation.
28. Child care professionals may also consider their work done by their “ticking the box” and not follow up their concerns to the detriment of children. The ticking of a box on a computer system is not a replacement for professional judgement but in providing the box there is a risk that it is assumed to do just that.
29. Child care professionals across many organisations and disciplines will therefore need a very clear idea as to what triggers a cause for concern indicator, and the action that needs to be taken to follow up a cause for concern indicator. There is then an on-going training and evaluation requirement to ensure that cause for concern indicators are being used accurately and consistently and are followed up. This may be difficult across many organisations whose staff will have different work cultures and languages and whose perspective on a child may well differ from that of other organisations. And indeed these factors might make agreement on a meaningful threshold level difficult in the first place.

A child's privacy

30. As indicated above in paragraph 19 children have a right to privacy. The fact that a child has been in contact with specific services might indicate problems or issues of a very personal nature which will be potentially available to child care professionals who might not have a need to know such information because it is not relevant to their role. And a child's parents might gain access to inappropriate information if, for example, they exercise on behalf of their child the child's right of access to personal data under the Data Protection Act.
31. As operational plans firm up and decisions are made as to who has access to information held on a child the government will need to ensure that the right of the child to privacy is considered carefully. Only those who have a need to have access to information about a child should do so and they should be made aware of the need to respect a child's privacy.

The security of the information

32. Potentially a wide number of organisations and their employees will have access to not only contact details for all children in England and Wales but also to any cause for concern indicator and the details of services being provided which will give an indication as to the child's circumstances. Improper access to this information could be very damaging or abused. The detailed proposals for the operation of the databases will need to ensure that the security and use of the information on the databases is tightly controlled by those responsible for running the databases.

Function creep

33. The Government has been quite clear in discussion as to the narrowness of the purpose behind the database but this is not reflected in the Bill. And the vagueness in the legislation does potentially leave the door open to function creep. The Bill provides that information sharing could be in support of improvements to the well-being of children in an authority's area so far as relating to education, training and recreation, the contribution made by children to society, and their social and economic well-being⁴. As mentioned above the Joint Committee on Human Rights has already expressed concerns that it seems difficult to justify an interference with a child's Article 8 rights purely on the basis of the provision of services. The above purposes could potentially allow local authorities to go much further in their use of the databases, for example by possibly allowing data sharing for the provision of sport and leisure services. In such unthought through cases it may well be that the uses made of the databases are not proportionate in terms of Article 8.

34. The Commissioner would therefore like to see any uses of the information held on the databases clearly restricted in secondary legislation.

⁴ Clause 10(2) of the Children Bill

Summary

35. During the formulation of policy and the passage of the Children Bill through Parliament the Information Commissioner has been concerned that the need to have a **universal** database of all children in England and Wales has not been justified in terms of the interference with Article 8 rights which arises from the creation of the database. These concerns remain although the Commissioner accepts that it is for Parliament to decide in passing the Children Bill that the ECHR is being complied with. However it is the case that the possible uses of the databases are wide, given the scope of clauses 10 and 11 of the Bill, and function creep has to be resisted. **The Information Commissioner believes that the Government and Parliament must ensure that regulations made under clause 12(5) of the Bill do place firm and clear limits on the use of the databases and the information contained in them.** Doing so would, he considers, help ensure that the privacy of children and families is respected, and given this help build confidence in the Government's proposals.
36. Given the lack of detail as to how the databases are to be set up and maintained the Information Commissioner would, in order to address concerns about the compliance of the databases with the Data Protection Act 1998, also press the government to ensure that in its consideration of the practical operations:
- only those who are entitled to see information actually do so, both in terms of security and in terms of who officially has access to information
 - clear instructions, quite possibly at a national level are in place as to when indicators of concern should be placed on a child's record, the action that should be taken in consequence and how long the indicator should remain on the database
 - that local authorities and other child service providers take the requirements of data protection legislation seriously in setting up and maintaining the databases and seek to ensure the accuracy of information placed on the database, its security, and its relevance. And also understand the rights of individuals, specifically those of access.
37. In addition to narrowing the regulations as far as possible the Information Commissioner considers that statutory guidance, provided for in clause 12(13) of the Bill would be the best way of ensuring such consideration of the practical issues raised above. The Commissioner would welcome the opportunity to work alongside the Department for Education and Skills in ensuring that the regulations to be made under clause 12 of the Children Bill result in the aims for the proposed databases being met, whilst at the same time ensuring that the privacy of children and their families are fully respected and their rights met.

38. The Information Commissioner would also welcome the opportunity to work alongside the Department for Education and Skills and others, for example the Association of Directors of Social Services, in providing clear and specific advice to child service providers as to what information can be shared about children and when.