

Confidentiality: will you keep this to yourself?

Summary of discussion around confidentiality, held on 29th August 2006 in CHILDREN 1ST offices, 83 Whitehouse Loan, Edinburgh.

These notes also include comments from a pre-meeting with Healthy Respect, which is a sexual health service for young people in the Lothians, and notes from ChildLine Scotland.

Introduction

In December 2005, CHILDREN 1ST and ChildLine Scotland held a 'think tank' of experts to look at the child protection system, and ask tough questions about whether Scotland is getting the balance right in keeping children safe, such as the balance between trusting professional judgement, and child protection procedures; between prosecuting abusers, and helping children to recover; between listening to children and following rigid procedures; between acceptable risk, and seeking a guarantee of safety in following set procedures?

A key issue that emerged from this 'think tank' was around the place of confidential space within the child protection system, where young people are allowed the time and support that they need to take steps to keep themselves safe, and be fully informed about what happens in the child protection system. This issue has particular relevance currently because of upcoming Scottish Executive legislative proposals around information sharing between agencies. It also ties in well with the work priority of Scotland's Commissioner for Children and Young People (SCCYP) to consider issues of proportionate protection of young people to keep them 'safe, active and happy'.

Why confidentiality?

Children and young people want to be able to speak in confidence about their anxieties and troubles. This is borne out by research where 40% of young respondents said that it is important that the person that they speak to about their worries will keep their word not to tell anyone. They also want to be listened to (66%), believed (49%), and feel that the other person would know how to sort things out (44%).¹ Children often tell a friend first about any problems they are experiencing, including abuse, but often their friends do not know how to help them.

¹ NSPCC, Someone to turn to, 2004

Children who phone ChildLine are often concerned about the helpline's confidentiality before they will speak openly with a counsellor. Many young people phone back a few times to test that ChildLine has not told anyone about what they have said before they feel that they can trust the service. Healthy Respect, the sexual health service for young people in Lothian, found that young people felt strongly that it is not OK for professionals to share information about their sexual health or well-being without first seeking their permission².

Confidentiality is important to young people not only when they are in crisis situations, but also when they want to share more general worries. It is important to acknowledge that adults likewise value being able to share their concerns and worries in confidence.

Confidentiality in law

There are several pieces of legislation that deal with issues of information sharing and confidentiality of personal records. For example, the Data Protection Act ensures that all personal data is kept hidden but accessible to the subject of the data, whilst the Freedom of Information Act ensures that more information is shared.

There is legal precedent for children's views and concerns being kept confidential. In court cases to determine family contact, the Sheriff can seal the young person's views so that neither side in the dispute can know their content. In Children's Hearings, a young person can also request to give their evidence and discuss their case with the panel in private. However, when the parent(s) are summoned back in, this private discussion must then be summarised for them. Depending on how this is handled, it can mean that in effect, the young person cannot keep their input to the Hearing confidential.

It is important to note that in law, no one, including young people, can ever be assured of absolute confidentiality. This is illustrated by a case in the United States where a college counsellor was found by the courts to have acted wrongly in not passing on information to a student about a threat on their life that they found out about during a counselling session (despite the counsellor already having shared that information with the police). Even in counselling scenarios then, there may be certain circumstances where a person's confidence must be broken.

How is confidentiality treated across the sectors?

Young people are often aware of the different approaches to confidentiality across different sectors. For example, young people believe that health

² TASC Agency for Healthy Respect, *In Confidence*, 2004

professionals offer a greater degree of confidentiality than other professionals, whilst they are cautious in talking about underage sexual relationships with school staff because they understand that this information will need to be passed on. ChildLine report that often children are surprised that the helpline is fully confidential (unless the child is in imminent danger), believing that they will have to pass details to their school or other agency.

Whilst different sectors follow different guidelines or duties around confidential information about service users, social work, education and health all appear to hold the same general principle that information should be kept confidential unless sharing that information is necessary for someone's safety. For example, the health sector's general duty of confidentiality towards their patients can be over-ridden where disclosure is in the public interest, is necessary to prevent serious injury or damage to a third party, or is in the best interests of the service user³.

Confidentiality requirements are also integral to social work and health professions – this can mean that an unjustifiable breach of confidentiality will lead to an individual being disciplined within their profession, as well as by their employer. For example, the Nursing and Midwifery Council states that nurses, midwives and health visitors are 'personally accountable' for protecting all confidential information concerning patients. Individuals in health professions appear particularly conscious of this personal liability when making decisions about passing on information.

However, anecdotal evidence suggests that in reality, confidentiality about client or patient records is often broken in an informal and unthinking way in discussion with colleagues or with other agencies. Research shows that such breaches of confidence that might be done accidentally or in conversation are of considerable concern to young people⁴. Young people within the child protection system in particular, are often very aware of feeling that everyone knows about all the details of their life. Indeed, it is worth considering the extent and type of information that is shared amongst professionals that the service users themselves are not party to.

Therefore, it is clear that although there are professional ethics, legislation and guidelines around confidentiality, there is still considerable scope for people to use their individual judgement about when a breach of confidentiality is justifiable or necessary. Confidentiality always depends on certain circumstances. It is important then, that when individuals make decisions about confidentiality for children and young people, it is always for their best interests and welfare.

³ Scottish Executive, NHS Code of Practice on Protecting Patient Confidentiality, 2003

⁴ TASC Agency for Healthy Respect, In Confidence, 2004

Sharing information, and confidentiality

Information about a child or young person should not be shared between agencies without good reason. Children and young people need to feel sure that those they seek help from, treat personal information about their lives with respect. Only with such assurance can young people build up trust in adult professionals.

Children should be able to have confidence that information will only be passed to others on a 'need to know' basis. For example, a school may need to know that a child has some difficulties at home and therefore some leniency is required with homework deadlines, but they may not need to know all the details of these home difficulties. Indeed, many young people are worried about teachers having too much information about them and would prefer to keep school life as separate as possible. Similarly, the '18 and Under' service in Dundee (further details below) can sometimes pass intelligence information to the police about suspected perpetrators of abuse in a way that is helpful to them without breaking the confidence of the young person. Such 'need to know' information sharing requires considerable trust and understanding of roles and responsibilities between agencies. It is not something that can be built up through procedures or protocols alone, but must be developed through personal contact.

Even when information is shared appropriately, this is not the same as communication. Communicating information suggests that all parties have a good understanding of the meaning of the information, and can respond to it appropriately. Information sharing is not an end in itself – only a means to an end. If it is to actually meet a purpose, then someone needs to assess the information and decide whether to initiate action of some kind. For example, if a school was to pass on information that they are concerned about a child's truancy and a neighbour is concerned that the child has been seen out late at night, it still requires someone to decide on what action, if any, to take in response. It may be worth considering the role of the lead professional, as proposed in 'Getting It Right for Every Child', in making overview decisions about such information.

Response of the child protection system to disclosure of abuse

The end purpose of information sharing about children and young people must be their welfare and safety. Therefore, the response to information about abuse or neglect must be to consider the child's needs first and foremost and to act in their best interests.

Unfortunately, this does not always happen in the child protection system. Many children find that when they tell a professional about abuse, they lose all

control over what happens next. Their abuser is most often someone in their family, and the investigation and any resulting prosecution, can often tear their family apart, leaving the child feeling guilty and let down. They tell an adult about the abuse because they simply want the abuse to stop and for things to get better for them, but instead, telling can often make things worse. This is particularly the case where the investigation does not find conclusive evidence and the child is returned to their home and to contact with their abuser. Many abused children say that they regret ever having spoken out about their abuse because of the traumatising consequences.

Conversely, the experience of CHILDREN 1ST and many other organisations is that sometimes young people are 'screaming out' about problems in their lives through their behaviour or their body, but professionals or other adults do not always recognise the signs of abuse or indeed, sometimes choose not to act upon them.

When a child tells a professional about abuse, other priorities such as the need to gather evidence for prosecution, professionals' own fears, or strict protocols and procedures, can overshadow the child's own interests and needs. Children report often being seen only as a provider of evidence, while their own needs and concerns are largely ignored.

Confidentiality in sexual health services for young people

The health sector has relatively clear guidelines around providing confidential services to young people. The Gillick House of Lords ruling in 1985 set out the principle that as long as a young person is capable of understanding the decision they are making, they can consent to medical treatment without their parents' consent, often called being 'Gillick competent'. This same principle is reflected in the Age of Legal Capacity (Scotland) Act 1991.

This principle now underpins all areas of health work with young people, including and in particular, sexual health services. Sexual health services have long recognised that assurances of confidentiality for young people are essential if they are to be encouraged to seek their help and advice. This has attracted considerable media attention around issues such as terminations and treatment for STIs for young people under 16 years old without their parents' knowledge. Sexual health practitioners are encouraged to help young people to speak to their parents and involve them in their decision-making, but ultimately the practitioners are not required to inform the young person's parents at any stage of giving them advice or treatment.

However, this confidentiality has limitations – if the health practitioner believes that the young person is subject to abuse or neglect, they can break their confidentiality and pass that information on to social work without their

consent (it is unclear as to whether they would also pass information to the parents in this circumstance). Good practice in most sexual health services suggests that this limitation would be explained to the young people when they first access the service, and if a young person's confidentiality is to be broken due to suspected abuse, the young person would be informed of this. Confidentiality within health, including sexual health, settings is therefore limited in circumstances of child abuse.

However, confidentiality is not necessarily broken in situations where a crime has been committed against a young person. In particular, most sexual health services would not automatically pass on information about underage sexual activity to police or social work. Instead, they would consider factors such as whether it was consensual and the ages of the young people before deciding what action to take. If they consider the sexual activity not to be abusive, they would instead offer confidential support and advice to the young person. This places considerable emphasis on the experience and understanding of the sexual health practitioner to make a judgement about whether the young person is in an abusive situation.

It is important to note however, that there are exceptions to this general approach, where teenage boys have been prosecuted and placed on the Sex Offenders Register for engaging in underage consensual sexual activity.

Sexual health services therefore, promote confidentiality as a way of attracting young people to access their services. This confidentiality is largely understood by other agencies and the public, although the lack of involvement of parents in major treatment decisions for young people remains controversial. This raises the question that, if confidentiality is acknowledged as vital in sexual health services for young people, should it not also be viewed as important for other types of services for young people? Should a similar assurance of confidentiality be used to encourage young people to seek help and advice about other issues, such as when they are suffering from abuse or neglect?

Confidentiality in ChildLine and '18 and Under'

ChildLine has different limitations to the confidentiality they offer, than many other types of services for children and young people. It is only if ChildLine believes that the child is in imminent danger, or if it is known that an adult is abusing several children, that they will give serious consideration to informing social work about the abuse. In fact, due to the fact that the very nature of ChildLine is telephone counselling, it would be impossible practically for them to pass such information on without the child willingly providing their personal information, such as name and area where they live. ChildLine's policy is that 'unless there isn't time, there is time'. Unless the child's risk is imminent, ChildLine allows the child the confidential space to talk through how they are

feeling, get support and advice, and consider what action they can take. Without such assurances of confidentiality, ChildLine is sure that children would not tell them about abuse or other difficult situations in their life, and ultimately many children would not be able to get the support and help that they so desperately need.

'18 and Under' in Dundee has a similar approach to confidentiality, but on a face-to-face, localised basis. The project provides confidential support and information for young people in the Dundee area who have experienced physical, emotional or sexual abuse. Young people are referred to the project by social workers, police, education and others, and a significant proportion of young people also refer themselves to the service.

'18 and Under' offers young people confidentiality, unless they are deemed to be in immediate danger. In such situations, the support worker will discuss the case with a child protection worker within '18 and Under'. If they then decide that information about the abuse needs to be passed on, the young person will be kept fully informed at every stage. Even where this happens, care is taken to first explain to the young person what will happen to help them to be prepared, even if this is only possible for a short time.

There are no paper records kept about each young person – only a report of the key themes discussed in each session, filed using a case reference number. Every young person is welcome to see the session reports about themselves. Young people are not allowed to see any child protection reports about them, but the support worker will take time to explain what they contain.

'18 and Under' work with young people from first disclosure of abuse, throughout the child protection investigation if this is what the young person chooses, to any court proceedings, and beyond. They do not immediately report abuse to social work, or necessarily encourage the young person to do so either. Instead, they work at the young person's pace to help them to gain confidence and understand their options. The young person can then make an *informed choice* about whether to report the abuse to social work.

Implementing confidential space

Such an approach to confidential space in cases of child abuse is rare, if not unique, to ChildLine and '18 and Under' in Scotland. The experience of both of these services is that it has taken time to build up the trust of the public, professionals and young people themselves in the service, and to promote understanding of this approach. In particular, '18 and Under' consider that the interagency training that they have provided for social work, police and other agencies has been vital for building up this trust. Confidential space is also a challenge to professionals' concerns about whether they are doing enough to

keep children safe, particularly in cases of sexual abuse, and may require professionals to change their focus and procedures within child protection.

However, both ChildLine and '18 and Under' testify to young people's greater willingness to disclose abuse when they feel confident that this will not be passed on to other agencies or individuals without their consent, unless they are in imminent danger. They are also confident that such an approach helps the young person to cope throughout any subsequent court case or the personal consequences of disclosing abuse. '18 and Under' also find that this approach minimises later retraction of reporting of abuse – in 12 years of the project, none of their young clients have retracted their story at a later date.

It is important to consider, if such an approach was considered desirable, whether giving young people confidential space should be part of the work of statutory services, and whether this would be the most effective option. In general, there is a different relationship between individuals and statutory agencies now than there has been in the past, with the public increasingly perceiving voluntary services as more approachable and accessible than statutory services. The 21st Century Social Work Review recognised this need to build the confidence of the general public in social work services, and to work in a way that meets people's needs so that they value the help and support that social work provides. However, providing confidential space for young people to disclose abuse and get support within voluntary agencies who work closely with social work and other statutory agencies, may currently be the most effective and welcome approach for young people.

Proposed information sharing duties

In February 2006, the First Minister announced the government's intention to legislate to 'make it a duty in law for professionals to share the information necessary to protect our children.'⁵ Details of what such a duty will entail are still sketchy as of August 2006. However, we know that they will be included in the upcoming Bill that will also change vetting and barring arrangements. We also have some indication of their proposed nature from early discussion with the Scottish Executive.

Sharing information between agencies, and confidentiality, are not mutually exclusive. As described above, certain aspects of a young person's 'information' can be kept confidential whilst other 'need to know' aspects are passed on. In addition, young people can still be assured of confidentiality within certain limits.

However, clearly confidential space for young people to disclose abuse and get support without any information about the abuse being automatically passed to social work requires a certain understanding and application of any

⁵ In speech by Jack McConnell at Labour Party Conference, February 2006.

duty to share information. Will this duty require immediate reporting to social work in a case of abuse, or will certain professionals or agencies be allowed to use their discretion about when to share this information? Must a statutory investigation into the abuse be begun immediately after information is passed to social work, or can this be delayed until the child or young person feels ready and as long as they are accessing some kind of support service? Who can make such a decision?

In addition, who makes the decision about whether a prosecution should be pursued against the accused, or not? Can confidential space be allowed indefinitely, or only within a certain timescale? When does the public interest outweigh a young person's best interests? The risk that the abuser may go on to harm other children can never be used to pressurise them to give evidence. Even where prosecution is pursued, joint investigations between social work and police mean that the focus can often be on the gathering of evidence, rather than the needs and concerns of the child or young person. What needs to be changed to make sure the child or young person feels supported, included and valued throughout any prosecution process?

Key questions

These discussions raised a number of key questions that we feel need to be addressed in order to establish the best way forward around the issue of confidentiality and information sharing for children and young people who have suffered from abuse.

- What is the law around keeping disclosure of abuse by children and young people confidential?
- What is the reality of professional regulation around confidentiality?
- What is the boundary between information sharing and confidentiality?
- What is the reality of confidentiality between agencies, and between staff within agencies?
- Who is protected by confidentiality for young people?
- What are the likely outcomes of increased information sharing about children at risk between agencies?
- What is the end purpose of information sharing, in principle and in practice?
- What should be the governance frameworks around information sharing between agencies? What are good inter-agency protocols?
- Does GIRFEC blur agency boundaries, so that information should automatically be shared between children's services as a whole?
- What should be the outcomes when a child or young person tells an adult professional about abuse?

Future work

There are two timescales –the more long-term need to influence attitudes and practice so that the child protection system is something that is accessible to children and young people, and offers them positive outcomes with the focus of timescales, investigation, decision-making and service response dictated by the best interests of the child or young person. The more short-term timescale is shaped by the upcoming discussions around information sharing between agencies, and how this fits with confidential space in the child protection system. There is an immediate task of raising awareness of the importance of confidentiality, and of having a sensible, child-focused and beneficial approach to information sharing.

CHILDREN 1ST will now liaise with SCCYP and others to explore options for joint work around this issue.