Should we accept always accept information given 'in confidence'?

Abstract

This article looks at some of the dilemma's facing practitioners when dealing with information presented to them 'in confidence'. It also seeks to outline a framework which helps to ensure that professional judgements about such 'confidences' are made in a proportionate manner which reflects social work principles and natural justice.

Main Article

Despite the world of social work being encircled by an ever increasing legal framework which seeks to champion the human rights of child and adult alike; effective social work practice is often rarely as simple as following legal procedures and protocols by the letter. Effective social work in all its manifestation is principally about making measured professional judgements and ensuring social justice is promoted. Nowhere is this more so than when having to deal with information which has been presented to you 'in confidence'.

By way of an example; imagine if you will that during the course of an adoption assessment, you receive a letter sent 'in confidence', which outlines significant allegations against a prospective adoptive applicant. Although the allegations being made are not so serious as to warrant the involvement of the police, they are significant enough that you cannot proceed with the assessment properly without first exploring the substance of these allegations, however to do so, would in all probability enable the prospective adoptive applicant to identify the source. Furthermore, despite your best efforts to negotiate the release of the information from the informant, you are unable to get their agreement to use the information in any way which might identify them.

Having recently experienced the above scenario, I found myself in a position where all of what I had previously regarded as 'good practice' when dealing with requests to keep 'confidences', proved to be completely ineffectual. Having hitherto always 'managed' not to offer assurances of 'complete confidentiality', on the basis that my professional role required me to act upon any information which came into my possession if I thought it was necessary to protect children, I now found myself in a situation where I was unable to corroborate, let alone proactively act upon the information presented to me by the informant.

Colleagues with whom I consulted at the time offered various professional views on the subject, which in themselves reflected some of the complex contradictions inherent when trying to balance and consider social work principles of; client determination, respect for privacy, trusting and open relationship with clients, etc, within a framework of statutory regulations which required that 'confidences' are kept. As such, their views ranged from; 'game over' to 'if you cannot test the validity of information then proceed as if the information had not been given', to 'even a S47 child protection enquiry (CA 1989 Act) has to be tested out (CA 1989 Act S8-S31) before a court will agree to an order compelling intervention in someone's life', to 'if the police don't let themselves be held hostage to such confidences…..why should we?'

In contrast, the legal advice was straightforward and simple; according to the Adoption Agencies Regulations 2005; 25(10) it required that this additional information (however unsubstantiated) was to be presented to the adoption panel for it's consideration, and that there was 'no requirement' for its disclosure to the prospective adoptive applicants.

The applicants were duly informed that 'additional information' had been received 'in confidence' during the course of the assessment, which meant that until the panel considered this 'additional information' their adoption assessment, had to stop.

The applicants were also informed that because of the 'confidential' nature of the information they could not be told the details nor the source of information received, but that they could write to / attend panel to express their own views, which would be heard by panel alongside my substantive report (which they would see) and my additional report (which they would not see).

After the howls of indignation which then followed from fellow professionals and non-professionals, protesting the 'unfairness of the process', 'this is Orwellian stuff', 'how Kafkaesque is this?', and the general 'trouncing of Article 6' of the Human Rights Act 1998 (right to a fair hearing) had all died down, a closer inspection of the underlying rationale behind the above regulation, clarified that it simply sought to ensure that no one should be discouraged by feeling inhibited to provide significant information which might be used to protect children. However whilst one cannot argue with the intended aim of the regulation, it takes no account of the possibility that such information might at best, be incorrect, or at worst malicious.

When considered in the wider social work context, where many of us work in an atmosphere where direct social work practice frequently faces organisational and political pressure to be as risk free as possible (Kemshell & Pritchard; 2002), the constraints and sometimes bizarre interpretation of the Data Protection Act 1998, the increasing reliance by public bodies on anonymous referrals / tip offs, (police, benefits agencies, anti-social behaviour units etc), and now the recent ruling by the Law Lords (R v Davis [2008] All E R (D) 222 (Jun) 2008] UKHL 36) against the use of anonymous witnesses, the above scenario raises some fundamental questions about how as social workers we deal with information provided 'in confidence' whilst still maintaining some sense of proportionality and social justice.

Not withstanding our professional duty to break any confidence if needed to protect a child or an adult; frequently situations present where there is no immediate danger present, (such as the above scenario where at the time of the assessment there was actually no child actually placed with the applicants), and in many ways these can be the hardest to resolve.

In light of the above pressures, the question of what do we do with information presented to us in confidence which cannot be corroborated, is more often than not to err on the side of caution and simply accept it at face value on the basis of 'well what else can we do?'

This approach might be tolerable in a situation which is subject of court proceedings (i.e. care proceedings), because the court and counsel can challenge and test out the credibility of the information, by court order if need be. But in a situation which is not before the court, such as the above case scenario, other than someone seeking a judicial review of the process (which is a rarity), there appears little most people can do to challenge what might be a gross injustice.

It is therefore all the more important that as social workers we have a very clear professional framework available to us when considering how to weight information presented to us 'in confidence', where there is not an immediate danger to child or adult alike. As such, the author would suggest that any professional framework should consist of;

1. Developing a clear critical understanding of the context and motivation behind the informant's presentation of the information.

2. An assumed challenge to the informant to enable release of the condition of 'in confidence', stressing to the informant that the use of any information can be severely limited if professional restrictions are placed on it.

3. A clear understanding of the legal implications of the Data Protection Act surrounding information presented. For example; in the above scenario, the term 'there is no requirement to disclose' is not the same as 'you cannot or should not disclose'. Therefore in the above case, had the above informant not stipulated that the information had been given 'in confidence', then the adoption agency could if they had chosen to, disclosed the information to the applicant.

4. An organisational confidence to support professionals in making their own professional assessment and judgment about the weighting which they attach to such information.

The implications for practice are that;

- Social workers should be encouraged to form an opinion about the credibility and relevance of any information provided to them in confidence and then weight this information accordingly.

- Even where immediate child and adult protection issues are not present, and cannot be used as a basis to waive any confidences being sought; strenuous efforts need to be made to seek agreement from the information to use the information in a way which does not restrict its use.

- That where information is presented on the condition of keeping the informants anonymity, the motive of the informant has to be critically evaluated, and not simply accepted as being benign.

- That however professionally uncomfortable such information might be to manage, one has to accept that at times access to such confidential information can be crucial to increasing our understanding of a case as a whole.

- That as an emerging profession, we have to be careful not to be unduly influenced and blinded by legal opinion, which if left unchecked, frequently appears to try to fill a social work decision making void by being presented as re-packaged social work judgement.

In conclusion, as a social worker one always has a choice.

One can either adopt a bureaucratic and often defensive approach which accepts at face value any information received, and rely entirely upon the most recent legal opinion offered, in the hope that by doing so it both reduces risk to a child / adult, and limits our own professional exposure. Accepting that with this approach frequently one runs the risk of confusing individual client's rights with our own professional responsibilities and duty to uphold and defend the rights of others.

Or we can be mindful of relevant legal opinion and regulation without letting it unduly paralyse us into inactivity, and recognise that it is possible to maintain a 'confidence' (if absolutely required, and does not put a child or adult at risk), and still exercise our own professional judgment about what weighting we attribute to uncorroborated information which has been provided to us in confidence.

References

1. Children Act 1989
2. Data Protection Act 1998
3. Human Rights Act 1998 Article 6
4. Kemshall & Pritchard; 2002: Good Practice in Risk Assessment & Risk Management. Published JKP. London
5. R v Davis [2008] All E R (D) 222 (Jun) [2008] UKHL 36 reported 18 June 2008

Further Reading

1. Times Online; 26-6-08; Anonymous Witnesses.
2. Beijer, A; (1997); Report on Anonymous Witnesses in The Netherlands. Published; University of Utrecht, the Netherlands

Notes of the lead author (50)

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