



The Scottish Parliament  
Pàrlamaid na h-Alba

## EDUCATION AND SKILLS COMMITTEE

John Swinney MSP  
Cabinet Secretary for Education and Skills

**By email**

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12th June 2019

Dear Mr Swinney,

The Committee conducted its initial consideration of petition PE 1692, which is calling for an inquiry into the human rights impact of GIRFEC policy and data processing, on 29 May. I understand that you corresponded with the Public Petitions Committee in response to the general issues raised by the petition, before the PPC referred the petition to the Education and Skills Committee in November 2018.

In referring the petition, the PPC also recommended to the petitioners that it would be “most appropriate for the petitioners to raise some of the suggestions they have offered with the Children’s Commissioner, the Equality and Human Rights Commission and the Scottish Human Rights Commission, rather than for this committee to call for the Government to set up an independent review”.

The background paper from the Clerk that informed this Committee’s initial consideration is attached. It includes two supplementary submissions from the petitioners Alison Preuss, on behalf of the Scottish Home Education Forum, and Lesley Scott, on behalf of Tymes Trust which I invite you to consider. One submission provides case studies which the petitioner suggests demonstrates poor data collection and sharing practices. The second submission sets out the contact by the petitioners with the organisations suggested by the PPC. The petitioners reflect that there has not been progress with any one particular body that considers it is in a position to scrutinise the issues raised.

The Committee would draw your attention in particular to this second submission. Whilst the Committee absolutely appreciates it is inappropriate for the Scottish Government to interfere with independent bodies such as those the petitioners have been advised by, the Committee does consider that the Scottish Government has a role in ensuring the framework for independent bodies effectively covers matters the public might wish to pursue, including those that relate to rights of parents and families.

On that basis, the Committee agreed to write to you seeking the Government's perspective as to how the framework for the functioning of independent bodies operates where multiple remits are engaged on a particular issue. For example, the petitioners raise cases that cover human rights considerations, including rights of the child, the processes of local authorities, the processes of NHS Boards and also on the appropriate sharing and processing of data. Their experience would suggest that where there are overlaps in responsibilities, or a number of remits are engaged in a multi-faceted case, a situation may be generated where no single body considers it can consider a particular case or issue with complete authority.

I appreciate this matter does not fall entirely within your remit and that another member of the cabinet may need to contribute to the response. As set out in the paper from the Clerk, the Committee intends to give further consideration to the issues raised by this petition once you have updated Parliament on the findings of the GIRFEC Practice Development Panel, which I am assuming will be in advance of the Summer Recess. The Committee would then be in a position to consider the petition in more detail in September.

I should appreciate a response to this letter by Monday 15 July.

Yours sincerely

**CLARE ADAMSON MSP**  
**CONVENER**

## Education and Skills Committee

18<sup>th</sup> Meeting, 2019 (Session 5), Wednesday 29 May 2019

### PE 1692 - Inquiry into the human rights impact of GIRFEC policy and data processing

#### Introduction

1. PE1692 from Alison Preuss, on behalf of the Scottish Home Education Forum, and Lesley Scott, on behalf of Tymes Trust, is “Calling on the Scottish Parliament to urge the Scottish Government to initiate an independent public inquiry into the impact on human rights of the routine gathering and sharing of citizens’ personal information on which its Getting It Right For Every Child (GIRFEC) policy relies.” The petition was lodged on 13 June 2018 and considered by the Public Petitions Committee (PPC) in June and November 2018.

#### Background

2. The petitioners [appeared before the Public Petitions Committee](#) and made two supplementary written submissions to that Committee (see [submission 1](#) and [submission 2](#)). This, in addition to the [background summary](#) on the intention of the petition and a [SPICe paper](#) provides context for this Committee’s consideration.
3. The PPC also wrote to the Scottish Government and the Information Commissioner (ICO) on issues raised by the petitioner. Having considered the responses, the Committee agreed to refer the petition to this Committee for further consideration.
4. The central issues raised by the petitioners relate to current policy and practice under GIRFEC as opposed to the proposed legislative provisions within the Children and Young People (Information Sharing) (Scotland) Bill. During the consideration of the Bill at Stage 1 in 2017 the petitioners sought a view from this Committee on the need for a public inquiry and the Committee responded stating that current information sharing practice had not been the prime focus of the Committee’s scrutiny, it had been more focused on the proposed legislative provisions in the Bill.
5. The PPC, in referring the petition to this Committee, also suggested to the petitioners that it would be “most appropriate for the petitioners to raise some of the suggestions they have offered with the Children’s Commissioner, the Equality and Human Rights Commission and the Scottish Human Rights Commission, rather than for this committee to call for the Government to set up an independent review”.
6. The petitioners have now provided two further submissions to this Committee to inform consideration, both in Annexe A. One submission provides case studies which the petitioner suggests demonstrates poor data collection and sharing practices and its impact on families and offers a private meeting with parents. The other submission sets out the contact by the petitioners with the organisations suggested by the PPC. The petitioners reflect that there has not been progress with any one particular body that considers it is in a position to scrutinise the issues raised.
7. The submission also repeats an issue raised in oral and written evidence to the PPC: the use of advice issued by the ICO in 2013 on information sharing practice under DPA

1998. The petitioners are of the view that: “Although formerly withdrawn in September 2016, [the 2013 advice] is still routinely cited in current training modules, organisational guidelines and correspondence (even from the SPSO)”.

8. The petitioner cites instances where they consider that complaints made to local authorities, including on practices relying on the 2013 advice, are not acknowledged or acted upon. The submission from the ICO to the PPC did not specifically respond on the point about 2013 advice and its effective replacement with the 2016 advice (full response from the ICO is in [Annexe B](#)).
9. In a previous submission to the PPC the petitioners cited a letter from the ICO to the petitioners’ representative on this issue. It states: “You have provided to us instances of our earlier [2013] Letter of Advice being available on a number of websites. When the Commissioner issues any relevant guidance, it is not our practice to instruct organisations to remove previous versions from documents published on their websites. That would prove to be a highly resource intensive and ongoing activity...With regard to the other organisations which have yet to update their website content, your clients should raise the matter with them directly.”
10. The Scottish Government’s submission to the PPC states that: “Ultimately, it is for each organisation to justify its reliance on any given legal basis and if young people/parents/guardians believe that such reliance is erroneous, provided they have exhausted organisation’s complaint process, they can raise the matter with the ICO.” (see [Annexe C](#))

### **Children and Young People (Information Sharing)(Scotland) Bill**

11. This Committee agreed, by majority, to halt consideration of the Bill at Stage 1 until the Scottish Government provided a draft code of practice for named persons and other practitioners to accompany the Bill. The Cabinet Secretary has written to the Committee to keep it updated on progress of the GIRFEC Practice Development Panel, which was tasked with producing a draft code.
12. The Committee wrote to the Chair of the Panel seeking information on the consultation processes being followed by the Panel and also seeking indicative timescales for the completion of its work. This request was specifically to enable the Committee to decide when to timetable scrutiny of the petition. The response from the Chair, Professor Ian Welsh OBE, dated 27 February 2019, stated that “We aim to draft a report which factors in our work so far, the stakeholders’ feedback and the current legal climate, which we hope to present to the Deputy First Minister shortly.”
13. Although the petition relates to existing information sharing practice, any work by the Scottish Government generated from the Bill is relevant as it is likely, in general, to set out advice on how new GDPR provisions will impact upon data sharing practices in Scotland.

### **Options for initial action**

14. It is suggested that the substantive consideration of this petition should take place once any further policy developments by the Scottish Government, based on the Panel’s

work, have been announced. At this stage, it is suggested that the Committee could consider undertaking some preliminary information gathering as useful context for further consideration of this petition. Options include:

- A) The Committee could write to the Scottish Government seeking its perspective as to how the framework for the functioning of independent bodies operates where multiple remits are engaged on a particular issue. For example, the petitioners raise cases that cover human rights considerations, including rights of the child, the processes of local authorities, the processes of NHS Boards and also on the appropriate sharing and processing of data.
- B) The Committee could write to the ICO seeking an update on its work following the introduction of GDPR including any issuing of updated advice and other work with organisations to ensure the shift in data sharing practices from those adopted under the Data Protection Act (including moving away from practices based on 2013 ICO advice and 2016 advice).

Roz Thomson  
Clerk to the Committee  
21 May 2019

## **Annexe A – Submissions from petitioners**

### **Submission 1**

In November 2017, a briefing paper and dossier of ‘postcards’ from families who had been affected by services’ over-reach and unlawful GIRFEC data processing was circulated to members of the Education & Skills Committee following a ‘fringe’ event to give voice to those who had been excluded from the formal parliamentary process. Respondents were unequivocal in their call for a public inquiry into how an unlawful threshold for interference with Article 8 of the ECHR came to be embedded in public policy well before the 2014 Act was passed and has continued to be cited as justification for *ultra vires* practice nearly three years after the 2016 Supreme Court ruling.

As co-petitioners representing families who already experience disproportionate prejudice and discrimination, it is frustrating to have to ‘police’ professionals who have limited knowledge or experience in the specialist areas in which we work, and who are acting beyond their areas of professional expertise. There is now such a lack of trust in health visitors (the subject of current research by the Scottish Home Education Forum) that many parents, especially those whose children have ASNs, are fearful of accessing support from public and third sector services. Policies and training *still* do not reflect the 2016 court ruling or acknowledge the forced withdrawal of the 2013 ICO statement that had endorsed arbitrary interference with families’ human rights.

The following advocate’s summary and case studies serve to illustrate the problems families continue to face in seeking to exercise lawful choices and secure their rights under GDPR, ECHR and UNCRC. They have been anonymised, but the parents are willing to speak in confidence to members on request. Indeed, a private meeting with parents would be welcomed.

#### **Advocate’s summary**

Parents were victims of crime and moved to a new area on police advice. Their infant child was duly re-registered with GP and health visiting services and developmental delays were identified. Parents requested referral to SaLT, but this was not actioned by the HV until a complaint was made. After the 2016 Supreme Court ruling, parents wrote to the HV, stating that they wished to continue using the service but did not consent to routine data sharing below the legal threshold (a lawful request made by many other families concerned about data misuse). The HV immediately referred the family to social work, claiming the child’s developmental delays were due to parental neglect and they were ‘hiding’ him from health services, but a multi-agency meeting decided there was no cause for concern. Parents had meanwhile reported anti-social behaviour by a neighbour to Police Scotland, who made several ‘vulnerable persons’ reports and referred them to SW. A multidisciplinary meeting was called where parental mental health was discussed (records had been provided by NHS without consent), and SW wrote to SCRA requesting a hearing and recommending a CSO. The reporter declined both, but recommended a voluntary support arrangement for as long as the parents felt it would be useful. Parents agreed to a child’s plan, and a lead professional from SW was appointed. The child had meanwhile been diagnosed as profoundly autistic and the LP pushed for a home visit, despite having been asked to first develop a relationship with the child who had meltdowns when strangers came into his home. The LP nevertheless visited when they were out (and the child was at playgroup),

then claimed they had missed an appointment that had never been made. Parents made a formal complaint to the LA, which was not upheld despite the LP being unable to provide any record of a meeting being arranged. Parents withdrew from the voluntary child's plan on the basis of a breakdown in trust. The LP then wrote to SCRA requesting a hearing and a CSO, stating that withdrawal from a voluntary arrangement was grounds for a compulsory order (which conflicts with independent legal advice) and that parents were seeking to 'hide' the child from services, prejudicially recording 'home education' as an 'ACE' on their 'resilience matrix' despite him not having attained compulsory education age and despite him continuing to see SaLT and OT services regularly, GP services as necessary, and the parents accessing local autism services, home education peer support and advocacy. There has been an ongoing failure by the LP to accept home education as having equal legal status and validity to schooling and a lack of engagement with experts in this field. This family's experience of GIRFEC, both before and after the 2016 judgment, demonstrates the prevalence of poor practice by professionals in relation to data collection and sharing, and an embedded culture of disempowering parents and coercing compliance with services below the legal threshold for intervention.

### **Case study 1**

We have awful ongoing experiences with Social Work regarding our children, all stemming from their inability to attend school and total lack of support. Both children have autism and have had very negative experiences of mainstream schooling from nursery. Our older son, who has Aspergers with an ongoing sleep disorder and severe social anxiety, was referred to the Children's Reporter on the grounds of 'non-compliance of parents to get child to attend school'. It was absolute hell, with our then 13-year-old having to attend the sheriff court before the case was dismissed as 'misuse of the Reporter's service'. More recently we have had a serious situation with our 11yr old son, who had become unable to attend school due to his difficulties and lack of support. We tried everything to get him to school including my being there with him. Eventually we couldn't get him to leave the house, but our council actively discourages home education and it would have meant losing our autism outreach worker. When a social worker was brought into multi-agency meeting at school, ostensibly to discuss a co-ordinated support plan, she insisted on referring him to the Reporter as 'outwith parental control, with a view to removing him to a secure place for treatment for anxiety'. All we ever asked for is support and assistance in getting our children the education that they can cope with and we have tried to assist and comply, but continue to be intimidated and bullied. The system is utterly broken and corrupt. The more I speak to other parents, carers and even professionals, the more I realise our experience is the GIRFEC 'norm'.

### **Case study 2**

My daughter is 5, with ASNs, and would be due to start school in August but is being home educated. Her health visitor is demanding a meeting with me, my daughter, consultant and the local school and is calling me daily to say it is in my child's best interests and if I don't comply I will be classed as neglectful and she will have to inform social work. She has described home education as a welfare concern as my daughter would be an 'unseen child' and no one could check on her. No one has had concerns up until now, and because they can't guarantee she can get the necessary support from school, it is the only logical (and completely legal) choice. I have two other children in school and they are not a concern, just my youngest. I take her to all her hospital appointments with her consultant and community

paediatrician, so how can she be 'unseen'? I am furious at the unwanted interference and undermining of my parental responsibility when I am protecting my child's interests.

### **Case study 3**

My daughter could not attend school because of severe anxiety. The school involved social work as they didn't know what else to do and CAMHS had refused a referral because she wasn't suicidal - so they decided to blame 'poor parenting' (i.e. my attempts to access specialist support and uphold her human rights). We were referred to the Reporter for non-attendance as anxiety/mental health is not deemed a 'reasonable excuse' for absence (and GPs do not issue medical certificates). She was placed on a CSO and threatened with foster care to help her 'focus on getting back to school', which was in my view abusive. I eventually had the order lifted and formally removed her from school for home education. She is now accessing education and recovering after a period of private therapy. From subject access requests, I have found the referral was based on the opinion of non-mental health professionals who dismissed her anxiety as bad behaviour to push for damaging intervention that left her even more terrified of school and at risk of self-harm.

### **Case study 4**

Nine months after moving areas a health visitor appeared on our doorstep completely unannounced. She said it was for my youngest girl (about to turn five), but when I asked why she didn't let me know in advance she started to make excuses and said she just decided to pop in while in the area. We were heading out to the library but she persisted in asking me home educating the siblings and immunisations. A few days later she reappeared asking for the other children's names and dates of birth. When I asked her the purpose of her visit, her behaviour started to escalate and she said she would be sending social services as I was failing to co-operate. I have nothing to hide and let our previous council know we had moved, and my children all go to the GP when required. Because I'm originally from a different country, I'm not as familiar with the system as I would like, but I felt this health visitor was over-stepping her role. I asked her to put the questions in writing, which upset her, and she said 'by law' I had to comply. My children (and myself) were left really unsettled by her hostile and unprofessional behaviour.

*[This situation was finally resolved after the parent took advice from the home education forum and complained to the health visitor's manager. Although an apology was received, this is only one example of several from the same area, so the problem has not been properly addressed.]*

### **Case study 5**

I noticed my health visitor had ticked boxes in my child's red book saying that data could be shared but I was never asked for consent. We attended a consultant for my daughter and the information was shared between them and our GP which I thought acceptable. However, I had an appointment for my own health and letters were copied to my child's health visitor 'because of GIRFEC' so I am wondering how much of my own private health information has been shared and who with. I am very upset as I had already asked for 'no sharing data' to be attached to all our notes and want all my medical information sent to the HV to be erased as there was no legal basis for overriding my wishes. I now have to submit multiple SARs to find out who saw fit to presume consent on my behalf after I made my instructions explicitly



clear, and I am saddened I can no longer trust the NHS to maintain confidentiality of my health data.

### **Case study 6**

Following the assault of our son by a school staff member, our entire family was added to the Police iVPD without our knowledge. It took a 16-month battle to have our names removed as police opinions were found to be 'unsubstantiated, disproportionate and irrelevant'. After receiving SAR evidence of staff admitting to the assault (15 months after the event), I approached PIRC who had upheld some complaints and advised returning to Police with evidence of obstruction of justice. Police again closed it down as 'no new evidence'. I contacted the Crown Office who advised returning to Police. Police again closed it despite submitting documents and giving a statement. Crown Office then advised CAAPD (54 months after the assault occurred and multi-agency collusion ensued). Former GP practice have been advised by their Defence Union not to communicate with us (due to questions over unlawful data processing) and pertinent health records have been locked down, leaving some notes inaccessible to our new GP. New paediatrician can access previous paediatrician's 'concerns' but refuses to remove his opinion 'just in case - as a signpost for the future', although no diagnosis or treatment has ever been offered due to concerns being baseless. ICO stated that they did not have the resources to investigate (evidenced) unlawful data sharing by myriad individuals and organisations. SPSO initially said the Council had thoroughly investigated my complaints but did not have resources to investigate all of them. SPSO later upheld our complaints against the council, stating it was difficult to establish who made the initial referral to Children's Reporter that led to a traumatising investigation and recording of inaccurate data across multiple agencies that has since proved impossible to erase. All involved told conflicting stories of who made the referral. SPSO initially refused to investigate the SCRA unlawful referral and investigation stating there was a 'legal obligation' to investigate low-level GIRFEC concerns (contradicting the SC judgment). SCRA appear to have made the referral themselves, pretending it was a Police referral. SCRA has refused to amend or delete inaccurate information about my children, despite having documentary evidence of fabrication/collusion by 'professionals' as this would 'breach GDPR'. The Children's Commissioner refused to investigate breaches of Article 16 UNCRC as it would 'duplicate' investigation by ICO and SPSO. ICO stated they investigate information rights breaches, SPSO investigate maladministration, neither has a human rights remit. I returned to the Children's Commissioner to be told they will not investigate due to 'lack of resources' and they closed down correspondence leaving my children without redress or representation by UNCRC 'defenders'. Families are being sent in circles and treated with contempt by services and regulators alike as a result of data gathering and sharing practices that are based on subjective 'wellbeing concerns' and do not meet the legal threshold. GIRFEC policy has spiralled out of control and is continuing to cause incalculable damage to our family and others.

### **Case study 7**

My health visitor seemed alright, not particularly helpful but I never had a problem with her. Then I started talking about home educating my four-year-old and she told me it was illegal, and I'd need to write applications, have regular home visits and follow the school curriculum. I explained that she was wrong, thanked her for her concern and said we no longer felt the need to see her. Due to us declining her services (which are optional) and making a fully informed, legal educational choice, she referred us to social work who are now coming over

for a 'chat'. Aside from 'learned ignorance' of the law among GIRFEC professionals, this sort of harassment of law-abiding parents is a scandalous waste of resources.

### **Case study 8**

My daughter is on 12-month supervision order. Although she is under the care of the Royal Hospital for Sick Children for chronic pain syndrome, hypermobility, scoliosis and severe panic and anxiety, this is not considered a reasonable excuse for absence and my request to withdraw her to home educate is not being progressed.

### **Case study 9**

My daughter has chronic pain, ME, EDS and other health issues. The council tried to prevent us home educating (despite the school supplying zero education). They spoke to our daughter's paediatrician (without our permission) and a hard-fought-for appointment at GOSH is the only thing that saved us from being referred to social services as GIRFEC multi-agency professionals were circling. Although my daughter has now been home educated for three years, we still feel under constant threat due to the appalling attitude of professionals towards home educators, in particular to families whose children have additional needs that schools cannot begin to meet.

### **Case study 10**

My family has been referred to social work by health visitors so often it feels like a campaign of harassment. My SARs included a record of me being admitted to a psychiatric hospital several years ago, which is either a case of mistaken identity or completely fabricated but no one can explain it. When I declined the health visiting service last year (for the umpteenth time) because I choose to access health care through my GP surgery after previous issues, she called education (who had sent a letter expressing no concerns about my children's education provision just two months before) to discuss how to get me to 'comply'. She also got my housing association to send an officer to report on me and my children on the pretence of discussing my application for rehousing. The child protection conference they called included professionals I had never met and had nothing to say, but my own recently diagnosed medical condition had been shared with all of them, including non-medical professionals, without my knowledge or consent, and used to undermine my parenting capabilities. Despite a joint concerted effort by the health visitor and education, my children were *not* placed on the child protection register and I still do not accept health visitor interference, but I feel discriminated against because I live in a poor area and home educate my children.

### **Submission 2**

Alison Preuss, on behalf of the Scottish Home Education Forum, and Lesley Scott, on behalf of Tymes Trust, submit the following additional information in relation to Petition PE1692, Inquiry into the human rights impact of GIRFEC policy and data processing. This petition was referred to the Education and Skills committee by the Public Petitions Committee at its meeting of 8<sup>th</sup> November 2018. The Public Petitions Committee members also thought it "most appropriate for the petitioners to raise some of the suggestions they have offered with the children's commissioner, the Equality and Human Rights Commission and the Scottish

Human Rights Commission, rather than for this committee to call for the Government to set up an independent review.”

We had already written to the Scottish Human Rights Commission immediately following the UK Supreme Court ruling of July 2016 asking if they had made any public comment regarding the GIRFEC/Named Person situation. We received a response stating that they had “not made any statement with regards to the recent ruling by the UK Supreme Court.” A further email from the Scottish Human Rights Commission shortly after stated:

“Given the clarity provided by the Supreme Court’s judgment, and the Scottish Government’s commitment to bring the matter back to the Scottish Parliament the Commission has not felt the need to comment on the issues to date.”

Following the meeting of the Public Petitions Committee of 8<sup>th</sup> November 2018, we wrote again to the Scottish Human Rights Commission and to the Equality and Human Rights Commission on the 23<sup>rd</sup> November 2018, explaining the situation regarding the petition and setting out our concerns and asked for a meeting. We did not receive any response from the Scottish Human Rights Commission and a response from the Equality and Human Rights Commission was not received until the 24<sup>th</sup> December 2018 which stated:

“As you may be aware we share our human rights remit in Scotland with the Scottish Human Rights Commissions. The SHRC has focus on devolved issues of human rights, the EHRC has a focus on reserved human rights.

As education and children’s welfare is a devolved responsibility can I suggest you that contact the SHRC on [hello@scottishhumanrights.com](mailto:hello@scottishhumanrights.com)”

We informed the Equality and Human Rights Commission that we had already tried to engage with the Scottish Human Rights Commission as detailed above and asked if they would they assist in getting the SHRC to respond to our most recent communications. The Equality and Human Rights Commission replied:

“As I explained below the SHRC has responsibility for Human Rights in devolved areas of policy in Scotland and the EHRC for reserved issues of Human Rights policy. This split remit is set out in legislation and is not something that we can change. So in this case we have to defer to the SHRC as the lead agency as this is clearly within their remit.

I can only suggest that you raise this with them again by writing to their Commissioner.”

On 23<sup>rd</sup> January 2019 we again wrote to the Scottish Human Rights Commission, explaining our correspondence with the Equality and Human Rights Commission and asking for a response to our email of 23<sup>rd</sup> November 2018. On the 25<sup>th</sup> February 2019, three months after our initial email, the Scottish Human Rights Commission replied stating:

“The legislation which created the Scottish Human Rights Commission prohibits us from duplicating work undertaken by other enacted bodies. We have considered your email carefully, and are of the view that the content falls within the remit of the [Children and Young People’s Commissioner for Scotland](#) (CYPCS). You can find further information, including their position in relation to some of the issues you refer to [here](#). You may wish to contact CYPCS directly to discuss.”

We had in fact already contacted the Children's Commissioner at the same time as the Scottish Human Rights Commission and the Equality and Human Rights Commission, on the 23<sup>rd</sup> November 2018. They replied to us on 11<sup>th</sup> January 2019 offering us a meeting to speak about our concerns. This meeting was arranged for the 7<sup>th</sup> February 2019. The outcome of this meeting was that the Children's Commissioner's Office stated they were "constrained by legislation", meaning that if the issue concerned something that sits within the investigatory remit of another body that would "constrain any exercise of their powers". In this case it is their view that whilst they "agree there are children's rights issues engaged here" it is actually the remit of the SPSO and the ICO to address any breaching of human rights in respect of children and their families under GIRFEC. They also indicated that they had an agreed work programme, apparently following consultation with children and young people, although none of our young members has ever been approached for their views. They regretted that they did not have the resources to support children whose Article 16 rights have been, and are still being, blatantly undermined and infringed.

The day-to-day reality for families in Scotland therefore is that of an on-going imbalance of power that leaves them open to the continued abuses of a GIRFEC approach that was ruled unlawful nearly three years ago, yet has operated ceaselessly throughout that time. Families have been left with no true recourse to justice; although some victims' complaints have been upheld by the SPSO, others have failed or only been partially successful due to the Ombudsman's acceptance of the wrong threshold for interference with Article 8/16 rights. The wrong and unlawful threshold of undefined, subjectively interpreted 'wellbeing' remains rooted in the policies of all LAs, NHS boards, police and third sector bodies. This includes the 2014 national child protection guidance which references the now notorious ICO memo of March 2013. Although formerly withdrawn in September 2016, it is still routinely cited in current training modules, organisational guidelines and correspondence (even from the SPSO).

Meanwhile, victims have no affordable means of redress and are finding it well-nigh impossible to have unlawfully generated and shared records (including subjective opinions of non-specialist professionals) deleted or rectified. To add insult to injury, many complainants are now time-barred from taking legal action (even if they could afford to do so) due to having had their complaints wrongly dismissed by the ICO who had failed to interpret the data protection legislation to comply with human rights, as underlined by the Supreme Court in 2016.

In Scotland, it would appear that no-one is in fact responsible for the human rights of children and their families when it comes to GIRFEC/Named Person and the breaches that have occurred throughout its near decade of operation:

The Equality and Human Rights Commission say it is the responsibility of the Scottish Human Rights Commission;

the Scottish Human Rights Commission refer it to the Children's Commissioner;

the Children's Commissioner's Office pass it on to the SPSO and the ICO;

the SPSO is limited to looking at individual cases and undertakes investigations based on the wrong threshold for interference with Article 8/16 rights;

the ICO did not see anything wrong with the legislation that was ruled unlawful by the UK Supreme Court with the Lead Communications Officer stating immediately after the 2016 ruling from the UK Supreme Court “We’re disappointed with the judgement because we offered advice and they had addressed our concerns...Ken has been speaking to the Scottish Government this morning and we are working on a line..”

The 2013 letter of advice to practitioners from the ICO was based on extensive discussions with, and reference to, a report authored by the Scottish Government. The ICO took the unusual step of requesting that the Scottish Government take down its 2013 advice when it released its 2016 statement, but that withdrawal was not ‘cascaded’ directly or via community planning partnerships to other agencies, who have continued to cite the earlier statement to justify unlawful information sharing.

Families do not and cannot have faith and trust in the ICO when it continues to support and enable the GIRFEC approach to operate. It has done nothing to uphold the human rights of children against this authoritarian push to undermine families, but rather has been at the forefront of its development and its on-going modification.

As we have stated before, the people of Scotland deserve to know the truth about how a Scottish Government national flagship policy that breached Article 8 of the ECHR and was ruled unlawful found its way on to the statute books. They deserve the opportunity to have their experiences heard and at least a semblance of justice delivered in regard to the early and ongoing implementation of that unlawful practice across Scotland.

## ICO submission to the Public Petitions Committee

### PE1692/C

The Information Commissioner's Office submission of 31 July 2018

Thank you for your letter of 3 July, inviting the Information Commissioner's Officer (ICO) to provide its views on the action called for in the above petition.

Unfortunately, the petitioners' proposed action calls for an Inquiry into the human rights impact of Getting it Right for Every Child (GIRFEC) and the Information Commissioner's Office (ICO) has no locus in respect of this legislation. As such, I am afraid that I am unable to comment on the merits or otherwise of the action itself. However, having read the Official Report of the Committee meeting of 28 June and the background information on the Petition itself, I note that the discussion is much wider than human rights and also brings in issues of data protection. As the Regulator of the data protection regime in the UK, I am happy to provide input to the Committee's deliberations from that perspective.

Fundamentally, the issue under question is the sharing of personal information between organisations for the purposes of the Scottish Government's GIRFEC initiative. GIRFEC introduced the concept of wellbeing into children's services and it is the petitioners' view that personal information shared without consent for wellbeing purposes is inappropriate at best and perhaps unlawful in some cases. I think it might be helpful for the Committee to understand how data protection legislation is relevant to the sharing of personal information.

The law in place at the time of GIRFEC's introduction was the Data Protection Act 1998 (DPA 1998). In May 2018, the vast majority of this Act was repealed and replaced by the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018 (DPA 2018). Under both the old and the new regimes, the preamble to the EU legislation from which they are derived, provides for *the protection of individuals/natural persons with regard to the processing of personal data and the free movement of such data* (Directive 95/46/EC & Regulation (EU) 2016/679). They essentially provide a framework for the use, including sharing, of personal information.

The first Data Protection Principle in both regimes is broadly similar in that:

Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject [the individual to whom the data relate] (GDPR Art5:1(a))

In terms of lawful processing, this has two aspects that must be met. First, for the processing to be lawful it must rely on specified legal bases as set out in the data protection legislation. Second, it must not contravene any other legislative requirement. As the latter is self-evident, I shall confine my comments to the former.

Schedules 1 and 2 of the DPA 1998, set out the legal bases for the processing of personal and sensitive personal data respectively, the first of which in both cases is consent (explicit consent for sensitive personal data). The rest of the legal bases provide for situations where it would be unreasonable or inappropriate to rely on consent because the processing is considered to be *necessary* for one of the specified lawful purposes, such as *to protect the vital interests of the data subject*. This legal basis could be relied on, for example, to share information where there is potential for significant harm, i.e., a child protection issue. If

personal information is to be shared without consent at a level below the vital interests/significant harm bar, the organisation in question must be able to rely on one of the other legal bases such as it being *necessary for the exercise of any other functions of a public nature exercised in the public interest*. For this to be lawful, the organisation must be able to identify the public function in question, usually, but not exclusively, set out in statute, and the sharing must relate to that function.

It is important to note that all legal bases carry equal weighting with none more or less valid than any other. Consent, therefore, is not the only legal basis for the lawful sharing of personal information between organisations. However, where consent is not being relied on, the organisation must be prepared to justify its position clearly.

Under the new data protection regime, the same requirements apply and organisations engaged in the sharing of personal data since 25 May 2018, must be able to rely on one of the legal bases set out in GDPR/DPA 2018. The matter of consent, however, is more problematic for public authorities under the new regime. The GDPR provides for a more robust consensual process, the focus of which is that it must be meaningful and individuals must have real choice in the matter so that, should they wish, they can withhold or withdraw that consent with no real detriment. For public authorities, this is especially difficult because of the inherent nature of the relationship between it and its constituents. As Recital 43 of GDPR articulates:

In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, **in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.** (added emphasis)

Given the nature of the relationship between public authorities and children, young people and their parents/guardians, the potential for an imbalance is exceedingly high. Indeed, the potential for such was implied at paragraph 95 of the Supreme Court Judgment where it states that:

...there must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered...and further, that their failure to co-operate...will be taken to be evidence of a risk of harm. ([2016] UKSC 51<sup>1</sup>)

The GDPR's more robust regime around reliance on consent substantiates fully the consistent position the ICO has taken on the matter in that consent should only be relied on when individuals have real, meaningful choice. If sharing is deemed necessary regardless of consent, one of the other legal bases must be used and organisations must be prepared to justify their position.

It would be remiss of me not to mention that the DPA 2018 now provides a specific legal basis for the necessary processing of special category (sensitive personal) information for the Safeguarding of children and of individuals at risk (Schedule 1:18). However, caveats ensure that this is not used for wholesale sharing but only that which meet the specific circumstances outlined in the provision.

The second part of the first Data Protection Principle is the concept of fairness and transparency and this permeates every aspect of data protection compliance. This is about ensuring that individuals are fully informed about how their personal information is to be used. Again, the new regime is much more robust in this requirement and introduces a fundamental right to be informed and requires that more detailed information is provided, including where the information was obtained – if not from the individual themselves - and with whom information will be shared. As I said, this is fundamentally important because even if the sharing is deemed necessary and consent is not being relied on, the processing will be unlawful if individuals have not been fully informed about how their information is to be used. Of course, there are exceptions to this but the overriding imperative of data protection is transparency, so they should only be used when absolutely necessary. For example, it would be wrong to inform an individual about any specific processing where to do so would be prejudicial to the purposes. However, this notwithstanding, it is vital that public authorities get this right because it is an important part of mitigating that imbalance.

Regardless of whether the legal basis for sharing is consensual or necessary, it is very definitely about proportionality: sharing only that which is absolutely necessary with the relevant person at the appropriate time. This speaks to the third Data Protection Principle and, again, the ICO has been consistent in saying that the sharing of personal information must be adequate, relevant and limited to what is necessary for the purposes.

Ultimately, it is for each organisation to justify its reliance on any given legal basis and if young people/parents/guardians believe that such reliance is erroneous, provided they have exhausted organisation's complaint process, they can raise the matter with the ICO.

I trust that the Committee find this helpful in its deliberations.

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<sup>1</sup> The Christian Institute and others v The Lord Advocate (Scotland) 28 July 2016



**Scottish Government submission to the PPC****PE1692/B**

Scottish Government submission of 30 July 2018

1. The Scottish Government welcomes the opportunity to contribute to the Public Petition's Committee's consideration of PE1692 on an inquiry into the human rights impact of the getting it right for every child policy and data processing.
2. The Scottish Government notes the submissions made by the petitioners Lesley Scott and Alison Preuss given on behalf of Tymes Trust and the Scottish Home Education Forum at the meeting of the Committee on 28 June. It is further noted that the petitioners '*call on the Scottish Parliament to urge the Scottish Government to initiate an independent public inquiry into the impact on human rights of the routine gathering and sharing of citizens' personal information on which its Getting It Right For Every Child (GIRFEC) policy relies*'.
3. The Scottish Government does not share the view of the petitioners that an independent public inquiry is necessary.

**Specific points from the submissions made by the Petitioners**

4. Before turning to the substantive issues raised in the Petition regarding GIRFEC, human rights and information sharing, two specific matters raised by the Petitioners are dealt with below.
5. In their submissions to the Committee, the petitioners make reference to the experience of children and families in individual cases and wider evidence which the No2NP Campaign have gathered, particularly in relation to Highland Council. Whilst the Scottish Government has responsibility for the setting and promotion of national policy, the provision of services in individual circumstances is a matter for Local Authorities, Health Boards and partners. The Scottish Government cannot therefore advise on these matters.
6. The Petitioner, Alison Preuss also refers to a request to meet with the Scottish Government. The Scottish Government has spoken with the Petitioner Alison Preuss on a number of occasions. Officials from the Learning Directorate and Children and Families Directorate are due to meet with her on 8<sup>th</sup> August 2018.

**GIRFEC, Human Rights and Information Sharing***GIRFEC*

7. Getting it right for every child (GIRFEC) is the national approach in Scotland to improving outcomes and supporting the wellbeing of our children and young people by offering the right help at the right time from the right people. The GIRFEC approach has developed and evolved for over a decade through extensive partnership working and consultation with children, young people and their families, including through the "*Highland Pathfinder*"<sup>1</sup>, and then through the adoption and

<sup>1</sup> An evaluation report of the development and early implementation phases of Getting it right for every child in Highland 2006 – 2009 <http://www.gov.scot/Publications/2009/11/20094407/0>

roll out of the GIRFEC approach across local authorities and health boards throughout Scotland.

8. The Scottish Government is committed to embedding the GIRFEC approach across Scotland, supporting better outcomes for children and young people and ensuring that every child has access to the support and services they need to meet their wellbeing needs.
9. Full and effective implementation of the Children and Young People (Scotland) Act 2014 ('the 2014 Act') continues to be an important part of the Scottish Government's strategy to deliver the GIRFEC approach consistently across Scotland. Part 4 of the 2014 Act will ensure that a Named Person, a key element of the GIRFEC approach, is available to all children, young people and their families as an entitlement. In making a Named Person available, the legislation will ensure that there is an identified individual who will be there when families want information, advice, support and help to access services. However, there will be no obligation to accept the offer of advice or support from a Named Person.  
Further information about the 2014 Act is provided below.

#### *Human Rights and GIRFEC*

10. The GIRFEC approach is fundamentally based upon and promotes respect for the rights of children and young people and their families, including rights under the European Convention on Human Rights and the United Nations Convention on the Rights of the Child<sup>2</sup>.
11. In line with international best practice in the delivery of children and families services, it is an approach that puts the rights and needs of children and young people at the centre, promoting early intervention and partnership working to ensure that public services work for every child and young person and their families by offering the right help at the right time from the right people. It seeks to do this by providing a framework for all services and agencies working with children and families to deliver a co-ordinated approach which is appropriate, proportionate and timely.
12. Human rights is at the heart of GIRFEC; requiring a whole child approach, building on strengths and promoting resilience, alongside encouraging opportunities and valuing diversity. The UNCRC is further reflected in GIRFEC values and principles which stress the promotion of children's wellbeing by keeping them safe, promoting their development and respecting their views.

#### *Information sharing and GIRFEC*

13. Appropriate and lawful sharing of relevant and proportionate information is a vital part of making the right support available to families at the earliest opportunity, which is at the heart of GIRFEC. Sharing the right information at the right time

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<sup>2</sup> For more information about how GIRFEC is based upon and supports human rights see 'UNCRC: The foundation of Getting it right for every child' <https://www.gov.scot/Resource/0041/00417256.pdf>

improves outcomes for children, young people and their families and can help prevent concerns or issues growing into bigger problems.

14. The GIRFEC approach supports a common understanding of 'wellbeing' through the use of wellbeing indicators, those being how Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included a child or young person is. There is no threshold of wellbeing which must be achieved by a child or young person. These indicators provide a common language for professionals and families when considering the individual needs of children and young people
15. The GIRFEC approach does not create new thresholds for information sharing, rather it provides a clear and consistent framework for families to engage with services when they wish to obtain information, advice, support and help that promotes, supports and safeguards the wellbeing of children and young people.

Where the sharing of information is considered to be in the best interests of supporting a child's wellbeing, in the manner described above, this may only be done where there is an appropriate legal basis. Information can only be shared where it is proportionate to do so under Article 8 ECHR. It is for relevant authorities, usually Local Authorities and Health Boards, in line with their existing duties, to ensure that services (including the sharing of information) are provided in accordance with law including human rights, data protection law (both historically under the 1998 Data Protection Act and going forward under the new data protection regime as of May 2018 that includes the General Data Protection Regulation and the Data Protection Act 2018) and the law of confidentiality. Crucially, the GIRFEC approach does not alter child protection thresholds or legislation that supports the protection of children and it is for relevant authorities to ensure that their practice and procedures comply with all legislation.

16. In the petition, it is suggested that the GIRFEC team cascaded a "unilateral re-interpretation of the reserved UK Data Protection Act 1998 via community planning partnerships a year before the 2014 Act". The Information Commissioner's Office (ICO), rather than the Scottish Government, chose to issue an independent statement to local authorities, health boards and Police Scotland on 28 March 2013, titled "[Information Sharing Between Services in Respect of Children and Young People](#)". To be clear, this advice was not authorised by the Scottish Government.
17. During their evidence, the petitioners refer to minutes of a meeting where they suggest that "it was a series of backroom deals that caused the threshold to be dropped to the subjective notion of "wellbeing" from "significant harm" in 2013". We believe this refers to the GIRFEC Programme Board meeting of 12 February 2013<sup>3</sup>. This minute noted in relation to information sharing that "a joint statement has been agreed with the Information Commissioner's Office which should help clarify situations where a child was on a pathway to risk to wellbeing as well as significant risk of harm". A joint statement was not issued by the Scottish

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<sup>3</sup> Minutes of GIRFEC Programme Board meeting of 12 February 2013  
<http://www.gov.scot/Resource/0043/00430422.pdf>

Government and the ICO. As highlighted above, [this independent statement](#) was issued by the ICO to stakeholders.

18. The petitioners also highlighted their concerns that SG was not explicit about the named person service being implemented ahead of commencement of Part 4 of the 2014 Act, and that the information sharing involved was, “ all contrary to the law as confirmed by the highest UK court”. This was not the case. A number of local authorities and health boards chose to operate a named person service on a non-statutory basis in a number of communities before of development of the Children and Young People Act (2014). It is important to note that where named persons services have been provided in the past, or are being provided for at present, these are provided by organisations on a policy basis. As noted for above, it is the responsibility of organisations, in line with their existing duties, to ensure that such services are provided in accordance with law.
19. The petitioner have also suggested that the Scottish Government failed to issue revised advice to stop the data misuse on which its GIRFEC policy and named person scheme is founded after the Supreme Court judgment. As outlined, the Scottish Government was not the author of the advice on information sharing. In fact, the ICO chose to issue a statement on the implications of the judgment on 15 September 2016<sup>4</sup> to local authorities, health boards and Police Scotland. This statement was made publicly available online on the Scottish Government website.

### **The Children and Young People (Scotland) Act 2014 and the Christian Institute Case**

20. Whilst the current petition relates to implementation of the GIRFEC approach historically, the petitioners have made submissions which relate to the impact of the Children and Young People (Scotland) Act 2014 (‘the 2014 Act’) and the interpretation of the Supreme Court’s decision in the case of *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51 (‘the Christian Institute case’) on current practice. Some information about the 2014 Act, the Christian Institute case and the Children and Young People (Information Sharing) Bill, which is currently before the Education and Skills Committee, is therefore provided below.
21. The 2014 Act reflects in domestic law the role of the United Nations Convention on the Rights of the Child (UNCRC) in influencing the design and delivery of policies and services by placing duties on the Scottish Ministers and the wider public sector. Amongst other things, the 2014 Act places key aspects of the GIRFEC approach on a statutory footing, improving the way services work to support children, young people and families by ensuring there is a single planning approach for children who need additional support from services; creating a clear point of contact for children, young people and parents ; ensuring coordinated planning and delivery of services with a focus on outcomes, and providing a holistic and shared understanding of a child’s or young person’s wellbeing. In

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<sup>4</sup>ICO statement on the implications of the Supreme Court judgment on 15 September 2016  
<http://www.gov.scot/Resource/0050/00507298.pdf>

particular, Parts 4 and 5 of the 2014 Act place the provision of named persons and child's plans on a statutory basis for the first time. Section 96 of the 2014 Act also places the assessment of wellbeing on a statutory basis for the first time.

22. In the Christian Institute case, the Supreme Court was asked to consider the lawfulness of Part 4 (provision of named persons) of the 2014 Act. Their consideration therefore relates to the future provision of named person services to be operated under Part 4 of the 2014 Act.
23. The Supreme Court found the policy objective to provide for a universal named person service to be "legitimate and benign". It went on to find, however, that the information sharing provisions of that Part were incompatible with article 8 ECHR (right to respect for one's private and family life), on the basis that they were not in accordance with law. The reasons for this are summarised in paragraphs 83 to 85 of the judgment. In brief, the provisions were not in accordance with the law because of the very serious difficulties in accessing the relevant legal rules and the lack of safeguards which would enable the proportionality of an interference with article 8 rights to be examined. The serious difficulties referred to related in particular to the relationship between Part 4 of the 2014 Act which contained a duty to share information and the Data Protection Act 1998 with which relevant authorities would also have to comply with for information sharing to be lawful.
24. Whilst the Supreme Court decision related to Part 4 of the 2014 Act information sharing provisions are contained within Part 5 of the Act and as such, commencement of Parts 4 and 5 of the 2014 Act was postponed by the Scottish Government to allow for the matters raised by the Supreme Court to be addressed.

#### *The Children and Young People (Information Sharing) (Scotland) Bill*

25. Following a period of intensive stakeholder engagement from September to December 2016<sup>5</sup>, the Scottish Government introduced the Children and Young People (Information Sharing) Scotland Bill in June 2017 to make changes to the information sharing provisions in Parts 4 and 5 of the 2014 Act.
26. The Bill fully responds to the Supreme Court's findings and will ensure that information sharing under parts 4 and 5 of the 2014 Act is lawful and proportionate and puts in place appropriate safeguards.

#### *What the Bill does*

27. The Bill responds to the Supreme Court's findings regarding the difficulties in accessing the relevant legal rules and the lack of safeguards by:

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<sup>5</sup> More information about the intensive stakeholder engagement process held by the Scottish Government can be found in the Policy Memorandum to the Children and Young People (Information Sharing) Scotland Bill here [http://www.parliament.scot/Children%20and%20Young%20People%20\(Information%20Sharing\)%20\(Scotland\)%20Bill/SPBill17PMS052017.pdf](http://www.parliament.scot/Children%20and%20Young%20People%20(Information%20Sharing)%20(Scotland)%20Bill/SPBill17PMS052017.pdf)

- replacing the previous duty to share information under the 2014 Act with a new duty to consider sharing information;
  - creating a new power to share information (where a proper legal basis exists);
  - providing that information may only be shared where this would support, promote or safeguard the wellbeing needs of the child; and
  - requiring Ministers to issue a binding Code of Practice, providing clear safeguards and supporting lawful and proportionate sharing of information.
28. The new duty to consider sharing information is broken down into the following parts:
- a duty to consider sharing information where this would support, promote or safeguard the wellbeing needs to the child;
  - a duty to consider whether the information can be shared lawfully, including in accordance with human rights law, data protection law and the law of confidentiality;
  - where the above steps can be complied with, the Bill then provides for a power to share information.
29. Importantly the Bill only provides for a power to share information where this can be done so lawfully, including in accordance with human rights law, data protection law and the law of confidentiality. In addition to responding to the Supreme Court's findings regarding accessibility and safeguards, moving from a 'duty' to share to a 'power' is also intended to better support partnership working which is at the very heart of GIRFEC, allowing for dialogue and professional discretion.
30. It is important to note that where named persons services have been provided in the past, or are being provided for at present, these are provided by organisations on a policy basis. As provided for above, it is the responsibility of organisations, in line with their existing duties, to ensure that such services are provided in accordance with law.
31. The provisions contained within the Bill will ensure that information sharing in relation to the provision of named person services and child's plans, under the framework provided for in Parts 4 and 5 of the 2014 Act, is lawful and proportionate and fully respects the rights of children and families.
32. The Supreme Court judgment has provided an opportunity to revisit the information sharing provisions in the 2014 Act in a way that will not only secure the protection of those rights but will improve the named person service and reassure parents and practitioners and the wider public that this service will work with and for families.

### **Code of practice on information sharing**

33. The Scottish Government notes the questions asked by members of the Committee about the Code of Practice on Information Sharing provided for under the Bill.

34. The Bill places a duty on Scottish Ministers to publish a binding Code of Practice about the provision of information (including the consideration of the provision of information) under Parts 4 and 5 of the 2014 Act. This Code will make the applicable legal rules clear and accessible and provide safeguards in relation to the sharing of information. The Bill requires that before Scottish Ministers make such a code, they must consult any person to which the Code of Practice relates and other persons as they consider appropriate. The Bill also provides for scrutiny by the Scottish Parliament.
35. An Illustrative Draft Code of Practice was published alongside the Bill to assist the Parliament and members of the public understand how the power to issue a Code of Practice in the Bill could be used. Regrettably, during Stage 1 evidence, it became clear that this illustrative draft had caused confusion amongst some stakeholders. The Education and Skills Committee asked the Scottish Government to provide a further draft Code of Practice to aid their consideration of the Bill.
36. The Deputy First Minister made clear his intention to establish the Getting it right for every child Practice Development Panel in November 2017. The Panel is independently chaired by Professor Ian Welsh, OBE, Chief Executive of the Scottish Health and Social Care Alliance and will report, providing an authoritative draft Code of Practice and any recommendations, to the Deputy First Minister later this year. An authoritative draft Code of Practice will then be provided to the Scottish Parliament's Education and Skills Committee and will be publically available, enabling the Committee to resume Stage One of the the Children and Young People (Information Sharing) (Scotland) Bill. .
37. We trust that the above information is of assistance to the Committee. The Scottish Government would be happy to provide any further assistance to the Committee in their consideration of this matter.