

## **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

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<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 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.