Scottish Government Consultations on:

- **Draft GIRFEC Information Sharing Guidance and draft Code of Practice**
- **Children and Young People (Scotland) Act 2014 Revised Draft Statutory Guidance for Part 18 (Section 96)**

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.
The Commissioner is fully independent of the Scottish Government.

Summary

This response relates both to the refresh of and stakeholder consultation on the Getting It Right for Every Child (GIRFEC) policy and the public consultation on the revised draft Statutory Guidance for Part 18 (Section 96), which relates to assessments of wellbeing.

As we outlined in our response to the consultation on the draft National Guidance for Child Protection in Scotland in 2021,[1] child protection necessarily involves an interference with the human rights of the child and their wider family, specifically the right to a private and family life under the European Convention on Human Rights (ECHR Art 8) and the UNCRC (Articles 9 and 16). Human rights law may permit this interference, but only where the intervention is lawful, necessary and proportionate. We are concerned that the guidance is not accessible and does not explicitly demonstrate how practitioners can share information in a way that is compatible with human rights law. It is imperative that the entire refreshed GIRFEC policy framework and accompanying guidance is compatible with human rights law and standards.

We reiterate our longstanding concerns that GIRFEC information sharing guidance continues to do little to address the ambiguity about the threshold for non-consensual information-sharing in child protection and other processes. This is despite more than 5 years having elapsed since the United Kingdom Supreme Court found that the information sharing elements of Part 4 and 5 of the Children and Young People (Scotland) Act 2014 were incompatible with the child's right to private and family life under Article 8 of the ECHR[2] and despite the extensive debate generated by the Children and Young People (Information Sharing) (Scotland) Bill, which was ultimately withdrawn at Stage 1. We provided both written and oral evidence to Committee on that Bill, outlining our concerns at that time.[3]

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[1] CYPCS. 2021. Consultation on the revised National Guidance for Child Protection in Scotland.
[2] The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland). [2016] UKSC 51
[3] CYPCS. 2017. Written Evidence: Children and Young People (Information Sharing) (Scotland) Bill.

We consider that the current draft guidance materials fail to adequately respond to the UK Supreme Court judgment in the Christian Institute case, nor provide sufficient safeguards for children's and families' human rights and are therefore incompatible with the ECHR and the UNCRC. We would question the need for statutory guidance on assessment of wellbeing, at all, given that the original duties under Parts 4 and 5 were never brought into force. There are now only very limited situations where there are statutory duties to assess a child or young person's wellbeing, including under sections 49 and section 58 of the 2014 Act relating to Corporate Parenting duties. This statutory guidance should be clear that it does not apply to assessments of wellbeing beyond these situations.

Background

For over a decade, children's services and public authorities across Scotland have been implementing the GIRFEC policy and principles, by adopting a collaborative, child's-rights based approach and by putting the best interests and wellbeing of children and young people at the heart of delivery of public services. GIRFEC aims to provide timely help and support to meet children's wellbeing needs, to prevent any concerns for the child escalating. It embeds an understanding of 'wellbeing' and the holistic assessment of a child's needs.

As part of the GIRFEC policy the Scottish Government sought to introduce new information-sharing laws under parts 4 and 5 of the Children and Young People (Scotland) Act 2014, (the 2014 Act). These duties were intended to come into force on 31 August 2016. In preparation, many public authorities set up protocols and procedures for sharing information across partner agencies, which included screening groups and multi-agency meetings to discuss and share the wellbeing needs of individual children and young people.

As part of an assessment of wellbeing needs, a professional may want to share the child's and family's information with other services, to ensure the child and family get the necessary supports and assistance. In circumstances where a child may require additional support to meet their needs, a Team Around the Child, which should include the child and the child's family, may be arranged to assess the child's wellbeing needs. Unfortunately, in practice, many Team Around the Child meetings are professional-only and fail to give the child and family the chance to participate in decision-making, in accordance with the child's rights under article 12 of the UNCRC. Indeed, children and families are often unaware that their personal information and data is being shared by public authorities without their informed consent. We are concerned that this continues to be a widespread, but unlawful, practice across Scotland.

On 28th July 2016, the United Kingdom Supreme Court concluded that although the underlying policy aims of GIRFEC were "legitimate and benign", the information sharing provisions of the 2014 Act, were incompatible with children and their families' human rights, as well as with data protection laws, and were therefore unlawful. The Supreme Court criticised the laws as lacking clarity or safeguards for individuals' (especially children's) human rights to privacy and family life under Article 8 of the ECHR.

In June 2017, The Scottish Government published the Children and Young People (Information Sharing) (Scotland) Bill and Illustrative Draft Code of Practice, to address these legal incompatibilities. However, the Bill and Code were widely criticised as causing confusion and misunderstanding amongst professionals (and children and families) about what constitutes lawful information sharing. Although there appeared to be a generally clear understanding of the exemptions in cases of child protection or where there was a risk of significant harm, it was unclear when practitioners were considering the lower thresholds of 'welfare' and 'wellbeing' concerns. We outlined our concerns about this Bill in both written and oral evidence to the Scottish Parliament's Education and Skills Committee.[4]

The Supreme Court had specifically raised the issue of the need for consent and participatory decision-making, but this has become the central focus of much of the current confusion in practice. In May 2018, the European General Data Protection Regulation (GDPR) came into force and was followed by the Data Protection Act 2018. This meant that public authority duties, particularly around consent, privacy and confidentiality, were again under scrutiny.

Human Rights Requirements

Article 42 of the UNCRC requires states parties to ensure that the provisions of the Convention are widely understood. By relating all guidance explicitly to children's human rights, it would ensure not only its compatibility with the UNCRC and the ECHR but facilitate better understanding of human rights amongst those using the guidance and those affected by it in practice.

Whilst the human rights context is to some degree evident in parts of the refreshed guidance materials, we are disappointed that children's human rights are not explicitly threaded throughout all the guidance, particularly sections 6 and 7 of the revised draft Statutory Guidance. This is particularly concerning in light of the Scottish Government's commitment to incorporation of the UNCRC into Scots law.[5]

Sharing of information by a Team Around the Child, or between other professionals, constitutes an interference by the State with the rights to private and family life, home, and correspondence, in terms of Article 8 ECHR (and Article 16 UNCRC). In order to be lawful, any interference must be 'in accordance with the law', which requires the information sharing to have a basis in domestic law and be accessible to the person concerned and foreseeable in its effects.[6] The information sharing has to be aimed at one of the legitimate ends specified in Article 8(2) (the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others). Any information sharing must also be necessary, to answer a "pressing social need",[7] and be proportionate to the

[4] CYPCS. 2017. Parliamentary evidence: Children and Young People (Information Sharing) (Scotland) Bill and Scottish Parliament. Official Report. Education and Skills Committee. 25 October 2017.
[5] United Nations Convention on the Rights of the Child (Incorporation) Bill
[6] S. and Marper v. the United Kingdom, application no. 30562/04 (4 December 2008), para 95
[7] S. and Marper v. the United Kingdom, para 101

legitimate end pursued (any information shared must be carefully considered as to its relevance).

The European Court of Human Rights, in its caselaw, stresses the importance which it attaches to the State respecting the natural bonds between parent and child and their private family and home life.[8] Decision-making processes must be fair and respect the rights of both the child and their family. This includes ensuring that parents and children know and have access to information which is being shared and have the opportunity to participate in decision-making processes.[9]

To be "in accordance with the law" guidance must set out the limits of State powers in relation to children and the family. It must be transparent and accessible and clearly indicate the scope of discretion permitted to authorities.[10] Article 16.2 of the UNCRC also explicitly requires that children are protected in law from arbitrary or unlawful interferences, an important part of the Supreme Court's judgment in the Christian Institute case.

The European Court has been strongly critical of the indiscriminate and open-ended collection of sensitive personal data where there is an absence of clear and detailed statutory provisions which clarify the safeguards which apply and the rules governing how the data can be collected, the duration of the storage, how the data can be used, and the circumstances in which they may be destroyed.[11]

Lawful sharing of information

It must be explicitly clear in all GIRFEC guidance and materials that GIRFEC and the named person scheme is a **non-statutory** policy framework and that there are very limited situations where sharing personal information relating to a child without the express knowledge and agreement of the child and parents would be lawful.

Ordinarily, there are only 2 situations where children's services have legal powers to interfere in the ECHR article 8 and UNCRC article 16 human rights of children and parents and share information without knowledge and consent.

These legal exceptions are:

1. Risk of harm: where there is an identifiable and immediate need to take protective measures to prevent a risk of significant harm to any person, should consent be sought. This aligns to child and adult protection law and supports children's rights to be protected from harm and abuse, under article 19 of the UNCRC.[12]
2. Welfare concerns: where a child is likely to need *compulsory*, statutory measures of intervention and supervision because of their needs, under

[8] *W. v. the United Kingdom* (1988) 10 EHRR 29 at §§ 62 and 64.
[9] *P and Others v United Kingdom* (2002) 35 EHRR 31 §§117-120 and article 12 UNCRC
[10] *Malone v United Kingdom* (1985) 7 EHRR 14 at [66]–[68]; *Rotaru* at [55]; and *Amann v Switzerland* (2000) 30 EHRR 843 § 56.
[11] M..M. v. the United Kingdom, application no. 24029/07. This case concerned the regime for retention and disclosure of criminal records in Northern Ireland.
[12] CYPCS. 2021. Consultation on the revised National Guidance for Child Protection in Scotland.

section 67 of the Children's Hearings (Scotland) Act 2011. Only Police Scotland and local authorities have statutory duties to refer a child who may need compulsory measures to the Principal Reporter. Any other person, including other professionals in children's services (including health) may make a referral to the Children's Reporter on these grounds. However, this does not permit the sharing of information to any other public bodies.

These exceptions are not made clear in the guidance.

The GIRFEC policy framework for assessment and planning to support children's wellbeing needs does not provide a lawful basis for the sharing of information without knowledge and consent. As a rights-based model, it is therefore essential that all practitioners are aware of their legal duties to include children and families in all decision-making processes and that their knowledge, agreement and informed consent is required throughout.

We are concerned that the guidance materials are at times contradictory on the issue of consensual decision-making. We do not agree that the Data Protection Act 2018 gives a legal basis for sharing or processing without consent under 'public task' grounds, other than in the 2 exceptional situations outlined above.

It must be made explicitly clear to practitioners that they do not have a general statutory power to share children and families' data and information, outwith these limited circumstances.

There must be a presumption in both policy and practice that children and families must provide informed consent before information on wellbeing needs would ever be shared. This reflects both national policy for person-centred planning and decision-making and international human rights law and standards.

The Supreme Court concluded that there was a real risk of children's human rights being violated because of a lack of legal safeguards in the 2014 Act information-sharing provisions. We consider that this risk remains in the policy and practice proposed under the GIRFEC refresh.

The Court held that the lack of safeguards meant that it was possible:
"...that information, including confidential information concerning a child or young person's state of health (for example, as to contraception, pregnancy or sexually transmitted disease), could be disclosed [...] to a wide range of public authorities without either the child or young person or her parents being aware of the interference with their Article 8 rights, and in circumstances in which there was no objectively compelling reason for the failure to ascertain and have regard to their views."[13]

[13] The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland). [2016] UKSC 51

Conclusions and Recommendations

It is essential that practitioners know what the law is relating to the potential sharing and processing of information or data. Likewise, children, young people and their families must know what their rights are to privacy, confidentiality and data protection.

We do not consider that the current draft guidance documents achieve this.

The current draft guidance documents would, in our view fail the human rights tests of being 'in accordance with law' and of having the qualities of accessibility, foreseeability and precision which would provide proper protection against the possible arbitrary and unlawful, disproportionate and unjustified interference with the right to respect for individual families' private and family life, correspondence and home.

It is not made clear in the guidance materials that there is no legal duty to assess wellbeing under the National Practice Model, nor under GIRFEC policy. Indeed, by being labelled statutory guidance, there is a risk they may be interpreted as indicating one exists. It is not clear that the statutory guidance applies only to the very narrow remaining requirements of wellbeing assessments in the 2014 Act.

It must be unequivocally clear that there are no related statutory duties around the non-statutory Named Person service or Child's Plans as first proposed in the 2014 Act.

In order to ensure compatibility with the UNCRC and the ECHR, the guidance materials should be comprehensively redrafted, to ensure that children's human rights and legal rights are threaded throughout the guidance as well as any practice and training materials introduced to support implementation of the Guidance and GIRFEC policy. There should be a greater focus on human rights compliance. It should be clear that in all but the most exceptional circumstances (as highlighted above) and where justified in law, information should not be shared without the express and informed consent of the child and parents.

Without these procedural and human rights safeguards embedded into the GIRFEC policy, we consider the framework is rendered incompatible with the rights enshrined in the ECHR and UNCRC.

11 February 2022

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