PE1692/D
Petitioner submission of 10 September 2018

Alison Preuss, on behalf of the Scottish Home Education Forum, and Lesley Scott, on behalf of Tymes Trust, welcome the opportunity to respond to the Scottish Government submission of July 30 2018 and the ICO submission of July 31 2018. We have amalgamated our responses to the two submissions in to a single response, as the facts concerning these issues are overlapping.

Throughout its submission, the Scottish Government takes the position that it is responsible for the GIRFEC policy and framework "for the setting and promotion of national policy". Yet, when it comes to individual cases where families' human rights have been breached and their personal data unlawfully gathered and shared, it says that is the sole responsibility of the local authorities, health boards and partners who have implemented the Scottish Government's policy.

This is surely an abdication of responsibility by the Scottish Government. In a case where the central direction of policy has been so mismanaged that it results in a Supreme Court ruling that the Government was seeking to implement unlawful measures, a Bill to correct defects stalled and a draft code of practice withdrawn, it cannot be just for the Scottish Government to place all responsibility for such disarray on to local authorities and health boards. In the final analysis, central government, and the ministers who direct it, must shoulder responsibility for the results of its flawed decisiICOon-making.

The Scottish Government claims the GIRFEC approach was "developed and evolved ...through extensive partnership working and consultation" with families. What was "embedded" in practice throughout Scotland from 2013 onwards was not what was asked for by the handful of parents of children with ASN requirements involved in the Highland Pathfinder.

What is more, minutes from a Scottish Government GIRFEC Programme Board meeting[1] show that the rest of us were not even given the opportunity for "extensive partnership working and consultation". These record: "It had been a conscious decision to focus first on embedding GIRFEC in the professional practices of all stakeholder delivery bodies before raising awareness in the general public."

It is a recurring theme within the submission from the Scottish Government that GIRFEC is "based upon and promotes" rights of children, young people and their families. This is an inaccurate and misleading statement. GIRFEC is an outcomes-based approach that "promotes" state-mandated indicators of wellbeing, to, purportedly, "keep children safe, promote their development and respect their views".

[1] https://www.gov.scot/Resource/0043/00430746.pdf

“Outcomes” and “rights” are not necessarily compatible, and not interchangeable, as children’s rights campaigners, including ARCH[2] (on the outcome-based Every Child Matters agenda in England, which is mirrored by GIRFEC), and academics[3] underlined prior to the Supreme Court ruling.

However, more problematic for the Scottish Government is the fact that Article 8(2) of the ECHR does not include the “wellbeing” of children and young people as a reason for interference by a public authority in to someone’s private and family life.

This has not, however, halted current practice in relation to GIRFEC. A “Consent Flowchart” on the Perth & Kinross Council website poses the following question to practitioners: “Are You Worried or Concerned About a Child or Young Person’s Wellbeing?” If the answer is “Yes”, the practitioner is told they do not need consent and are to “share information”.

Perth & Kinross Council's “CPC Guidance for Practitioners, Working with Hostile and/or Non-Engaging Parents and Carers”, effective from September 13 2011, states under the GIRFEC section: “**Nothing** whatsoever in Scottish, UK and/or European Law and/or Scottish child protection policy environment prevents you from sharing and/or exchanging personal information regarding a child or young person, if you have any of these concerns, no matter how small and/or insignificant you think that worry and/or concern may be.” [their bold]. The “concerns” mentioned include “wellbeing”. Furthermore, the Scottish Government admits in its submission that “there is no threshold of wellbeing which must be achieved by a child or young person”.

Wellbeing underpins the GIRFEC framework, but it cannot be placed on a statutory footing when, as the Supreme Court stated, it is “undefined” and the SHANARRI wellbeing indicators “are not themselves defined, and in some cases are notably vague”. The Faculty of Advocates has previously urged the Scottish Government to ”get back to UNCRC basics”[4] in guidance.

The Secretariat of the “independent” GIRFEC Practice Development Panel highlights this ongoing inability to define wellbeing. It wrote to members on June 8[5]: “Some of the points that haven’t been incorporated just yet include: ...Defining wellbeing (requires further discussion with legal group and panel).”

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[2] https://www.youtube.com/watch?v=LRQr2VrtX-0

[3] http://www.academia.edu/20034249/Children_s_Wellbeing_and_Children_s_Rights_in_Tension

[4] http://www.advocates.org.uk/news-and-responses/news/2016/jun/guidance-on-child-convention-could-be-more-effective-suggests-faculty

[5] https://beta.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2018/08/foi-18-01962/documents/foi-18-01962---related-documents-3/foi-18-01962---related-documents-3/govscot:document/?inline=true

In addition, evidence from practitioners to the Education and Skills Committee refutes the Scottish Government's claim that GIRFEC "supports a common understanding of "wellbeing"." Yet practitioners have "assessed", and continue to "assess", the "best interests of the child" without a threshold for wellbeing and with no definition of wellbeing. The reality of this situation, as many families have discovered, is subjective decision-making by practitioners, based on "worries", "gut-feelings" and "hearsay". This does not reflect an approach that is "appropriate, proportionate and timely".

Even if a definition were to meet the accessibility and foreseeability tests demanded by law, data collection and sharing on the basis of wellbeing would have to rely on consent, since the Supreme Court upheld the compulsion threshold, explicitly stating that promoting wellbeing was not listed as one of the exemptions in Art 8(2). Regardless of practitioners' "consideration", they still need consent because it is the parents' responsibility to determine a child's best interests, as underlined by the court, until the compulsion test is met.

The submission from the ICO reaffirms the point made by the Supreme Court over "the potential for an imbalance" that such a situation can result in, quoting paragraph 95 of the judgment regarding the risk that parents will think they must accept the advice and support offered through the GIRFEC approach and that any "failure to co-operate" will be viewed as "non-engagement" and surreptitiously elevated to risk of harm.

This echoes the experience of families under the GIRFEC approach, as evidenced in over 90 submissions from families[6] who do not see an entitlement to services but rather an imposition of state-mandated outcomes.

The Scottish Government has submitted (para 6) that it had "spoken with Alison Preuss on a number of occasions". It can be confirmed that, prior to a frustrating email exchange beginning in June 2018 which led to a meeting on 8th August, the last contact with the petitioner was in September 2013, when a meeting with ministers was arranged by a local MSP. The Scottish Home Education Forum has since been excluded from engagement, "intensive" or otherwise, and the recent meeting simply reinforced the position that government would not interfere in local authority matters.

In other words, statutory home education guidance could be ignored with impunity, and thus families continue to experience discrimination, harassment and malicious child protection referrals, often due to their philosophical objections to outcome-based education and GIRFEC, which are antithetical to children's rights. Those who remove their children from school due to unmet additional support needs and/or safety concerns (the fastest growing cohort of home educators according to a recent

[6] http://www.np-fringe.uk/the-evidence

survey[7]) are especially vulnerable to abuses of power. This includes forum member Marie, who had to raise her concerns with the Deputy First Minister live on BBC Radio Scotland[8] in order to secure an investigation.

The Scottish Government claims that GIRFEC "does not create new thresholds for information sharing". This is contrary to the Supreme Court ruling of 2016, which records (in relation to the GIRFEC legislation in Part 4 of the Children and Young People (Scotland) Act 2014) that "one of the principal purposes of Part 4, as envisaged at that stage, was to alter the existing law in relation to the sharing of information about children and young people" (Para 4).

Moreover, Maureen Falconer of the ICO says to practitioners in a video from 2013: "We know when we're talking about child protection issues we are looking at the significant harm, but we know we've got the Children and Young People Bill coming through which is lowering that trigger down to wellbeing."[9]

The Scottish Government continues to try to distance itself from the 2013 letter of advice from the ICO, but this position is not consistent with the facts. The GIRFEC Programme Board meeting of September 12 2012[10] records a report (GIRPB/07/07) on "Information Sharing: Risks to wellbeing leading to significant harm". Discussion on this resulted in the board agreeing "engagement with the Scottish Information Commissioner should take place in order to open discussion on the extent to which information could be shared without consent if there was a concern that there was a risk or potential risk to wellbeing". The action point notes: "Engage with the Scottish Information Commissioner to open a discussion on sharing concerns about a child's wellbeing."

GIRPB/07/07 was also the Scottish Government's "discussion paper" for the agreed meeting with the ICO that then took place on November 23 2012. Minutes from the GIRFEC Programme Board meeting of November 27 2012[11] record "a good meeting" between the Board members, GIRFEC officials and Ken MacDonald, Scottish ICO, at which "ICO stressed neither the Act or ICO should be seen as a barrier".

The minutes then record: "1. GIRFEC team to produce statement to encourage shift and information shift: ICO to endorse this. 2. Joint work between ICO and GIRFEC on consent guidance including examples to give reassurance on this."

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[7] http://www.home-education.biz/education/3541/

[8] https://twitter.com/BBCRadioScot/status/1030124526259134464

[9] Getting Our Priorities Right seminar, Perth, 29 November 2013: https://www.youtube.com/watch?v=ybpx6Brh4HA&feature=youtu.be+%288%3A45%29 (8:45)

[10] https://www.gov.scot/Resource/0041/00411740.pdf

[11] https://www.gov.scot/Resource/0043/00430746.pdf

The February 2013 minutes of the GIRFEC Programme Board[12] record: “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...”

Interestingly, the “independent” 2013 statement put out by the ICO on March 28 2013 quotes the Scottish Government discussion paper GIRPB/07/07, saying: “In many cases, a risk to wellbeing can be a strong indication that the child or young person could be at risk of harm if the immediate matter is not addressed,” and it continues: “While it is important to protect the rights of individuals, it is equally important to ensure that children are protected from risk of harm.”

Thus, it is clear the 2013 statement from the ICO was based on extensive discussions with, and reference to, a report authored by the Scottish Government. It was quickly circulated to all community planning partnerships by the chair of the GIRFEC board with an accompanying memo[13] that stated: “The GIRFEC Programme Board and Ken MacDonald, the Assistant Information Commissioner for Scotland (ICO), **have agreed a short guidance paper** which dispels the common misconception that the Data Protection Act (1998) is a reason not to share information.” [our bold].

Since FOI requests have failed to elicit any minutes of the “good meeting” with the ICO on November 23 2012 (which crucially led to the lowering of the data sharing threshold without legal advice or reference to parliament), it is our view that attendees could be called upon to recall these discussions during a public inquiry into the circumstances that led up to the breaching of human rights through unfettered data gathering and sharing.

The close working relationship between the ICO and the Scottish Government was further evident immediately after the Supreme Court ruling, when emails record Ken MacDonald’s reaction[14] as a “disappointing result” and the Lead Communications Officer as saying: “We’re disappointed with the judgment because we had 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 ICO subsequently took the unusual step of requesting that the Scottish Government take down its 2013 advice when it released its 2016 statement15 but that withdrawal was not 'cascaded' directly or via community planning partnerships to

[12] https://www.gov.scot/Resource/0043/00430422.pdf

[13] https://www.gov.scot/Resource/0041/00418079.pdf

[14] https://no2np.org/oops-ico-officials-exposed-embarrassing-email-gaffes/

[15] https://no2np.org/wp-content/uploads/Letter-from-Ken-Macdonald-21-10-2016-003-1.jpg

other agencies, who have continued to cite the earlier statement to justify unlawful information sharing.

Legitimate complaints by families had meanwhile been dismissed due to the wrong threshold having been embedded in public policies, all of which referenced the ICO advice from 2013 that had been circulated by the GIRFEC board chair. A letter to a complainant[16] dated August 11 2014 from Aberdeen City Council provided confirmation that the Scottish Government and ICO had jointly endorsed the lower threshold, so the ICO was never going to uphold the complaint.

Police Scotland also intimated in evidence to the Education and Skills Committee last October that the 2013 ICO advice led them to believe they could share information routinely below the level of child protection, but had "tightened up" since the ruling.[17] Yet minutes of a GIRFEC Lead Officer meeting on September 4 2017[18] recorded that Police Scotland "does not feel like it needs to comply [and] will continue to operate a no consent model".

The ICO's response to the committee does not address the issues of our petition, in which we seek clarification and accountability on how the unlawful threshold came to be agreed by a regulator who is obliged by law to act with complete independence[19], and why it is **still** being applied across services. It is also less than candid regarding the contrasting positions of its 2013 letter of advice that reassures practitioners that the Data Protection Act 1998 (DPA) "should not be viewed as a barrier" and that of 2016, which emphasises the DPA as a "measure implementing the protections for individuals" and emphasises the "duty of confidentiality" due to children and young people.

We must again correct the misstatement by the Scottish Government which continues to claim that the Supreme Court found the Named Person scheme to be "legitimate and benign". The Supreme Court in fact ruled that the "aim of the [2014] Act, which is unquestioningly legitimate and benign, is the promotion and safeguarding of the wellbeing of children and young people". This does not extend to the means by which the Scottish Government seeks to exercise that aim, ie GIRFEC and the Named Person. Indeed, the Children's Commissioner's office issued an apology[20] for failing to make this key differentiation after the judgment was handed down.

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[16] https://leahurst66.files.wordpress.com/2018/09/sansbury-to-dga-redacted-2014-08-11.pdf

[17] http://www.parliament.scot/S5_Education/Meeting%20Papers/20171025_Education_and_Skills_-_PUBLIC_Papers.pdf (p17)

[18] https://leahurst66.files.wordpress.com/2018/09/170904-girfec-lead-officers-mtg.pdf

[19] https://gdpr-info.eu/art-52-gdpr/

[20] https://twitter.com/CYPCS/status/760121543544467456

We must insist that the Scottish Government ceases its intentionally misleading and disingenuous conflation of the quote on “legitimate and benign” in terms of GIRFEC and the Named Person policy and would point to an analysis of the judgment by lawyer and social worker Allan Norman[21] (who had predicted the outcome in his consultation response and was the instructing solicitor in the 2013 Haringey case[22], in which the established threshold for compulsory intervention was upheld, just weeks before the Scottish government circulated advice that they should ignore it):

“The Supreme Court held that nothing in Article 3 could extend the State’s powers to interfere with the negative rights in Article 8.[23] The court also pointed out that in order to properly understand the child’s best interests, Article 18 of the CRC comes into play.[24]: ‘Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern.’” [emphasis in judgment].

Whether or not the Children and Young People (Information Sharing) (Scotland) Bill “fully responds to the Supreme Court’s findings” has yet to be determined by Parliament and may well be subject to further legal challenge. Its provisions cannot be determined as “lawful and proportionate and fully respecting the rights of children and families” while it does not have a definition of “wellbeing” and a Code of Practice.

We note in the Scottish Government’s submission (para 19) the admission and acceptance of our stated position that its “GIRFEC policy” is “founded” upon “data misuse”. Breaching human rights to prevent undesirable outcomes is not only unlawful, but any such data-driven predictive social sorting carries huge risks, as a Surveillance Society[25] report for the ICO found. According to former assistant ICO Jonathan Bamford: “If your parents both have criminal records or you have a bad school attendance record because of poor health, even if you are the best-behaved kid in class, you will find that every teacher is likely to treat you with suspicion.”[26]

Eileen Munro also observed[27] the same “risky assumptions: that professionals can accurately predict which children will be problematic, that they can intervene effectively, using coercion if necessary, to change the course of children’s development, and that there will be adequate resources to meet the needs identified through screening. It fails to consider what harm may be caused by the process of

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[21] http://www.pinktape.co.uk/cases/the-named-persons-scheme-when-protecting-wellbeing-is-totalitarian/

[22] http://www.bailii.org/ew/cases/EWHC/Admin/2013/416.html

[23] http://www.bailii.org/uk/cases/UKSC/2016/51.html#para89

[24] http://www.bailii.org/uk/cases/UKSC/2016/51.html#para72

[25] https://ico.org.uk/media/about-the-ico/documents/1042390/surveillance-society-full-report-2006.pdf

[26] https://www.theguardian.com/technology/2007/jul/19/guardianweeklytechnologysection.it

[27] http://eprints.lse.ac.uk/4403/1/Confidentiality_in_a_preventative_child_welfare_system(LSERO).pdf

surveillance of families and by labelling children as future problems.” On outcomes-based early intervention policy she concluded: “Rejecting the rights approach to defining children’s needs that is embodied in the UNCRC, the government has opted for its own set of targets and performance indicators. These can be criticised for placing too much value on the needs of society (for well-educated, healthy, law-abiding citizens) compared with the needs of the individual child.”

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.