

## **Meeting to discuss Code of Practice (at Victoria Quay) – 4 April 2018**

**John Paterson** (Scottish Government Legal Directorate) (chair) (“**JP**”)

**Maureen Falconer** (Information Commissioner’s Office) (“**MF**”)

**Norma Shippin** (Central Legal Office) (“**NS**”)

**Peter Hessett** (Society of Local Authority Lawyers and Administrators ) (“**PH**”)

**Alison Reid** (Clan Childlaw) (“**AR**”) (guest)

**Maria J. Galli** (South Ayrshire Council) (“**MG**”) (guest)

**SG officials**

### **Welcome and approval of minutes of meeting held on 20 February 2018**

The chair welcoming everyone to the second legal focus group meeting. Minutes of the previous legal focus group meeting (20 February 2018) circulated and legal focus group members agreeing on the content of the minutes.

### **Statutory duties under Named Person provisions and Article 8 ECHR considerations**

It was noted that, following the previous GIRFEC Practice Development Panel (the “Panel”) discussions (14 March 2018), the Panel requested that the legal focus group discuss the statutory duties under the Named Person provisions.

Group noting that the duty is to “make available” a named person service, under Part 4 of the Children and Young People (Scotland) Act 2014 (the “2014 Act”). It was noted that section 19 of the 2014 Act describes the named person service.

The group discussed that, in terms of GDPR, making the named person service available would fall within the “public task” function. It was suggested that, unless there was a risk of harm, the decision of whether or not to engage with the service would be voluntary. As such, the “necessity” test would not apply if the parent or child did not wish to engage with the service.

It was suggested that, where the threshold is below the risk of harm, it would be likely that consent would be required prior to any data sharing taking place. The group once again highlighted the difficulties with obtaining freely given, unambiguous consent, in circumstances where there is an imbalance of power; however, it was highlighted that the complexities of this were very much dependent on the facts of each individual case.

It was suggested that, even where sharing information is considered to fall within a public task/public interest function, an Article 8 ECHR proportionality assessment would still require to be carried out, in order to ensure that there would be no disproportionate interference with an individual’s right to private and family life.

AR highlighted that, in her organisation’s view, if you did not legislate on information sharing, then there would be no legislative scheme to challenge. However, by legislating in order to restate the legal position, the risk of challenge against an Act of the Scottish Parliament is opened up. In AR’s view, adding a further piece of legislation, makes something complicated, even more complicated.

**ACTION: following the legal focus group’s discussion on this point, officials to draft a note setting out the statutory duties under the 2014 Act, and how they relate to a public task to share information, and share this with the legal focus group and wider Panel.**

#### Discussion on what constitutes welfare, wellbeing, and child protection concerns

It was noted by the Chair that the Panel had asked the legal focus group to discuss what constitutes welfare, wellbeing or child protection concerns. It was understood that, in particular, the Panel were interested in knowing where the line is on when information can be shared without consent.

The legal focus group indicated that the assessment of “wellbeing” is contained within section 96 of the Children and Young People (Scotland) Act 2014. The relevant legislation related to welfare and child protection considerations can be found at section 67 of the Children’s Hearing (Scotland) Act 2011.

It was suggested that, firstly, you would need to explore whether or not there was a relevant statutory duty. If there was, then you would have to explore whether or not it was a safety or health matter. If it was a safety or health matter, then potentially you would not need to obtain consent in order to share information, however, you would still have to consider whether or not sharing information in each particular case would be compatible with Article 8 ECHR.

**ACTION: officials to produce a note on the legislative assessment of wellbeing, welfare and child protection.**

#### Discussion of draft flowchart circulated in advance of meeting

The legal focus group were in agreement that the draft flowcharts were very helpful in terms of capturing the law and attempting to break it down in detail. However, the legal focus group felt that the draft flowcharts did not address the accessibility of the code for rights holders or practitioners

It was highlighted that, if the flowcharts were included within a binding code of practice, and the practitioner failed to follow a step, they would in fact be breaching the binding code and therefore, the law. The group felt that, for example, working out the legal basis for processing data under GDPR should not be something a practitioner should have to work out; it should be the data controller’s responsibility to work this out, or for legal teams to advise on.

While the group felt that publishing these flowcharts would be extremely helpful as a tool for those providing legal advice to practitioners (as opposed to practitioners themselves), they could be made available by way of, for example, non-binding appendices or guidance,.

The legal focus group suggested that one approach would be to have a detailed code of practice targeted at data controllers and guidance would be produced for all other parties. However, it was noted that the Supreme Court had suggested that

guidance, which was not binding, may not rectify the issues at hand. It was also noted that this would not fulfil the remit of the Panel, who have been asked to produce an accessible code, that can also be used by service providers.

Alternatively, it was suggested that you could have a high level short code of practice. It was noted that South Ayrshire Council have in collaboration with the pan-Ayrshire GIRFEC partners developed an interim flowchart, which is only one page in length, and she is happy to share this with the legal focus group, as well as with the wider Panel, as an additional example for consideration and comment. The flowchart was adopted and agreed by each of the Children's Services Planning Groups.

AR suggested that in terms of the Supreme Court judgement you would have to consider whether it would be foreseeable that information could be shared and ask if this could be made accessible? AR suggesting that it would need to be simplified.

The group suggested that and the introduction of the code of practice is expanded in order to encompass the duty to consider sharing information.

**ACTION: officials to circulate to the legal focus group, and to the wider Panel members:**

- the draft legal flowcharts,
- the current illustrative draft code of practice,
- guidance on information sharing prepared by South Ayrshire Council and partners, and
- a flowchart prepared by South Ayrshire Council and partners.

**ACTION: group agreeing that the next legal focus group meeting will take place on 8th May at 2pm. Officials will send an official invite for this.**

**ACTION: legal focus group to consider the draft example scenario circulated in advance of this meeting and provide feedback on this by email.**