

## **Meeting to discuss Code of Practice (at Victoria Quay) – 12 June 2018**

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

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

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

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

**Kenny Meehan** (Glasgow City Council) (“**KM**”) (guest)

**SG officials**

### **Welcome and approval of minutes of meeting held on 4 April 2018**

Group discussing the minutes of the previous legal focus group meeting and suggesting a couple of minor amendments.

Group also discussing and agreeing that they are content for the minutes of the legal focus group meetings to be published by the Scottish Government.

### **Latest iteration of code of practice – discussion of legal points**

The legal focus group members were generally content with the progress of the latest iteration of the draft Code, although it was agreed that it is too long. It was commented that the latest iteration flowed naturally from relevant human rights law, and then to data protection law. Some discussion took place around the Common Law duty of confidentiality and whether it is necessary to include it in the draft Code.

In terms of the flowchart on the legal duties under the relevant provisions of the Children and Young People (Scotland) Act 2014, the general feedback was that it was helpful, however, it would be more appropriate for inclusion in guidance materials.

It was noted that data protection law had evolved since the Supreme Court's decision in the *Christian Institute* case. The code of practice could therefore be drafted in a manner that addressed the principles of the Supreme Court's decision, ( for example compatibility with Human Rights Law) rather than the specifics of the decision.

The group discussed the application of consent in light of GDPR. A distinction was made between consenting to information sharing and choosing to use a service where information must be shared by an organisation in order to comply with their statutory obligations. The group discussed examples of these other statutory obligations including child protection or referrals to SCRA. Some members of the group felt that the use of the word “consent” in the current iteration of the draft Code could be revisited to take account of this distinction. It was also commented that the child's rights to participate and their views to be considered and taken account of in any decisions to share information were also relevant.

Members of the group commented that they agreed with the current position taken by the draft Code regarding a higher standard of protection for individuals applying when relying on consent for GDPR purposes, in comparison to relying on consent under other laws. In particular, the Group discussed whether the references in the draft Code to the ‘law of confidentiality’ need to be further explained and clarified to avoid confusion.

The group discussed the difficulties with consent under GDPR when a public authority is involved. The group once again discussed the power imbalance issue where a public authority is concerned. It was suggested that, whilst there will not always be an imbalance of power in this scenario, it must be acknowledged that reliance on consent as the legal basis for

processing data will not be the norm where a public authority is concerned. Some members of the group disagreed with this highlighting that in practice in children's services, in all but exceptional cases, agreement or consent of the child and parents will be sought before information is shared. It was also suggested, that the draft Code starts from the position of seeking consent or informed agreement in every case, as the norm.

**ACTION: the legal focus group asked officials to consider whether the code could be drafted in a manner that set out the policies and procedures that service providers should have in place. This would ensure that sufficient safeguards are in place for service providers to meet their legal duties under the 2014 Act. Some members highlighted that, although the language on this should be explicit, it should not be overly prescriptive.**

The group generally agreed that reference to the best interests of the child should be included in the general policy section of the draft Code, and that this iteration of the code should be amended to reflect that.

In terms of the length of the draft Code, and the specific terminology used (for example, references to "you"), it was suggested these could be considered in detail once the draft Code had been developed further.

#### Data protection Act 2018 – discussion on the provisions which relate to the safeguarding of children

It was noted that the provisions of the new Data Protection Act 2018 now provide for a specific condition for processing which data controllers can rely on when there is an issue regarding the safeguarding of children and of individuals at risk. It was commented that the benefit of these new provisions are that a specific condition for processing special categories of data have now been provided. ,

It was commented that, in terms of safeguarding of children and individuals at risk, the introduction of these provisions mean that the threshold is now clearer. It does not however lower the threshold as, ultimately, there is still an ECHR proportionality assessment that must be carried out, and arguably, the threshold remains as before at levels of 'risk' and safeguarding or child protection.

In terms of how the draft Code could address this point, the group suggested that the Article 9 conditions under GDPR could be referred to, and linked to the relevant provisions of the Data Protection Act 2018. It was not thought to be necessary for the code to set out a detailed analysis of the provisions of the Data Protection Act 2018.

**ACTION: Agreed that officials will circulate a further iteration of the draft Code to members.**

**ACTION: Agreed that officials will email members to arrange the next legal focus group meeting.**