

## **Legal Focus Group – 17 July 2018 Scottish Government, Victoria Quay**

Attendees:

Kenny Meechan

Norma Shippin (Central Legal Office)

Maureen Falconer (Information Commissioner's Office)

Scottish Government Officials

Maria J. Galli (South Ayrshire Council) (Guest) (via conference call)

### Welcome and apologies

Minutes of the previous meeting (12 June 2018) were circulated and group members agreed that, due to the limited time available, these could be approved via email.

### Consent and engagement with the named person service

The group agreed that people must be suitably informed that engagement with a named person service is not mandatory and not using the service would not of itself constitute a reason for concern. However it was noted that this was complex as many aspects of the provision of a named person service overlaps with the provision of other parts of public services, e.g. provision of information, advice and support through health visiting and as part of engaging with school provision. The key thing is that people must be provided with the full information about what is going to happen with their information. It was noted that the Supreme Court judgment had highlighted the importance of this. It was further noted that the named person or services will only be in a position to consider sharing information if they engaged fully with the family in any decision making processes and was human rights focused – rather than on the basis of data protection alone.

The group discussed the different ways in which a consensual approach to accessing the named person service could work and, in particular, how this would work in relation to information sharing. The group highlighted the importance of clearly communicating to children and parents what the service involves and getting their agreement at the outset as to engagement. Further active engagement would be required between services with children and families at each stage of service provision. It was noted that, whilst under data protection law the lawful basis for processing data would likely be public task and substantial public interest, this would not negate the need for consensual and active engagement with the children and families concerned. The conditions for sharing information would be clearly set out at the outset. This would allow children and families to make an informed choice in respect of their active engagement with the services on offer.

The group agreed that spelling out the data protection principles in the code was unnecessary given the previous discussion on adding hyperlinks for clarity.

**ACTION: the section which refers to the data protection principles in the Code should be removed.**

In relation to the drafting of the Code, it was stated that aims of the policy should come before any applicable law and it should be clear on what is trying to be achieved to allow public bodies to fulfil their statutory duties. There was a need to strongly articulate that engagement with the service should reflect a rights based approach.

**ACTION: The Panel should consider primarily promoting an approach to information sharing in the Code based on active engagement by children, young people and parents with clearly defined services The background within the Code should highlight the rights based approach.**

### Laws of Confidentiality

It was noted that the draft code of practice implies that everyone has a duty of confidence. In many circumstances the nature of the information being processed and the circumstances around it will have a quality of confidence. Some specific people have duties of confidentiality e.g. certain professions, contractual obligations, medical and legal. It was suggested that people should initially refer to their relevant codes of practice/ conduct and there was a risk of legal challenges when trying to summarise common law. A solution was offered to provide hyperlinks to these codes.

**ACTION: The Confidentiality section of the draft Code should be streamlined and hyperlinks to professional duties of confidentiality be included**

It was highlighted that the general feedback from the last Practice Development Panel meeting was that people were moving towards reducing the length of the code but producing more detailed guidance, supplying hyperlinks to other information already available.

The group discussed the link between the Supreme Court judgement and the Code. It was suggested that the code was trying to address the Supreme Court's decision in the context of a duty to consider information sharing, rather than a duty to share information.

**ACTION: Members of the group agreed that the annexes were superfluous and should be removed.**

### Consent

The group agreed that the discussion around the interpretation of "consent" have now evolved given the discussion and debate surrounding active engagement. It was agreed that a human rights based approach must be taken, and this would also address some of the concerns highlighted in the Supreme Court judgment.