

**Education and Culture Committee  
Children and Young People (Scotland) Bill**

**Schoolhouse Home Education Association**

### **Introduction**

1. The Scottish Government has brought forward legislative proposals in its Children and Young People (Scotland) Bill, which include legislative underpinning for its policy of Getting It Right For Every Child (“GIRFEC”). This proposal has given rise to a call for written evidence. This response is made in response to that invitation.
2. I am instructed in this matter by Schoolhouse Home Education Association. I am a solicitor practising in England and a social worker registered in England. I qualified as a social worker 23 years ago, and as a solicitor 13 years ago. I have a niche practice, specialising in the law relating to the practice of social work. I am also a visiting lecturer at a number of universities, teaching and examining in social work law.
3. I am the solicitor who brought the case of *AB and CD versus Haringey Council*<sup>1</sup> on behalf of the successful Claimants. The Claimants were granted both Data Protection Act remedies and Human Rights Act damages<sup>2</sup> when Social Services intervened on the basis of a referral which did not meet the threshold of “significant harm”. In relation to data protection, the Court held that there was no legal basis for the information sharing. The Human Rights Act damages were awarded in respect of a breach of the right to respect for private and family life – Article 8. I am aware that Schoolhouse HEA have instructed me in the light of my role in that case, and will make appropriate reference to it.
4. I am invited specifically to answer the question whether the legislative proposals – and in particular those in relation to a “named person” for every child – are compatible with European law. The short answer is that they are not, and I set out why below. Since I also practise as a social worker, and as a visiting lecturer, I also comment upon the compatibility of the proposals with professional obligations, and upon their utility.

### **European Law**

5. There are two strands of over-arching law emanating from Europe. This law derives from European Treaty and Convention obligations, and UK legislatures

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<sup>1</sup> [AB & Anor, R \(on the application of\) v The London Borough of Haringey \[2013\] EWHC 416 \(Admin\) \(13 March 2013\)](#)

<sup>2</sup> Set out in the Order, which can be made available on request. See also news coverage e.g. from BBC <http://www.bbc.co.uk/news/uk-england-london-21783900>, Guardian <http://www.guardian.co.uk/society/2013/mar/14/couple-accused-of-child-abuse-win-damages> or Telegraph <http://www.telegraph.co.uk/news/uknews/law-and-order/9977557/Haringey-council-tried-to-crush-our-family.html>

must act compatibly with it. The first strand is the law of European Union, or EU law<sup>3</sup>. The second strand is human rights law<sup>4</sup>. Both are relevant.

### **Data Protection – Consent and Necessity**

6. The Data Protection Act is an Act that was passed to give effect to the UK's obligations under EU law<sup>5</sup>. That is an important point because it means that it is simply not open to UK legislatures to change it if they do not like it.
7. Although data protection laws are complex, the underpinning principles are in fact very simple indeed. The Act sets out a complete list of the circumstances in which the processing of data – which includes information sharing – is permitted<sup>6</sup>. Ultimately, information sharing is permitted in two situations:
  - with consent; and
  - where it is necessary.
8. To be clear, while there are several alternatives to consent, every one of the alternatives has a requirement of necessity. This should be neither surprising nor objectionable: you can share information when you need to, and whether or not you need to, you can share information with permission. But the Data Protection Act simply does not allow – anywhere – for information to be shared without consent when it is not necessary to do so.
9. It follows that any legislative provision which purports to allow information sharing which is neither consensual nor necessary, will fall foul of the Data Protection Act and the EU directive from which the Data Protection Act derives.
10. Of course, the concerns about GIRFEC are that it does precisely that. There is no objection to the involvement of a named person where they are involved with consent. There is no objection to the involvement of a named person where their involvement is necessary. The objection is to the automatic involvement without consent or necessity.
11. It might be argued that information-sharing becomes “necessary” either to comply with the legislation once enacted in Scotland, or more generally to safeguard children. To address this, I think it is helpful to consider the Haringey case. In that case, the local authority received a safeguarding concern and made routine enquiries of other agencies without seeking consent. In its Defence, it sought to argue that it was acting under an enactment, believing that the child protection threshold of “significant harm” was met.
12. This argument was rejected. The Court did not accept that the child was at risk of significant harm. But in any case, and separately, it did not accept that it was

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<sup>3</sup> The relevant court is the European Court of Justice

<sup>4</sup> This derives not from the EU, but from our membership of the Council of Europe, and our obligations under the European Convention on Human Rights. The relevant court is the European Court of Human Rights.

<sup>5</sup> Specifically [Directive 95/46/EC](#)

<sup>6</sup> Schedule 2 '[Conditions relevant for purposes of the first principle: processing of any personal data](#)'

necessary to share information without consent. Once again, this conclusion seems both unsurprising and unobjectionable. Since the alternatives to consent require that information sharing is **both** lawful **and** necessary, it is hardly surprising that pointing to a piece of legislation which allows for information sharing is not enough. **Information sharing is not necessary because it is lawful; it is lawful when it is necessary.**

13. My attention has been drawn, in this regard, to statements by the Assistant Information Commissioner for Scotland, Ken Macdonald. He is quoted as saying<sup>7</sup>,

“Where consent isn’t appropriate – for example, where an assessment under the SHANARRI principles raises concerns, then the Act provides conditions to allow sharing of this information... While it is important to protect the rights of individuals, it is equally important to ensure that children are protected from risk of harm.”

14. I make four observations in response to that statement, a statement which strikes me as seriously misconceived in respect of the fundamental principles the Commissioner is supposed to protect.

15. **Firstly**, I draw attention to these words of the Information Commissioner himself, commenting on similar issues in relation to the Every Child Matters agenda in England<sup>8</sup>:

“The *Every Child Matters* agenda extends social care from protection to welfare. Although there are overlaps, this shift means that substantially more information will be collected and shared about substantially more children for different reasons. These different purposes raise different considerations from a data protection perspective. It is important that approaches used in the context of protection are not assumed to be transferable to the welfare context.”

16. The Information Commissioner (as distinct from the Assistant Commissioner in Scotland) here distinguishes, correctly, between information shared for the purposes of protection and that shared for the purposes of welfare. The Assistant Commissioner in Scotland, by suggesting that SHANARRI concerns may be shared without consent, has blurred the important distinction.

17. **Secondly**, Assistant Commissioner in Scotland explicitly says here that “consent isn’t appropriate”. His guidance seems to suggest this is his reason<sup>9</sup>:

“the issue of obtaining consent can be difficult and it should only be sought when the individual has real choice over the matter”

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<sup>7</sup> [GIRFEC Bulletin Issue 1: Information sharing](#)

<sup>8</sup> [Protecting Children’s Personal Information: ICO Issues Paper, Information Commissioner’s Office](#)

<sup>9</sup> [Information Sharing Between Services in Respect of Children and Young People](#) – Information Commissioner’s Office, Scotland

18. This is an extraordinary statement in terms of its implications for professional practice. It purports to exclude attempts to work with families co-operatively in any case where that attempt may fail. It is hardly surprising if such an approach results in deep suspicion and hostility between families and named persons. Professionals generally seek to work with consent in all but the most limited circumstances, and do so because it is more likely to be effective.
19. Once again, the argument is reminiscent of issues that were explored in the Haringey case. The relevant test for seeking consent there was not whether the individual has real choice over the matter but whether seeking consent would result in “increased risk of suffering significant harm”<sup>10</sup>. To put it another way, even if a child is considered at risk of significant harm, consent should be sought unless the process of doing so would result in additional harm. The approach of the Assistant Commissioner in Scotland to trying to work co-operatively with families could not be more at odds with this threshold test for consent!
20. **Thirdly**, the use of the term “harm” in the Assistant Commissioner’s statement is curious, and reflects a blurring of hitherto clear legal concepts. The threshold for compulsory state intervention has hitherto been “significant harm”, a threshold test higher than “harm”, and clearly distinguishable from “well-being concerns”. But the Assistant Information Commissioner here suggests some link between well-being concerns and harm and that that is enough: “a risk to wellbeing can be a strong indication that a child or young person could be at risk of harm”<sup>11</sup>. That is, frankly, a very casual approach to statutory thresholds, suggesting that an associative link between two measures may suffice for a legal threshold. It shouldn’t.
21. **Finally**, I observe that the Assistant Commissioner mentions alternatives to consent “The Act provides several conditions/justifications for processing, only the first of which rely on consent”<sup>12</sup>. No mention is made, as I have pointed out, that every alternative to consent includes the word “necessary”; by creating the impression that consent is a minority approach to information sharing, it seems to me the Assistant Commissioner fails to promote the spirit of the Act.
22. To be very clear: whenever there are significant child protection concerns, there are no legal problems. No-one can reasonably object to protecting children from significant harm. Doing so is lawful and necessary. It is the compulsory intervention to impose contested well-being outcomes that will fall foul of data protection principles and the EU directive.

### **Human Rights – the citizen and the State**

23. The human right to respect for private and family life has, in recent years, been one of the most contentious human rights. Before considering its application to

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<sup>10</sup> ‘Working Together to Safeguard Children’ 2010 edition at 5.18, 5.35, 5.37 and 5.47

<sup>11</sup> [Information Sharing Between Services in Respect of Children and Young People](#) – Information Commissioner’s Office, Scotland

<sup>12</sup> *ibid*

GIRFEC, it is useful to set the scene with some reminders about the wider human rights context – and, to dispel some myths.

24. Human rights are concerned with the relationship between the citizen and the State, rather than the relationship of human beings one to another. In modern form, they can be traced back very directly to the experience of the second World War, giving rise to the belief that it was necessary to give rights to the citizen to protect them from an over-bearing State:

“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind... whereas it is essential if man is not to be compelled to have recourse as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...”<sup>13</sup>

25. That being the case, it is important to recognise that the GIRFEC legislative proposal represents a fundamental reconfiguring of the relationship between the citizen and the State – and therefore automatically engages human rights.

26. It was interesting to note these words from the Minister for Children and Young People, Aileen Campbell, in her evidence to the Education and Culture Committee on 25<sup>th</sup> June<sup>14</sup>:

“Everything that we do and all our policies are underpinned by GIRFEC— getting it right for every child—and making sure that the child is at the centre of decisions. Of course we recognise that parents also have a role...”

27. These words carry two flaws. Firstly, they fail to make explicit the role of the State. The named person, performing statutory functions, is going to be an agent of the State. The named person’s functions are defined with reference to the State’s view of the welfare of the child. Secondly, they reveal a perception that the role of parents is residual and secondary.

28. In both respects, I am reminded of the powerful words of the United Kingdom House of Lords giving judgment in [B \(a Child\), Re \[2013\] UKSC 33 \(12 June 2013\)](#)

“In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments including the European Convention on Human Rights (art 8), the International Covenant on Civil and Political Rights (art 23) and throughout the United Nations Convention on the Rights of the Child. As Justice McReynolds famously said in *Pierce v Society of Sisters* 268 US 510 (1925), at 535, “The child is not the mere creature of the State”.

<sup>13</sup> preamble to the [Universal Declaration of Human Rights](#)

<sup>14</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8255&mode=pdf>

29. The critical issue here is, whose view of the welfare and best interests of the child is embodied in GIRFEC? I have drawn down the powerful and emotive language used by the United Kingdom's highest court, the language of a totalitarian state moulding children to its own design, as a stark reminder that what Scotland is seeking to embody into legislation is something startling: pre-eminence to the State's view of what childhood should look like.
30. That cannot be said to reflect the approach taken by human rights law to the welfare of a child. On the contrary, human rights law gives pre-eminence to the family in relation to the welfare of children. Each party to the United Nations Convention on the Rights of the Child affirms they are<sup>15</sup>
- “...convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”
31. In recent years, the United Kingdom has been diverging from much of Europe in this area. It has developed an approach which suggests that where the child's welfare is in issue, the human rights of the child are in conflict with the human rights of the parent, and the State ought to intervene on behalf of the child against the parent. The European Court emphasises, however, the child's rights are embedded within the child's family context; any State intervention should so far as possible be in support of the family role.
32. It is important to appreciate that the principle of necessity, already discussed in relation to human rights, is also embedded in Article 8. Article 8 of course allows for intervention. But, as with data protection, any interference in private and family life has to be “necessary” and not simply desirable.
33. It has been established that necessity in data protection law and in Article 8 have a shared meaning: if interference with family life is not necessary, then interference with data protection rights cannot be necessary either<sup>16</sup>.
34. Since the imposition of a “named person” under the GIRFEC proposal has to amount to an interference with private and family life, it can be permitted under human rights law only if it is necessary. This then brings us back to the same position as in relation to data protection: the interference is necessary to protect children from harm, but routine surveillance is not.
35. In the case of *Marper and S*<sup>17</sup>, the European Court had to consider the lawfulness of the police DNA database. The European Court considered that it was unlawful

<sup>15</sup> Preamble to the [United Nations Convention on the Rights of the Child](#)

<sup>16</sup> In England, see [Southampton City Council v Information Commissioner \(Data Protection Act 1998\) \[2013\] UKFTT 2012\\_0171 \(GRC\) \(19 February 2013\)](#) “it is common ground that if Art 8 is infringed by the policy, [it] will not be “lawful” for the purposes of the first data protection principle by virtue of the Human Rights Act 1998 and, furthermore, that none of the conditions we have identified as potentially relevant will be satisfied, in that the processing will not be “necessary” for any of purposes set out therein any more than it will be “necessary” for the analogous purposes set out in Art 8(2).”

<sup>17</sup> [S. AND MARPER v. THE UNITED KINGDOM - 30562/04 \[2008\] ECHR 1581 \(4 December 2008\)](#)

because its extent was unnecessary. The DNA database was not even a universal database. It seems self-evident that universal surveillance is going to be considered unlawful because it is unnecessary. Indeed, proposals in England for a universal children's database were dropped subsequent to the Marper and S case. It is worth observing that Scotland is singled out in Marper and S for commendation by the European Court for applying a reasonable and proportionate approach that is in contrast to the rest of the United Kingdom<sup>18</sup>!

### And turning to research...

36. Putting aside my lawyer's hat and putting on my social worker's hat, I find myself asking different questions about GIRFEC. Not, is it lawful, but will it work?
37. The rationale for the surveillance approach to child protection and safeguarding can be stated thus: concerns can emerge from a pattern of low level concerns as well as from high level concerns, so a mechanism is needed to monitor low level concerns; and to avoid concerning families "slipping under the RADAR", it needs to be universal.
38. I make three observations in response (quite apart from the observations about its lawfulness already made). The first is about the sheer inefficiency of this approach. The second is about the opportunity-cost. The third represents a vision of a better alternative.
39. Universal systems, such as that envisaged by GIRFEC, necessarily generate significant amounts of data which has to be processed. In England, before the children's database was abandoned, there was a systems process manual that at 202 pages long dwarfed the statutory guidance: <http://webarchive.nationalarchives.gov.uk/20101223090149/http://www.dcsf.gov.uk/everychildmatters/download/?id=1552>.
40. Trying to extract significant information from this deluge of largely low-level irrelevant information was not an improvement. Essentially, it was more difficult to filter out the information that mattered.
41. Indeed there is a wealth of research into the failed children's database in England that it seems to me that Scotland, looking to embed GIRFEC some years later, should be aware of:
- "We concentrate on the aspiration of the ICS towards 'integration' and 'systematization' of services within children's services, at local and national levels... The evidence suggests substantial problems in accomplishing government policy aspirations in each of these areas. We review the likely reasons for these problems, and recommend a review of the ICS on the grounds that the difficulties are inherent rather than transitory..."<sup>19</sup>

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<sup>18</sup> See [paragraphs 109-110](#)

<sup>19</sup> [Shaw, I. et al, 'An Exemplary Scheme? An Evaluation of the Integrated Children's System' Br J Soc Work \(2009\) 39 \(4\): 613-626](#)

42. Moreover, 'intervention' was at the expense of actually working with families. Simply put, the resources could have been better spent on services that reached and benefited families as the end-user. If those services were perceived to be both genuinely helpful and not under compulsion, that would maximise confidence in the services. That principle underpins the recent call by leading social work academics for recognition of<sup>20</sup>

“the moral legitimacy of support and its difference from intervention and the need to engage with and develop a family support project for the twenty-first century. We call for a debate on the current settlement between the state and family life and for a recognition that a perfect storm has ensued from the unholy alliance of early intervention and child protection.”

43. In my review of the relevant law relating to both data protection and human rights, I critiqued GIRFEC insofar as it proceeds without consent or necessity, but also suggested that it was lawful and unobjectionable to proceed on the basis of consent or necessity. I go further. It is not only lawful and unobjectionable, consent-and-necessity could properly underpin a completely different vision for children's services in Scotland, one that would not only address lawfulness, but also command respect:

- The consent-element of services to promote the well-being of children in Scotland being provided in the form of services that are perceived as beneficial by service users, so likely to be taken up without any element of compulsion;
- The necessity-element of services to protect children from significant harm being delivered within a specialist child protection framework, with no blurring of child protection and well-being issues.

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<sup>20</sup> [Featherstone, B. et al 'A Marriage Made in Hell: Early Intervention Meets Child Protection' in Br J Soc Work \(2013\) doi: 10.1093/bjsw/bct052 First published online: March 19, 2013](#)