SUBMISSION TO EDUCATION & SKILLS COMMITTEE

PE01692: Inquiry into the human rights impact of GIRFEC policy and data processing

Submission by Alison Preuss

For health reasons, my co-petitioner Lesley Scott has recently stepped down from her role as Scottish Officer for Tymes Trust. This further submission is therefore made on behalf of the Scottish Home Education Forum with the endorsement of Jane Colby, UK Director of Tymes Trust.

Having only recently had our attention drawn to the Committee's brief discussion at the meeting on 27 November 2019, the Convener's letters to the Deputy First Minister and Local Authorities, and responses from the ICO and Mr Swinney, I trust the following points will be useful for Members in their further consideration of the petition.

Committee meeting, November 2019

Contrary to Liz Smith's understanding, this petition is not simply concerned with the 'named person' but with the impact on human rights of the wider GIRFEC policy, which has relied, by design, on the collection and sharing of children's, parents' and associated third parties' personal data with or without their knowledge or consent.

As a *state outcomes-driven* policy - open to wide and subjective interpretation of a nebulous notion of 'wellbeing' that lacks precise legal definition - GIRFEC has, in practice, proved to be antithetical to citizens' *self-defined* rights under the ECHR, which may not be interfered with arbitrarily.

In 2016, the Supreme Court reaffirmed the established threshold for interference with Convention rights, rendering parents' and young people's engagement with GIRFEC - including the named person, child's plan and information sharing aspects - a voluntary, consent-based arrangement in the absence of substantiated risk of significant harm or other legal necessity.

However, owing to the premature implementation of provisions within the 2014 Children and Young People Act that never came into force, children's and families' personal data had already been routinely collected and shared from early 2013 on the basis of flawed ICO advice. This had also resulted in complaints being rejected and becoming time-barred due to the delay in concluding the judicial review.

The petition is therefore as much concerned with the historical abuses facilitated by GIRFEC as with the government's proposed actions to 'put it right' going forward. The fact remains that both confidential data and subjective opinions of children's and families' compliance (or otherwise) with state-approved 'wellbeing' pathways and outcomes have been recorded and shared between myriad agencies with no lawful basis.

Moreover, despite data subject access requests that have revealed non-consensual, unnecessary processing by multiple service providers, it has proved impossible for

data subjects to retrieve, amend or comprehensively erase unlawfully obtained and shared information or subjective opinions on perceived risks to 'wellbeing'.

Letter from the ICO (dated 15 January 2020)

The ICO once again misses the point of the petition insofar as it calls for a public inquiry into the human rights impact and infringements, *both past and ongoing,* that resulted from the application of an unlawful threshold for interference with Article 8 (i.e. the undefined and imprecise notion of 'wellbeing'). This stemmed from the ICO's own advice, procured by the GIRFEC board in March 2013 without legal or parliamentary scrutiny, and quickly became embedded in public policies, including the 2014 national child protection guidance (where it remains).[1]

There has meanwhile been no effort to effect a reversal of the process in order to bring rogue policies into line with the law. The 2013 'advice' should have been immediately disavowed following the 2016 'named person' judgment, and a full policy audit conducted, but it is still cited routinely by practitioners who have received no remedial training since the ICO withdrew it and belatedly underlined the necessity of acting within the law as definitively interpreted by the Supreme Court.

Although Parts 4 and 5 of the 2014 Act never came into force and are set to be repealed, our own research[2] has shown that some public services still appear unaware that they have no statutory basis and that there is no requirement for parents and young people to accept advice or agree to information sharing in the absence of risk of harm (*not* risk to 'wellbeing').

The ICO notes in his response to the Committee that GDPR has now come into force, superseding earlier advice, but the problem remains that those whose rights have been infringed since 2013 have been failed by the regulatory bodies charged with upholding them, while direct requests by young people for assistance from the children's commissioner in exercising their rights have been summarily rejected.[3]

Letter from the Deputy First Minister (dated 20 January 2020)

It is concerning that the Deputy First Minister remains thirled to the belief that the government can impose its own notion of 'wellbeing' on the nation's children and families rather than create the optimum conditions for them to flourish by enabling them to determine their own best interests and manage their own lives.

As Para 89[4] of the 'named person' judgment affirmed in relation to actions by public bodies, nothing in Article 3 of the UNCRC (acting in the best interests of children and young people when making choices that affect them) extends the state's powers to interfere with the negative rights in Article 8 of the ECHR.

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[1] https://www2.gov.scot/Resource/0045/00450733.pdf (para 81)
[2] https://scothomeed.co.uk/taking-local-authorities-to-task
[3] https://www.change.org/p/children-and-young-people-s-commissioner-scotland-in-relation-to-named-person-girfec-we-request-you-investigate-breaches-of-children-s-right-uncrc-article-16-interference-in-private-life-and-attacks-on-children-s-reputations
[4] https://www.bailii.org/uk/cases/UKSC/2016/51.html#para89

In order to be lawful, GIRFEC policy requires to be reset to a voluntary model and, crucially, there can be no adverse consequences for 'non-engagement' by families unless a child's welfare (not 'wellbeing') is at risk:

> *An assertion of such compulsion, whether express or implied, and an assessment of non-cooperation as evidence of such a risk could well amount to an interference with the right to respect for family life which would require justification under article 8(2). Given the very wide scope of the concept of "wellbeing" and the SHANARRI factors, this might be difficult. Care should therefore be taken to emphasise the voluntary nature of the advice, information, support and help which are offered […] and the Guidance should make this clear.*[5]

In the absence of legal necessity, such as child protection, 'wellbeing' data (i.e. subjective interpretation of a 'notably vague' concept) should only be gathered and shared with fully informed consent. The principle that parents are responsible for determining their children's best interests until the risk threshold is triggered was further affirmed in the 2017 EV judgment.[6]

Since 2016, there has been no definitive guidance in place for the implementation of the non-statutory GIRFEC policy, leaving parents and children unprotected from over-zealous, poorly informed practitioners, some of whom, as noted above, still appear to be unaware that Parts 4 and 5 of the 2014 Act never came into force, or that the 2013 ICO guidance had to be withdrawn as it was held never to have been a lawful interpretation of previous data protection legislation.

The introduction of GDPR in 2018 and withdrawal of the Information Sharing Bill in September 2019 (after efforts to circumvent the 2016 judgment had proved fruitless) did nothing to curb the ongoing fear felt by families or the uncertainty of practitioners. The lack of definitive guidance and failure to amend unlawful policies has permitted poor practice to continue with no redress for victims whose rights have remained unprotected by data controllers or the regulatory bodies charged with upholding them.

The DFM's intention to produce refreshed guidance and support for data controllers is not reassuring to families who have never been consulted as promised, and many remain subject to unwarranted interference. Those who have proactively questioned data processing activities that contravene the court ruling and GDPR principles have been disappointed with facile responses to detailed arguments or outright denial of the limitations that apply to policies, including GIRFEC, that engage Article 8.

The government's 'suite of products', and indeed all public policies, will have to comply with overarching data protection and human rights laws, including the UNCRC when it is incorporated. They may also be subject to further legal challenge if deemed incompatible with the court's reaffirmation of the intervention threshold (which is not 'wellbeing', however and by whomever it is interpreted).

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[5] https://www.bailii.org/uk/cases/UKSC/2016/51.html#para95
[6] https://www.supremecourt.uk/cases/docs/uksc-2016-0220-judgment.pdf

Parents already have concerns about practitioners' ongoing misunderstanding of the correct threshold for non-consensual interference and the near-universal failure to provide prior notification that is sufficiently specific to enable data subjects to withhold personal information they do not wish to be disclosed, whether it relates to themselves or third parties whose consent has not been obtained.

Again, Mr Swinney provides no explanation as to how and why the Scottish Government got it wrong for every child and family whose personal data was mishandled from 2013 onwards due to reliance on flawed ICO advice procured by the GIRFEC board that lacked sufficient safeguards to protect children and families.

Letter to Local Authorities

It would be helpful to have sight of any responses to the Convener's letter to Local Authorities in order to offer further comment, especially in the light of our research just published[7] on LAs' data processing policies and practice, which found evidence of unlawful information sharing, including prohibited data fishing expeditions, in contravention of GDPR and Article 8. Recent data subject access requests have revealed catalogues of unlawfully obtained information, factual inaccuracies and a culture of secrecy and contempt for parents who object to infringements of their own and their children's rights.

Ongoing concerns

Since our last submission to the Committee, the Scottish Home Education Forum has published its 'Home Truths' report[8] which highlighted serious failings directly attributable to implementation of GIRFEC policy that had resulted in less favourable treatment by public services of members of a minority group. Specific concerns over councils' data processing activities led to the further research referenced above.

Parents' longstanding concerns over data misuse have never been properly addressed and they are increasingly frustrated by routine flouting of the law by service providers, as revealed by FOI responses and subject access requests. Some still appear not to realise that Parts 4 & 5 of the 2014 Act never came into force and are to be repealed, nor that the discredited ICO advice from 2013 (still referenced in public policies) had to be withdrawn in 2016.

Given such ignorance of the law, families are left wondering what hope there is for UNCRC incorporation when the self-defined, rights-based, immovable object that is the Convention is faced with the state outcomes-driven, irresistible force that is GIRFEC.

On behalf of children and parents who have suffered detriment, the petitoners would reiterate the need for a public inquiry into the human rights impact of GIRFEC as implemented since its inception, and in particular from 2013 onwards.

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[7] https://scothomeed.co.uk/taking-local-authorities-to-task
[8] https://scothomeed.co.uk/home-truths-home-education-research