Submission

from

Tymes (The Young ME Sufferers) Trust

On

The Children and Young People (Information Sharing) (Scotland) Bill.

1. On 28th July 2016 the UK Supreme Court ruled that the "information-sharing provisions of Part 4 of the [Children and Young People (Scotland)] Act [2014] are incompatible with the rights of children, young persons and parents under article 8 of the ECHR because they are not "in accordance with the law"" and that these provisions were therefore "not within the legislative competence of the Scottish Parliament". But the Supreme Court judgment contained much more than this single indictment of the GIRFEC legislation that the Scottish Parliament had seen fit to pass in to law. For those of us who welcomed the ruling from the five Supreme Court judges, it was hoped that this would provide an opportunity for Parliament to address all matters explored in the judgment but instead the Scottish Government has chosen to interpret the five judges in the narrowest terms possible. The Children and Young People (Information Sharing) Scotland Bill 2017 has been put before Parliament in an attempt to obey the letter of the law but it does not seek in any way to obey the spirit of the law as set down by the Supreme Court judgment.

2. As identified by the UK Supreme Court, the background to the Children and Young People (Scotland) Act 2014 was underlain by the "shift away from intervention by public authorities after a risk to children's and young people's welfare had been identified, to an emphasis on early intervention to promote their wellbeing, understood as including all the factors that could affect their development" (*Christian Institute v Lord Advocate* [2016] UKSC 51, para 1). Yet, the 2017 Bill only concerns itself with the information sharing provision applicable to named persons once appointed. No attempt has been made to address the UK Supreme Court's finding that ""Wellbeing" is not defined" (*Christian Institute v Lord Advocate* [2016] UKSC 51, para 16). Wellbeing remains a vague undefined concept under the 2017 Bill with the only guidance as to its meaning still offered by eight "factors which are known under the acronym SHANARRI" and are that "the child or young person is or would be: "safe, healthy, achieving, nurtured, active, respected, responsible and included". As the ruling from the Supreme Court pointed out, "These factors are not themselves defined and in some cases are notably vague: for example, that the child or young person is "achieving" and

"included"" (*Christian Institute v Lord Advocate* [2016] UKSC 51, para 16). No amendments or a legally robust definition in regards to either "wellbeing" or indeed to the eight SHANARRI factors have been provided through the proposed amendments to the named person legislation. Paragraph 17 of the Supreme Court judgment noted that "Section 33(2) [of the 2014 Act] defines "wellbeing need" broadly: a child has a wellbeing need "if the child's wellbeing is being, or is at risk of being, adversely affected by any matter."" Section 33(2) remains unchanged under the proposed amendments to the legislation. By not including a legally robust definition of "wellbeing" as the concept upon which the Named Person legislation is based, the 'wellbeing assessment process' will continue to be rooted in the subjective considerations of practitioners as to what *they* consider "*appropriate"*, not *necessary*, in order to "promote, support or safeguard the wellbeing of the child or young person" [The children & Young People (Scotland) Act 2014, Part 4, Section 19 (5)(a)]. This will lead to further families being subjected to erroneous and potentially harmful state intervention.

3. The continuation, through the 2017 Bill, of subjective 'wellbeing' assessments, perpetuates the intolerable position of children and parents under the 2014 Act by which they are provided no protection or safeguards against ill-judged use of named person powers. The Supreme Court put it very well when they stated that "There must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered. Especially in pursuance of a child's plan for targeted intervention under Part 5; and further that their failure to co-operate with such a plan will be taken to be evidence of a risk of harm". The five judges went on that "An assertion of such compulsion, whether express or implied, and an assessment of non-co-operation as evidence of such a risk could well amount to an interference with the right to respect for a 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" (para 95). Therefore without a legally robust definition of such a vague expansive concept, legislation which uses "wellbeing" as its basis for operation cannot provide any clarity around what thresholds are being set in terms of intervention by the state. Without this, and without an independent complaints process parents and families will have no trust in the equitableness of any such legislation. In truth, as we have previously stated through consultation on this issue, there can be no equitable process through which families can seek justice when the

legislation itself fundamentally devalues and diminishes the role of parents in the raising of their children.

4. The Supreme Court ruling stated the need to "emphasise the voluntary nature of the advice, information, support and help which are offered." Yet there is nothing in the 2017 Bill to state in clear explicit and unambiguous terms the voluntary nature of the named person 'service'. Section 19 of the Children and Young People (Scotland) Act 2014 remains unchanged by the 2017 Bill and parents could still easily mistakenly believe that they have to accept and comply with the suggestions of a named person or, indeed, that any failure or refusal to comply or co-operate with the named person may result in an escalation of intervention as too often occurs at present. The word 'voluntary' does not appear in the Children and Young People (Information Sharing) (Scotland) Bill 2017, nor does it appear in the accompanying documentation 'the Code of Practice on information sharing under Parts 4 and 5 of the Children and Young People (Scotland) Act 2014' or the 'Illustrative Version of the Children and Young People (Scotland) Act 2014'. It still remains the case that named persons act to fulfil their statutory functions where "*the named person considers it to be appropriate* in order to promote, support or safeguard the wellbeing of the child or young person"; this does not reflect a 'voluntary' scheme but rather one where the state dictates to parents and children what it views to be in their best interests.

5. The Children and Young People (Information Sharing) Scotland Bill is solely intended to address the ruling by the UK Supreme Court regarding the information sharing provisions of Part 4 of the 2014 Act. Yet, the 2017 Bill still lacks that clarity clearly expected by the five judges on the relationship between the information sharing provisions under Part 4 of the 2014 Act and the demands placed upon named persons and practitioners in general through the Data Protection Act 1998. Furthermore, there is no clear reference to the reforms about to be introduced through the General Data Protection Regulation which is due to come in to force on 25th May 2018.

6. The 2017 Act does not fully address the criticisms of the Supreme Court that more than one piece of legislation need to be read together in order to interpret the information sharing provisions in the 2014 Act. This raises the question of whether the changes are in accordance with the principles of legal certainty or the requirement to be in accordance with the law.

7. The amendments proposed to the Children and Young People (Scotland) ACT 2014 through the Children and Young People (Information Sharing)(Scotland ) Bill 2017 still fail to follow the wording of the Data Protection Act 1998, the Data Protection Directive 95/46/EC and the General Data Protection Regulation which all refer to a necessity for disclosure of only relevant information. Instead the proposed amendments refer to a lower threshold of whether the information "*could*" in the opinion of the named person service provider, promote, support or safeguard the wellbeing of the child or young person.

The Young ME Sufferers (Tymes) Trust maintains its objection to the named person/GIRFEC legislation on the fundamental basis of its failure to afford proper respect to the autonomy of the family and their right to a private and family life. The proposed amendments put forth by the Scottish Government through the Children and Young People (Information Sharing) (Scotland) Bill 2017 do not address the main conclusion of the UK Supreme court judgment, in regards to the information-sharing provisions of Part 4 of the 2014 Act. Nor does it even consider the criticisms and warnings made by the five judges in regards to intrusion by the state in to family life or the dangers of basing such legislation on an undefined vague concept.

The proposed amendments to the Children and Young People (Scotland) Act 2014 contained in the Children and Young People (Information Sharing) (Scotland) Act 2017 do nothing to address the fundamental objection that many have to this legislation – that this places the state in every family in the country and undermines the position of parents in regards to their own children. It presumes that families *will* need the state to intervene and it presumes that such intervention is always either benign or helpful. This is not the case. The Young ME Sufferers (Tymes ) Trust can attest to the very damaging effects of erroneous unwarranted intervention by the state on both children and parents.

We would like to be considered to give oral evidence to the Committee.

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