SUBMISSION TO EDUCATION & SKILLS COMMITTEE

Alison Preuss, on behalf of the Scottish Home Education Forum, and Lesley Scott, on behalf of The Young ME Sufferers (Tymes) Trust, submit the following response in respect of Petition PEO1692 to the letters received by the Education and Skills Committee from Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney (dated 22 August 2019) and Dr Ken Macdonald, Head of ICO Regions (8 July 2019).

Letter from Deputy First Minister and Cabinet Secretary for Education and Skills

In his letter to the Committee, Mr Swinney stated that he would focus his comments on the GIRFEC approach. His focus from this was on information sharing, and he acknowledged that there were a "number of public bodies" involved in scrutinising and challenging this practice on behalf of the public. He went on:

> "These bodies have the expertise, responsibility, accountability and authority to investigate and where appropriate take action to protect the rights of families. It is my view that it is important that these bodies have focused remits for example in identifying interference with human rights, children's rights or breaches in data protection rights."

The point we raised, and that Mr Swinney seems to have totally missed, is that none of these public bodies is willing to discharge their responsibility to Scotland's children; not one even expressed willingness to investigate any of the claimed breaches to families' human rights through the GIRFEC approach. This would appear to be a complete collective failure to know or understand their remits.

Mr Swinney restates the remits of the various public bodies charged with scrutinising and challenging the practice of information sharing on behalf of the public as follows:

- "The Scottish Human Rights Commission (SHRC) have responsibility for human rights in devolved areas of responsibility
- The Equality and Human Rights Commission (EHRC) have responsibility for reserved issues in relation to human rights
- The Children's Commissioner's Office (CYPCS) remit is not in relation to human rights law but children's rights
- The Information Commissioner's Office (ICO) remit is in relation to data protection law."

On being advised that there was a possibility of children and families' human rights being breached under Scottish legislation, we received the following responses from the various bodies cited by Mr Swinney with responsibility to scrutinise and challenge on behalf of those children and families:

- The Equality and Human Rights Commission stated it was relating to a devolved matter and so was the remit of the Scottish Human Rights Commission.

  However, the organisation does undertake human rights work in Scotland.[1] As a report of its inquiry into another human rights issue (trafficking) noted: "Scotland needs end-to-end services for victims, with practical assistance accessible wherever a victim is found". Victims of unlawful, often traumatising GIRFEC-related practice (which is ongoing) should surely also be entitled to an inquiry and access to justice.

- The Scottish Human Rights Commission cited the legislation that had created them, saying it "prohibits us from duplicating work undertaken by another enacted body", and promptly told

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[1] https://www.equalityhumanrights.com/en/commission-scotland/human-rights-scotland

us that after careful consideration they were "of the view that the content falls within the remit of the Children and Young People's Commissioner for Scotland."

We would contend that GIRFEC policy and unlawful practice affects all citizens, both adults and children, and that this falls firmly within the SHRC remit, since "The Commission has a general duty to promote awareness, understanding and respect for all human rights – economic, social, cultural, civil and political – to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights"; and "The Commission has powers to recommend changes to law, policy and practice; promote human rights through education, training and publishing research; and to conduct inquiries into the policies and practices of Scottish public authorities." [2].

- Mr Swinney describes the remit of the Children's Commissioner's Office as that of children's rights as opposed to human rights law. The website for the Children and Young People's Commissioner Scotland states:

> "The Children and Young People's Commissioner Scotland is Bruce Adamson. He works with his team to protect children's human rights: the rights of children and young people."

This would seem to contradict Mr Swinney's claims; nevertheless, the Children's Commissioner's office also cited the constraints of legislation as a reason not to exercise their authority to even investigate any of the claims of breaches of children's human rights, but instead to state that whilst "there are children's rights issues engaged here", it was actually the remit of the ICO and the SPSO to deal with human rights issues.

It should further be noted that the CYPCS has failed to respond to assistance requests from young people for whom multiple UNCRC rights – not simply Article 16 - have been breached via GIRFEC policy implementation. One family has petitioned the CYPCS to uphold UNCRC rights on an equal basis after it became apparent that some rights(holders) were being treated significantly less favourably than others.[3]

- Mr Swinney states that the ICO remit is data protection law, not children's rights or human rights, while the SPSO is for general complaints about local authorities, health boards and others, not for investigating claims of breaches of human rights against children and families.

Our petition has been raised on the basis that all public bodies, including the SPSO, Police Scotland, SCRA and indeed the ICO, have been applying the wrong threshold and criteria for non-consensual information gathering and sharing. This has resulted in evidenced instances of human rights abuses and data protection breaches being wrongly held by 'regulators' to be lawful since 2013 - and the problem is ongoing.

The judicial review of the 2014 legislation, which led to the Supreme Court ruling in 2016, came about precisely because human rights and data protection were viewed in isolation. It is a matter of public record that the ICO considered only the (then) Data Protection Act 1998 without reference to the limiting provisions contained within the Human Rights Act 1999 when he issued incorrect advice in 2013 (ironically just weeks after a key English judgment upheld the established intervention threshold). Only after six and a half years of unlawful data processing becoming embedded into policy and three years of attempting to circumvent the Supreme Court judgment has the DFM admitted defeat and withdrawn his 'remedial' bill; yet no effort has been made to 'cascade' fully compliant advice, undo training or amend guidance. It does not bode well for the proposed

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[2] http://www.scottishhumanrights.com/about/

[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

incorporation of UNCRC into Scots law when GIRFEC outcomes-based policy remains antithetical to both children's and adults' rights, which are self-determined, universal and inalienable.

Mr Swinney does not think we should "interfere with" the specific remits of the public bodies he cites as being there to scrutinise and challenge on behalf of the public, and that it may sometimes be "necessary to engage with multiple organisations." We have not suggested interfering with the remits of these public bodies and the families whose interests we represent would be only too willing to engage with multiple organisations if it meant their cases being heard and a semblance of justice being offered. The issue is not one of interfering with remits or an unwillingness to engage by the families, but the failure of these public bodies to fulfil their remits, to embrace responsibility and accountability and properly discharge their duty to investigate when children and families tell them their human rights have been breached.

This is not about having a concern over the "responsiveness of public bodies to complaints", and why therefore it is not an issue for the SPSO, this is about the categorical failure of public bodies, tasked with protecting the human rights of children and families in Scotland, to undertake even the simplest of investigations to ascertain if there is any hint of a breach. It is, rather, about the bodies tasked with protecting the people from authoritarian over-reach by government intentionally looking the other way.

Given Mr Swinney's continuing enthusiasm for a single point of contact, lead professional and multi-agency working to share information **about** children and their families, with or without their consent, it is disappointing to note his distinct lack of interest in promoting a single point of contact, lead agency and multi-regulatory co-operation to co-ordinate and progress complaints of breaches of human rights and data protection **for** children and families. Access to justice remains elusive to victims, who can expect only to be signposted either straight down a dead end or on to a circular route to nowhere.

<u>Letter from Information Commissioner's Office</u>

Dr Ken Macdonald offers some context around the ICO's 2013 and 2016 advice. However, there is a bit more to that context than appears in his response. Whilst Dr Macdonald was indeed asked to attend a GIRFEC Programme Board meeting in February 2013, the involvement of the ICO was first mooted at a meeting of the GIRFEC Programme Board in September 2012 with the action point "Engage with the Scottish Information Commissioner to open a discussion on sharing concerns about a child's wellbeing" (not "**harm"**, as suggested by his response). The minutes of the GIRFEC Programme Board meeting of November 2012 record "a good meeting between the Board members, GIRFEC officials and Ken Macdonald, Scottish ICO at which "ICO stressed neither the Act or ICO should be seen as a barrier." Also recorded in these minutes is "1. GIRFEC team to produce statement to encourage shift and information shift <sic>: ICO to endorse this. 2. Joint work between ICO and GIRFEC on consent guidance including examples to give reassurance on this."

Following the February 2013 meeting that Dr Macdonald cites in his response to the Committee, the minutes record that "A joint statement has been agreed with the Information Commissioner's Office which should help clarify situations where a child was on a pathway to risk to wellbeing…" (not "**harm"**). The chair of the GIRFEC Programme Board circulated the 2013 advice to all community planning partnerships with an accompanying memo that stated "The GIRFEC Programme Board and Ken Macdonald, the Assistant Information Commissioner for Scotland (ICO) **have agreed a short guidance paper** which dispels the common misconceptions that the Data Protection Act (1998) is a reason <u>not</u> to share information." [Bold added].

Therefore, the reality of the "genesis of the 2013 advice" is not quite as Dr Macdonald seeks to portray in his response to the Committee; it was in fact a joint endeavour between the ICO and the Scottish Government GIRFEC Programme Board (which mirrored earlier, also erroneous, ICO 'advice' to one local authority that data could be gathered and shared on all children and young

people in order to “advance wellbeing”[4]). Furthermore, the ICO should have been aware that, as the UK Supreme Court ruled in 2016, the 2014 Children and Young People (Scotland) Act did not contain a definition of wellbeing; that consequently there could be no threshold for wellbeing and even if a definition were to meet the accessibility and foreseeability tests demanded by law, **data collection and sharing on the basis of wellbeing would have to rely on consent in the absence of necessity**. Dr Macdonald’s assertion in his response is therefore very concerning in that he endorsed and encouraged the sharing of private confidential information on children and their families **without consent** based on a practitioner’s “belief” that the child was, due to wellbeing concerns, on a “pathway to harm” (when the non-consensual intervention threshold was then, and remains, **risk of significant harm**).

Dr Macdonald makes it clear in his response that the ICO does not “seek out outdated guidance with a view to asking for it to be updated.” His view is that it is the responsibility of the data controllers to ensure websites are up-to-date. It has never been our contention that the ICO should go looking for outdated guidance; our concerns have been specifically around the continuation of the 2013 advice on local authority websites and child protection guidance, and the failure by public sector data protection officers to address this upon notification.

Dr Macdonald states in his response that he had sent the 2016 advice to the Scottish Government “and, to **avoid confusion**, I asked for it to replace the 2013 advice.” [Bold added]. If Dr Macdonald considered there was a need to ask the Scottish Government to remove the 2013 advice from its website to avoid confusion, why was there not a need to request the same of local authorities and other public bodies? Surely a request for the 2016 advice to replace the 2013 advice and ensure its removal from websites (and corresponding links embedded in policies) could have been included in the communication to local authorities of the 2016 advice. There seems to have been no such issue with “proactive contact” when it came to ‘cascading’ the 2013 ‘advice’.

In the case of Dr Macdonald and the ICO, they actively worked with government (in apparent contravention of the requirement of data protection supervisors to maintain complete independence[5]) to develop a policy that ended up undermining children’s rights and which, absent the intervention of the UK Supreme Court, would be running unchecked over the rights of Scotland’s families.

Early indicators from ongoing policy analysis

The Scottish Home Education Forum is conducting a major piece of research into all 32 local authorities’ home education policies and practices, and families’ experiences of them. Early findings have revealed significant misrepresentation of the law and blatant breaches of children’s and families’ rights that can be directly attributed to the implementation of GIRFEC policy. Some have illegal information gathering and sharing written into policy and fail to correctly delineate parental and state responsibilities, with a particular issue of misrepresentation of negative duties. Over-reach by councils, often founded in deep-rooted prejudice to the point of home-eduphobia, is all too often endorsed rather than challenged by other agencies, including children’s reporters, courts and safeguarders (all of whom are mandated to apply domestic legislation and policy in accordance with the overarching rights framework). We have evidence of significant detriment to children and their families, disproportionately those with ASNs, chronic illnesses and disabilities. Negative reports have come disproportionately from Highland where autistic, school anxious children with sensory and processing difficulties have been removed without warning from their safe spaces and some of them subjected to traumatic court-enforced assessments hundreds of miles from home with no reasonable adjustments made for their needs, nor access to representation or independent advocacy. There is strong evidence to suggest that child protection investigations are being

[4] http://minutes.stirling.gov.uk/pdfs/scouncil/Reports/SC20121213Item19ExercisingWellbeing.pdf
[5] https://gdpr-info.eu/art-52-gdpr/

precipitated, often via hearsay and malicious referrals, so that information can be collected and used without consent to build cases against families. Three years on from the Supreme Court judgment, families have been driven to hold public demonstrations as a reminder that 'Autism is not a crime' and that ASN children and their parents deserve to be treated equally.

Conclusion

The unlawful application of GIRFEC policy has only been checked, not eliminated, by the 2016 court ruling. Moreover, it is left to victims to bring legal proceedings at enormous personal expense, with no guarantee of redress in the lower courts given their poor track record in upholding overarching human rights legislation.

The extent to which our seldom heard communities have lost confidence in public services cannot be overstated. Being frozen out of meaningful participation by barriers of cost, geography, caring responsibilities and prejudice, and having our unique expertise and lived experience excluded, has only served to significantly widen that confidence gap.

A full independent public inquiry is essential in order to reveal the extent of the erosion of human rights in Scotland that accompanied the Children & Young People (Scotland) Act and the multi-agency failure which meant no aspect of the state or of the bodies tasked with protecting the public raised a murmur of protest.