

To: Education and Children Policy Board

On: 18 August 2016

Report by: Director of Children's Services

Heading: Children and Young People (Scotland) Act 2014: Supreme Court Judgement

1. Summary

- 1.1 The Children and Young People (Scotland) Act 2014 put into statute some key aspects of the GIRFEC approach. It set out a definition of 'wellbeing' (Part 18). It formalised the role of the Named Person (Part 4) and made provision for a statutory Child's Plan (Part 5) to coordinate support for those children who may require additional help. The Act also provided a framework for information sharing between professionals to support the functions of the Named Person (within Part 4).
- 1.2 Four charities and three individual parents challenged aspects of the legislation in relation to the Named Person Scheme. The challenge focused on two main areas: the lawfulness of the named person sharing and retaining information in relation to individual children and their families and the compulsory appointment of a named person was a breach of the rights of the parents of children under article 8 of the European Convention on Human Rights (ECHR). Article 8 relates to the right to a private and family life and the restrictions on interference in this area by public authorities.
- 1.3 The initial challenge was rejected in the Court of Session and the appellants appealed to the Supreme Court. The Supreme Court announced its judgement on 28 July 2016. The Supreme Court has held that Part 4 of the Children and Young People (Scotland) Act 2014 is incompatible with Article 8 of the ECHR. The Supreme Court is proposing that an Order be made to allow the Scottish Government an opportunity to correct this and have given them 42 days to make written submissions on what the terms of this Order should be.
- 1.4 The Scottish Government has said that they are assessing what this means for the timescale of implementation and will continue to progress its preparations for implementation of the named person service and related provisions. However, as the Supreme Court found that the aspects of the Children and Young People (Scotland) Act 2014 are outwith the legislative

competence of the Scottish Parliament, they cannot be brought into force in the meantime.

- 1.5 The named person duties in the Act were due to be effective from 31st August 2016. A local, interagency implementation plan was at a final stage to ensure the relevant policy, procedure, communications and training were in place for the planned commencement of the Act. This work has been suspended pending the outcome of the Scottish Government response to the Supreme Court.
- 1.6 A further update will be provided to Board once timescales from Scottish Government are clearer on their response to the Supreme Court judgement.

2. Recommendations

- 2.1 It is recommended that the Board note the content of this report.
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3. Background

- 3.1 The Children and Young People (Scotland) Act 2014 makes provision for a named person service in relation to children and young people in Scotland. Part 4 of the Act provides that named persons will exercise certain functions in relation to children and young people. These include:-
 - advising, informing or supporting them or their parents
 - helping them or their parents access a service or support and
 - discussing or raising a matter about them with a service provider (e.g. health boards and Councils) or relevant authority (e.g. the NHS and Scottish Police Authority).
- 3.2 Part 4 also sets out powers and duties in relation to information sharing, including conditions where information must be shared and an additional power to share where the named person service provider considers it "necessary or expedient" for the exercise of any of the named person functions, unless this is prohibited by other legislation.
- 3.3 Four charities and three individual parents ('the appellants') collectively challenged the legality of Part 4 of the Act. They contended that the Scottish Parliament had exceeded its authority in enacting that part of the legislation for a number of reasons. The challenge focused on two main areas: the lawfulness of the named person sharing and retaining information in relation to individual children and their families and the compulsory appointment of a named person was a breach of the rights of the parents of children under article 8 of the European Convention on Human Rights (ECHR). Article 8 relates to the right to a private and family life and the restrictions on interference in this area by public authorities.
- 3.4 The Court of Session, both at first instance and at appeal, rejected the appellants' contentions. The appellants then launched a final appeal to the Supreme Court.

- 3.5 The Supreme Court considered all of the various grounds put forward. Many of these were rejected, including the contention that the subject of the information-sharing provisions in Part 4 relates to a matter reserved to Westminster. Nonetheless, it was held that the bringing into force of the information-sharing provisions of Part 4, as currently drafted, would be incompatible with the rights afforded by Article 8 of the European Convention of Human Rights (ECHR). The Scottish Parliament is specifically prohibited from making legislation that is incompatible with the terms of the ECHR. As a result, the Scottish Government must now amend the information sharing provisions in the Act to provide greater clarity about how Named Persons will share information about children, young people and families with public bodies. This needs to happen before Part 4 of the Act can commence.
- 3.5 Article 8 provides that everyone has the right to respect for private and family life, including home and correspondence. Although this is not an absolute right, for an interference to be justified, it must be in accordance with law, necessary to pursue a legitimate aim and proportionate. The Supreme Court considered Part 4 was in pursuit of a legitimate aim, it held that, as currently drafted, the information sharing sections of Part 4 and the Guidance prepared by the Scottish Government are not "in accordance with law," and that their operation could be disproportionate in particular cases for two reasons:-
- Firstly, as there is a risk that parents will be given the impression that they must accept advice in relation to the named person service and their failure to co-operate would be taken as evidence of harm; and
 - Secondly, that decisions on proportionate disclosure of confidential information would be made only with the help of the Guidance and the criteria in Part 4, which currently set too low a threshold for the overriding duty of confidentiality.
- 3.6 This essentially means that:-
- Greater emphasis is needed on the voluntary nature of advice, information, support and help offered by the named person; and
 - There is a need for clear guidance on how to assess proportionality when considering whether information should be shared. In particular, there is a need for guidance on (a) the circumstances in which consent should be obtained, (b) those in which such consent can be dispensed with and (c) whether, if consent is not to be obtained, the affected parties should be informed of the disclosure either before or after it has occurred. Also relevant is whether the recipient of the information is subject to sufficient safeguards to prevent abuse. Further, if the guidance is to operate as "law" for the purposes of article 8, (i.e. ensure that any interference is in "accordance with law") the information holder should be required to do more than merely have regard to it.
- 3.7 The Supreme Court has indicated that is proposing an Order be made to allow the Scottish Government an opportunity to correct this and have given them 42 days to make written submissions on what the terms of this Order should be.

- 3.8 The Scottish Government has indicated they are assessing what the judgement means for the timescale of implementation and will continue to progress its preparations for implementation of the named person service and related provisions. However, as the Supreme Court found that the aspects of the Children and Young People (Scotland) Act 2014 are outwith the legislative competence of the Scottish Parliament, they cannot be brought into force in the meantime.
- 3.9 The named person duties in the Act were due to be effective from 31st August 2016. A local, interagency implementation plan was at a final stage to ensure the relevant policy, procedure, communications and training were in place for the planned commencement of the Act. This work has been suspended pending the outcome of the Scottish Government response to the Supreme Court.
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Implications of this report

- 1. Financial Implications**
None.
- 2. HR and Organisational Development Implications**
None.
- 3. Community Plan/Council Plan Implications**

Children and Young People	- There is strong partnership working across the community planning partnership which supports and promotes the wellbeing of children and young people.
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- 4. Legal Implications**
Await outcome of the legal process
- 5. Property/Assets Implications**
None.
- 6. Information Technology Implications**
None.
- 7. Equality and Human Rights Implications**
The Recommendations contained within this report have been assessed in relation to their impact on equalities and human rights. No negative impacts on equality groups or potential for infringement of individuals' human rights have been identified arising from the recommendations contained in the report because it is for noting only and reporting a court judgement.
- 8. Health and Safety Implications**
None.
- 9. Procurement Implications**
None.
- 10. Risk Implications**
None.

11. Privacy Impact
None.

List of Background Papers

(a) None

Children's Services
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