

To All Local Authorities, Area Health Boards and Police Scotland

The Children & Young People (Scotland) Act 2014

Introduction

Following the recent judgment¹ by the Supreme Court on the lawfulness of the provisions of Part 4 of the Children and Young People (Scotland) Act 2014 (CYP SA) – the 'Named Person' provisions – the ICO has been asked by a number of bodies for clarification on how the judgment impacts upon current information sharing practice in the child welfare sector in Scotland.

Data Controllers should take their own legal advice following the judgment to ensure that local information sharing practices comply with the ruling. In particular, they should confirm that they have a legal basis for the sharing of information, ensuring relevant conditions for processing under Schedule 2 and Schedule 3 (if appropriate) of the Data Protection Act 1998 (DPA) are met.

Data Controllers should also continue to refer to the ICO's [data sharing code of practice](#) for general guidance and good practice advice on data sharing.

Supreme Court Judgment

Data controllers must consider how the deliberations of the Supreme Court contained within the judgment apply to their current practices. In summary, the Court reached four conclusions² in relation to information sharing provisions of Part 4, CYP SA as follows:

- (a) The provisions do not relate to a 'reserved matter' (namely the subject matter of the DPA and Directive 95/46/EC) and therefore the Scottish Parliament was not (on this basis) acting outside its legislative competence in creating these provisions.

¹ The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51 <https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

² See paragraph 106 of the judgment

- (b) The provisions are incompatible with the rights of children, young persons and parents under Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (ECHR) in that they are 'not in accordance with the law' as that article requires. Consequently, the provisions are not (on this basis) within the legislative competence of the Scottish Parliament.
- (c) The provisions may in practice result in a disproportionate interference with the Article 8 rights of children, young persons and parents through the sharing of private information.
- (d) The provisions are not incompatible with EU law otherwise than in relation to their incompatibility with Article 8 ECHR (as referred to at (b) above).

As a result of its conclusion (b), the Supreme Court held that the information sharing provisions of Part 4, CYPISA cannot be brought into force³. The Supreme Court was of the view that it should make an order under section 102, Scotland Act 1998 suspending the effect of its decision as to incompatibility with Article 8 so as to allow the Scottish Parliament and Ministers the opportunity to correct the defects in the provisions identified by the Court. Consequently, revocation orders have now been laid before the Scottish Parliament and Parts 4 and 5 of the CYPISA will not be commenced at this time.

Implications of the Judgment on Current Practice

During his statement to the Scottish Parliament on 8 September, the Deputy First Minister indicated that he would initiate a consultation on the information sharing provisions with a view to bringing forward legislative amendments in due course. Pending the revision of the Part 4 information sharing provisions and/or the issue of revised guidance clarifying their relationship with the requirements of the DPA, Data Controllers will need to consider their ability to share information relating to children taking into account the requirements of the DPA (in particular, compliance with the data protection principles in Schedule 1, DPA).

As stated by the Supreme Court at paragraph 40 of the judgment, the DPA is a measure implementing the protections for individuals with regard to the processing of personal data set out in Directive 95/46/EC in the UK. In turn, the Directive provides, in Recital 10, that the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms,

³ Paragraph 109 of the Supreme Court judgment

notably the right to privacy recognised in Article 8 of the ECHR. Consequently, compliance with the requirements for the sharing of personal data as set out in the DPA is likely to ensure that the sharing of personal data in the child welfare sector will be in accordance with the Article 8 rights of the individuals concerned.

The ICO's data sharing code recognises that obtaining consent for sharing information can be difficult. It should only be sought in circumstances where an individual has real choice over the matter, reflecting the need under Principle 1 of the DPA for processing to be fair to the individual concerned. For a professional to request consent from an individual whilst knowing that sharing will take place nonetheless, raises false expectations and endangers the client relationship. We therefore stress that procedures should be clear about those circumstances which may necessitate processing without consent; the need for such clarity is reiterated in the judgment.

Conclusion

GIRFEC partners should now review existing procedures and policy to ensure that they are sufficiently clear. In particular, they should stress that over-riding the duty of confidentiality owed by GIRFEC partners to children and young people by sharing their personal data without their consent should only occur where such sharing may be carried out on the basis of an appropriate condition for fair and lawful processing under Schedule 2 (and for sensitive personal data, under Schedule 3) of the DPA. The failure to identify appropriate conditions for such sharing may amount to a breach of the DPA as well as a breach of the Article 8 rights of the individual.

The sharing of personal data without the consent of the individual is likely to take place only in very particular and clearly justified circumstances rather than as common practice. It should be exceptional for this to take place for sensitive personal data of children. Nevertheless, if the sharing of information is carried out in accordance with a Schedule 2 (and where appropriate, a Schedule 3) condition other than consent, the sharing is unlikely to be in breach of the DPA provided it is carried out in accordance with the remaining data protection principles.

In view of the above guidance, agencies should reassure themselves that information sharing elements of current schemes are in compliance with the requirements of the DPA, which in turn is likely to ensure compatibility with the Article 8 rights of individuals under the ECHR.

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