

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Children and Young People (Information Sharing) (Scotland) Bill introduced in the Scottish Parliament on 19 June 2017.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 17–EN);
 - a Financial Memorandum (SP Bill 17–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 17–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

Summary

4. "Getting It Right For Every Child" ("GIRFEC")¹ is the national approach in Scotland for working with and for children and their families to improve outcomes for children and young people. The Scottish Government believes that consistent and full implementation of the

¹ See <http://www.gov.scot/Topics/People/Young-People/gettingitright/what-is-girfec>.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

GIRFEC approach across Scotland will improve the wellbeing and life chances of Scotland's children and young people.

5. The Children and Young People (Scotland) Act 2014 (“the 2014 Act”)² contributed to this aim by placing two aspects of the GIRFEC approach on a statutory footing: Part 4 of that Act dealt with the provision of named persons, and Part 5 with child’s plans. The role of a named person is to act as a clear point of contact for children, young people and their parents to go to, should they wish to seek support, information or advice. This clear point of contact is also available to practitioners who support the wellbeing of children and young people. The named person may also raise matters with such practitioners directly. The named person may only carry out the functions specified in Part 4 of the 2014 Act if they consider that doing so would promote, support or safeguard the wellbeing of the child or young person. Sharing information about the wellbeing of a child or young person is often essential to the consideration and delivery of support which is tailored to meet their needs. A child’s plan is a plan to address an identified wellbeing need; again, information sharing may be needed to ensure that an appropriate plan is developed and implemented. Implementation of Parts 4 and 5 of the 2014 Act was planned for August 2016.

6. In July 2016, the Supreme Court found, in the case of *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland) [2016] UKSC 51 (“the Christian Institute case”)³, that, although the aims of Part 4 of the 2014 Act were “legitimate and benign”, the information sharing provisions of that Part were not “in accordance with the law”. The planned implementation of Parts 4 and 5 was postponed in order to enable this finding to be addressed. As part of the Scottish Government’s consideration of this matter, an intensive period of engagement with stakeholders took place (from September to December 2016) to explore views on how the matters raised by the Supreme Court should be addressed. After considering the views expressed in this engagement, Scottish Ministers concluded that the necessity for legislation in relation to information sharing in Parts 4 and 5 of the 2014 Act remained.

² Available at <http://www.legislation.gov.uk/asp/2014/8/contents>.

³ A copy of the full judgment and a press summary can be accessed via <https://www.supremecourt.uk/cases/uksc-2015-0216.html>.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

The Bill makes changes to the information sharing provisions in Part 4 of the 2014 Act in a way that responds to the Supreme Court's finding and takes account of the outcome of the engagement with stakeholders. The Bill also makes changes to Part 5 of the 2014 Act in order to keep the information sharing provisions of Parts 4 and 5 in alignment.

7. The Bill's policy objectives are to ensure that the information sharing provisions of Parts 4 and 5 of the 2014 Act are "in accordance with the law" and that the rights of children, young people and parents are respected when information is shared under Part 4 and 5 of the 2014 Act. This will allow Parts 4 and 5 of the 2014 Act to be implemented in full and enable the wider benefits delivered by the provision of named persons and child's plans to be made available to children, young people and their families across Scotland.

The Christian Institute case

8. In the Christian Institute case, the 2014 Act was subject to challenge as being outside the legislative competence of the Scottish Parliament. The grounds for the challenge were that Part 4 of the 2014 Act related to reserved matters, that it was incompatible with the European Convention on Human Rights (ECHR) and that it was incompatible with European Union law⁴.

9. The challenge on the first of these grounds did not succeed.

10. The main question considered by the Court in relation to the ECHR was whether Part 4 of the 2014 Act was incompatible with article 8. Article 8 provides as follows:

- "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the

⁴ The limits on the legislative competence of the Scottish Parliament are set out in section 29(2) of the Scotland Act 1998 (see <http://www.legislation.gov.uk/ukpga/1998/46/contents>).

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”.

11. The Court found that the information sharing provisions were not “in accordance with the law”. The reasons for this are summarised in paragraphs 83 to 85 of the judgment. In brief, the provisions were not in accordance with the law because of “the very serious difficulties in accessing the relevant legal rules” and “the lack of safeguards which would enable the proportionality of an interference with article 8 rights to be examined”. The “serious difficulties” referred to related in particular to the relationship between Part 4 of the 2014 Act and the Data Protection Act 1998 (“the DPA”)⁵.

12. In relation to the “necessary in a democratic society” test, the Court did consider that, but for not being in accordance with the law for these reasons, the 2014 Act would be “capable of being operated in a manner which is compatible with the Convention rights”⁶. In particular, in addressing the question of whether the objective pursued by Part 4 of the 2014 Act is sufficiently important to justify the limitation of a protected right, the Court commented that:

“... it can be accepted, focusing on the legislation itself rather than on individual cases dealt with under the legislation, that Part 4 of the

⁵ For example, the Court commented in paragraph 83 of its judgment that “The relationship between the Act and the DPA is rendered particularly obscure by what we have described as the logical puzzle arising from sections 23(7) and 26(11) when read with section 35(1) of the DPA.”. In addition, it noted at paragraph 58 that “... the duties imposed by sections 23(2), 26(1) and 26(3) in respect of sensitive data, and the power conferred by section 26(8) in respect of data of all kinds, cannot be taken at face value. Instead the duties imposed by sections 23(2), 26(1) and 26(3) in respect of sensitive data must be understood as being conditional upon compliance with at least one of the conditions in schedule 3 to the DPA, and therefore as being subject to more stringent criteria than those which appear on the face of the 2014 Act.”.

⁶ Paragraph 96 of the Supreme Court judgment.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

2014 Act pursues legitimate aims. The public interest in the flourishing of children is obvious. The aim of the Act, which is unquestionably legitimate and benign, is the promotion and safeguarding of the wellbeing of children and young persons. As the Dean of Faculty submitted, the policy of promoting better outcomes for individual children and families is not inconsistent with the primary responsibility of parents to promote the wellbeing of their children. Improving access to, and the coordination of, public services which can assist the promotion of a child's wellbeing are legitimate objectives which are sufficiently important to justify some limitation on the right to respect for private and family life.”⁷.

13. The Court did, however, express concern that, in individual cases, the information sharing provisions “may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents”⁸. It considered that, in relation to this conclusion, “the Act, subordinate legislation or binding “guidance”, should address the circumstances in which (i) the child, young person or parent should be informed of the sharing of information or (ii) consent should be obtained for the sharing of information, including confidential information.”⁹.

14. The finding that the information sharing provisions were not “in accordance with the law” under article 8 of the ECHR meant that the Scottish Parliament had acted outwith its legislative competence in relation to these provisions and that these provisions were not law¹⁰.

15. In respect of the challenge in relation to European Union law, the Court found that there was no incompatibility beyond the incompatibility with the ECHR.

⁷ Paragraph 91 of the Supreme Court judgment.

⁸ Paragraph 106 of the Supreme Court judgment.

⁹ Paragraph 107 of the Supreme Court judgment.

¹⁰ It would have been open to the Scottish Government to commence Part 4 of the 2014 Act without the information sharing provisions, but Ministers have elected to delay implementation of the whole of Part 4 (and Part 5) until it is possible to bring the whole of both Parts into force. The reasons for this are discussed further in paragraph 30 to 32.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

What the Bill does

16. The Explanatory Notes provide a full explanation of the Bill's provisions and how they change the original information sharing provisions in Part 4 (and Part 5) of the 2014 Act. They also provide a brief overview of the relevant background law. In summary, however, the Bill makes changes in Part 4 of the 2014 Act as follows:

- amending section 23 (communication in relation to movement of children and young people) by removing the existing duty in section 23(2)(b)(ii) for certain information to be shared (and material supplementary to that duty in subsections (3) to (7)). That duty is replaced by a duty to identify information the sharing of which could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the DPA and other relevant law. A power to share information if that wellbeing test is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B. The existing duties in section 23(2)(a) and (b)(i) are retained.
- replacing section 26 (information sharing) with a new version of that section. In particular, the duties in sections 26(1) and (3) to share information in certain circumstances are removed. Those duties are replaced by a duty to consider, when new information is acquired, whether the sharing of that information with certain persons could promote, support or safeguard the wellbeing of the child or young person and a duty to consider whether that information could be shared in compliance with the DPA and other relevant law. A power to share information if that wellbeing test is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B.
- repealing section 27 (disclosure of information). This section made additional provision in relation to information shared in breach of a duty of confidentiality, but this provision is no longer necessary as the provisions which permitted the sharing of information in breach of a duty of confidentiality (sections 23(7) and 26(11)) are being removed.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

- adding new sections 26A and 26B. Section 26A sets out the limitations that apply in relation to information sharing under Part 4. Specifically, in sharing information under Part 4, information holders must not breach any prohibition or restriction on the disclosure of information arising by virtue of the DPA, any directly applicable EU instrument relating to data protection or any other enactment or rule of law. Section 26B requires the Scottish Ministers to consult on and issue a code of practice in relation to information sharing under Part 4. The code of practice could cover issues such as notifying children, young people and their parents about the sharing of information and the circumstances when the views of children, young people and their parents need not be sought. Compliance with the code of practice is mandatory.

17. Key points to note about these changes are that:

- sections 23 and 26 of the 2014 Act will no longer impose any duties to share information (except those under sections 23(2)(a) and (b)(i)). This has implications for how these sections interact with the DPA – see paragraphs 16, 17 and 58 of the Explanatory Notes for more detailed explanation. Encouragement to share information that could promote, support or safeguard the wellbeing of children or young people is instead provided by the duties in new sections 23(3) and 26(1) and (2) to consider whether the sharing of information would have this effect and whether the sharing would be in compliance with the DPA and other relevant law.
- powers to share information tailored to the context of the named person service and based directly on a wellbeing test¹¹ are conferred by sections 23 and 26.

¹¹ The duties to share information in Part 4 as originally enacted were based on relevance to the exercise of certain functions to do with wellbeing and an “ought to be provided” test which incorporated a wellbeing test, while the test for the power to share information conferred by the original section 26(8) was that sharing was necessary or expedient for the exercise of the named person functions.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

- section 26A(a) makes clear that information sharing under Part 4 must take place in compliance with all other relevant law. In particular, nothing in Part 4 of the 2014 Act (as amended by the Bill) allows the law of confidentiality to be disregarded.
- Ministers will be under a duty to set out safeguards that apply in relation to information sharing under Part 4 in a code of practice, issued under section 26B, that must be adhered to.

18. In addition, within Part 5 of the 2014 Act (which deals with child's plans), the Bill amends section 40 of the 2014 Act and adds new sections 40A and 40B. These changes ensure that the procedures for information sharing under that Part align with those in Part 4.

Policy objectives

19. The Scottish Government's aspiration is for Scotland to be the best place for children to grow up in. The Scottish Government believes that consistent and full implementation of the GIRFEC approach across Scotland will improve the wellbeing and life chances of Scotland's children and young people.

20. GIRFEC is the national approach in Scotland for working with and for children and their families to improve outcomes for children and young people. It is a person-centred approach that is founded on partnership with families, and builds on the strengths of children, young people and their families to address concerns and improve wellbeing. It supports a coordinated system of service planning and delivery across children's services. Appropriate and lawful information sharing is central to this.

21. GIRFEC encourages streamlining and collaboration and prevents services working in isolation from each other. This approach ensures that children, young people and their families receive the services they need. It provides professionals working in children's services, and adult services where they are working with parents or carers, with the understanding and the mechanisms they need to deliver these services.

22. Most children and young people get all the support they need from their families, communities and the universal services for health and

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

education. Sometimes, perhaps unexpectedly, they may need extra information, advice or support. The 2014 Act will empower children, young people and parents to access support to promote or safeguard a child's or young person's wellbeing, if and when they need it, through a named person service that makes a clear contact available to work in partnership with them

23. The policy intention of the Bill is to bring consistency, clarity and coherence to the practice of sharing information about children and young people's wellbeing across Scotland. The information-sharing provisions contained in this Bill will ensure that the rights of children, young people and parents are respected when information is shared under Parts 4 and 5 of the 2014 Act for the purpose of promoting, supporting or safeguarding children's or young people's wellbeing.

24. The new approach will provide a legislative prompt for information sharing that will underpin the effective operation of the provision of named persons services and child's plans across the country so that children and families get equal access to the right support at the right time if they need this, regardless of where they live.

25. Feedback from engagement with stakeholders¹² told the Scottish Government that information sharing that was rooted in consent, engagement and empowerment of families was the best way forward. Information sharing under Parts 4 and 5 of the 2014 Act will sometimes be done with consent, but may rely on other bases, such as compliance with a legal obligation or protection of the vital interests of the person to whom the information relates.

26. Children and young people, and their parents, can accept or reject advice, information, support and help offered by a named person under Part 4 of the 2014 Act. Equally, they can accept or reject advice or services offered in pursuance of a child's plan for targeted intervention under Part 5 of the 2014 Act (except where the specific intervention contained in the child's plan is also stated as a condition in a Compulsory Supervision Order made by a Children's Hearing, or is a condition of another legal order). This

¹² <http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/engagement>

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

freedom of choice must be made clear to them. Refusal to accept advice or services offered or refusal to co-operate with a child's plan is not in itself to be taken as evidence of a risk of harm.

27. Consistent practice will be supported by the introduction in the Bill of the requirement to provide a code of practice about the provision of information that must be adhered to.

28. In summary, the new provisions:

- address the Supreme Court's judgment,
- give effect to the Government's objective of supporting children and young people in line with the founding principles of GIRFEC, and
- give children and young people, and their families, reassurance that their rights are respected.

Alternative approaches

29. The Supreme Court determined that Ministers needed to provide greater clarity about the basis on which health visitors, teachers and other professionals who support families will share and receive information in their named person role. It ruled that the information-sharing provisions of Part 4 of the 2014 Act as they were originally framed are incompatible with article 8 of the ECHR, and that changes are needed to make those provisions compatible with article 8, to ensure respect for a person's "private and family life, his home and his correspondence".

30. Commencing Part 4 and Part 5 of the 2014 Act without the information-sharing provisions was considered. The provisions related to information sharing would then ultimately have required to be repealed. This alternative would not have met the policy intention of supporting children and families sufficiently. Without addressing the Supreme Court judgment by bringing forward new legislation to amend the existing information sharing provisions, there would have been a risk that the benefits of a coherent and consistent approach, delivered through good practice in some places already, would not have been made available to all families. The alternative approaches considered were:

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

- option 1 – continue with the legislative situation as it currently stands, without commencement of Parts 4 and 5 of the 2014 Act.
- option 2 – commence Part 4 and Part 5 of the 2014 Act without the information sharing provisions.
- option 3 – introduce a Bill to amend the information-sharing provisions in Parts 4 and 5 of the 2014 Act.

31. The Scottish Government is committed to improving the outcomes for all children through services that are child centred, responsive and joined up. Children and young people deserve services that can provide support more effectively and earlier in their lives and taking account of their rights and views. Achieving this involves a programme of change that is not limited to one service but embraces a change in the culture and practice of all services that affect the lives of children, young people and their parents.

32. Commencing Part 4 and Part 5 of the 2014 Act with the amended information sharing provisions within this Bill will ensure a coherent and consistent approach to information sharing within the wider context of the GIRFEC approach. The information sharing provisions will underpin the effective operation of the provision of named persons and the child's plan across the country so that children, young people and parents get equal access to the right support at the right time if they need this, regardless of where they live or learn.

Consultation

33. Following the Supreme Court judgment, the Deputy First Minister led a three-month period of intense engagement on information sharing, listening to parents, charities, practitioners and children and young people, and to those who support the named person policy and those who have concerns about it.

34. Over three months in September to December 2016, this engagement involved over 50 meetings and some 250 organisations and groups. This included around 700 young people, parents and carers, practitioners, professionals and leaders from education, health, local authorities, police, faith communities, unions and charities.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

35. The feedback from this engagement shaped the policy development for the Bill.

36. Importantly, the Scottish Government listened to those who had concerns about information sharing and were prepared to consider a revised way forward, and reached out to others including Care Scotland, Clan Child Law, Together and the Scottish Parent Teacher Council amongst others.

37. A key part of the engagement was to listen to children and young people. Scottish Ministers' commitment to the United Nations Convention on the Rights of the Child (UNCRC) requires them to uphold children's rights by ensuring that their voices are heard, listened to and acted upon by all those who support them and provide services to help them. In the engagement process, young people expressed the view that they recognised the benefit of having access to someone they trusted to help them get support if needed.

38. The Scottish Government listened to parents. The named person service provides a point of contact and support who works in partnership with parents and families to help them navigate the wider system. Parents told the Scottish Government that they don't always get the support their families need at the right time and they have to tell their stories over and over. Parents also said that they want the named person service to work in partnership with them and that having a say in the sharing of information about their families matters to them. Their views and experience reinforce the initial rationale for creating the named person service.

39. The Scottish Government also listened to practitioners. As with families, nursing and medical professional organisations and trade unions told the Scottish Government that information sharing that was rooted in consent, engagement and empowerment of families was the best way forward. The Bill therefore makes provision for a duty to consider sharing information instead of a duty to share information as had been the case under the 2014 Act. Information sharing in Parts 4 and 5 of the 2014 Act will sometimes be done with consent, but may rely on other bases, such as compliance with a legal obligation or protection of the vital interests of the person to whom the information relates.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

40. The Care Inspectorate highlighted to the Scottish Government that sharing of relevant and proportionate information in relation to the wellbeing of children had improved as organisations prepared for the implementation of the named person service. Joint inspections of services for children and young people in 2014 to 2016 showed that most Community Partnership areas had developed mechanisms for sharing information about individual children with relevant services, while working within the requirements of data protection legislation and duties of confidentiality. However, their reports also show that practice remains inconsistent across services in localities, and between localities meaning families will experience differing levels of support¹³. A recurring issue in tragic cases has been a failure to share information when remedial action could have been effective.

41. The Supreme Court judgment has provided an opportunity to revisit the information-sharing provisions in the 2014 Act in a way that will not only secure the protection of those rights, but will improve the named person service and reassure parents and practitioners and the wider public that this service will work with and for families.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

42. As part of the Scottish Government's legal duty under the Equality Act 2010, assessing the impact of applying a proposed new or revised policy or practice against the needs mentioned in the equality duty is required.

43. An equality impact assessment (EQIA) was undertaken on the Bill for the 2014 Act¹⁴, which concluded that that Bill's provisions were neither

¹³<http://www.careinspectorate.com/index.php/publications-statistics/28-inspection-reports-local-authority/inspection-reports-joint-inspections-of-children-s-services>

¹⁴<http://www.gov.scot/Resource/0041/00418730.pdf>

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

directly nor indirectly discriminatory on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment. It also found that there were a number of potential benefits of that Bill and positive impacts on individual groups that share a protected characteristic.

44. An EQIA on the provisions in this Bill will be published on the Scottish Government website on introduction of the Bill. The EQIA process has identified that the Bill could have many potential benefits and positive impacts on individual groups that share a protected characteristic, and these include:

- the promotion of children's wellbeing, and how actions and activities may improve their wellbeing, should better engage parents;
- the Bill will be key to furthering and promoting knowledge of rights for children and young people under the age of 18;
- the GIRFEC approach will be a positive tool in achieving equality of treatment, opportunity and, crucially, of outcomes.

45. The assessment did acknowledge that in some areas there is limited evidence around the effect the Bill is likely to have on groups that share certain characteristics. In particular, the research and engagement identified gaps in the current knowledge base around gender reassignment and the experiences of transgender children and parents. The engagement process additionally reinforced the need to make appropriate arrangements for those with protected characteristics of disability, age and race. The need to ensure culturally specific/sensitive provision of services for families from different cultural backgrounds was highlighted. The lesbian, gay and bisexual (LGB) community raised issues relating to providing additional training to staff who work with LGB young people and families. Further detail can be found in the EQIA document.

Human rights

46. The Bill will, by amending the information-sharing provisions in the 2014 Act, ensure that Parts 4 and 5 of that Act are compatible with the ECHR and in line with the UNCRC.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

47. The information-sharing provisions in relation to the named person and the child's plan potentially engage the right to respect for private and family life set out in article 8 of the ECHR. It is considered that the new provisions are compliant with article 8 as they are a proportionate means of achieving a legitimate aim, accompanied by appropriate safeguards. Therefore, the Scottish Government is satisfied that the provisions of the Bill are compatible with the ECHR and address the points raised by the Supreme Court in the Christian Institute case. Further, as part of supporting Ministers in meeting their duties under Part 1 of the 2014 Act, and in relation to the articles of the UNCRC, a child rights and wellbeing impact assessment (CRWIA) will assess the Bill on the following aims:

- help to make children's rights a reality in Scotland.
- protect and promote the wellbeing of children and young people, as described by the wellbeing indicators in the 2014 Act.
- based on the evidence gathered, the Scottish Government has undertaken a CRWIA which considers that the Bill provisions are compliant with the rights of the child as set out in the Articles of the UNCRC and the Wellbeing Indicators (Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included), commonly known as SHANARRI. The Scottish Government considers that any impact of the Bill provisions will be neutral or positive. It is recognised that there may be benefit in further exploration of the experience and views of children and young people, including children with disabilities and those from the LGBT community. Further detail is available in the CRWIA document.

Island communities

48. The Bill will apply to all communities across Scotland, including island communities.

49. Informed by the engagement process during September and December 2016 with GIRFEC Lead Officers from Comhairle nan Eilean Siar, Orkney and Shetland Island Council, and health representatives from NHS Eilean Siar, NHS Orkney and NHS Shetland, no differential impact on island communities was identified.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

Local government

50. A business and regulatory impact assessment (BRIA), including any impacts on local government will be published on introduction of the Bill. The BRIA will use available evidence to find proposals that best achieve the policy objectives while minimising costs and burdens.

51. Local authorities will generally be responsible for the duties associated with named person and child's plan for those children and young people who are educated within state schools from age of school entry until they leave school or who are school leavers. They will also be responsible for sharing and receiving relevant and proportionate information with and by other service providers and relevant authorities in relation to children and young people to whom Parts 4 and 5 of the Act apply.

52. For staff delivering the named person role, or who will have significant contact with the named person or who will be primarily involved with the child's plan, it is expected that there will be a requirement for training in relation to new and amended provisions associated with information sharing. The cost of backfilling staff for training to be incurred by local authorities are estimated to be a one-off cost of £219,431 with subsequent competence development and training forming part of standard Continued Professional Development, and to be absorbed as part of the on-going training requirements on these organisations. Full details are outlined in the financial memorandum.

53. The BRIA recommends commencing Part 4 and Part 5 of the 2014 Act with the amended information-sharing provisions within this Bill to ensure a coherent and consistent approach to information sharing within the wider context of the GIRFEC approach. The information-sharing provisions will underpin the effective operation of the provision of named persons and the child's plan across the country so that children, young people and parents get equal access to the right support at the right time if they need this, regardless of where they live or learn. Further detail is available in the BRIA document.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

Sustainable development

54. It is considered that the Bill is likely to have no or minimal direct/indirect effect in relation to the environment and sustainable development and, as such, will be exempt for the purposes of section 7 of the Environment Assessment (Scotland) Act 2005. A pre-screening report has been completed. The pre-screening report confirming this will be published on the Scottish Government website under case PRE00793.

This document relates to the Children and Young People (Information Sharing) (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 19 June 2017

Children and Young People (information sharing) (Scotland) Bill

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