

Getting information sharing right for every child

DRAFT

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This is the fourth of a Practice Guidance series to help and support practitioners and managers embed and implement *Getting it right for every child (GIRFEC)* into their everyday practice. This guidance should be read in conjunction with the Scottish Government's *GIRFEC Policy Statement*, which refreshes our GIRFEC Values and Principles, and the Core Components of the approach.

The Guidance series is designed to provide further information on the key roles of GIRFEC, *Assessment of Wellbeing*, on how to use the *National Practice Model* and to guide our practice and provide clarity and confidence in *Information Sharing*.

The Practice Guidance

Practice Guidance 1. The role of the *named person*

Practice Guidance 2. The role of the *lead professional*

Practice Guidance 3. Using the *National Practice Model*

- Improving outcomes using the *Wellbeing Indicators*
- Gathering information with the *My World Triangle*
- Analysing information with the *Resilience & Vulnerability Matrix*

Practice Guidance 4. Information Sharing

The Statutory Guidance

Assessment of Wellbeing - Part 18 (section 96) of the Children and Young People (Scotland) Act 2014

This draft guidance was co-produced with a range of colleagues across local authority areas, health boards, the third sector and national organisations. Its development stemmed from a commitment made by the Deputy First Minister in September 2019. While much progress had been made prior to the pandemic, the more recent updates have purposefully reflected our current landscape.

1. Introduction

With the United Nations Convention on the Rights of the Child (UNCRC) as its foundation, GIRFEC provides Scotland with a consistent framework and shared language for promoting, supporting, and safeguarding the wellbeing of children and young people. Getting it right for every child is based on evidence, is internationally recognised and is an example of a child rights-based approach. It is locally embedded and positively embraced by practitioners across children's services, changing culture, systems and practice for the benefit of children, young people and their families¹. However more needs to be achieved as we work towards #KeepingThePromise, and do everything we can to respect, protect and fulfil the rights of all children in Scotland.

Scotland must ... ensure that the right information is shared at the right time and that those close to children are heard. The starting point for any decision must be how to best protect relationships that are important to children.

[The Promise, the report of the Independent Care Review](#)

Sharing relevant information at the right time is an essential part of promoting, supporting and safeguarding the wellbeing of children and young people including protecting them from harm. [The Plan 21-24](#) is the first of three Plans providing Scotland with a clear outline of the priorities and actions required to #KeepThePromise by 2030. Within this first set of priorities to be implemented by 2024, Scotland must be committed to ensure that *“Organisations with responsibilities towards children and families will be confident about when, where, why and how to share information with partners. Information sharing will not be a barrier to supporting children and families.”* This guidance represents a significant milestone in delivering this.

This guidance is intended for practitioners and service leads in services that work with children and families. The [Information Commissioner's Office](#) provides detailed guidance on wider information management.

¹ Throughout this document, “children and families” refers to children and young people under the age of 18, their parents and carers. A glossary of further terms used in this document can be found at Annex A.

This guidance is not aimed at law enforcement organisations (those described in the DPA as competent authorities) as data sharing by these bodies for specific law enforcement purposes is subject to a different regime.

When this guidance refers to information, it refers to personal information. This guidance promotes necessary, appropriate and proportionate information sharing, which complies with all relevant legal requirements, by clarifying:

- The circumstances in which information can be shared with another agency;
- The considerations that need to be taken into account to ensure sharing information with another agency is appropriate; and
- The importance of involving children and families in the decision to share information with another agency.

The UK General Data Protection Regulation (UK GDPR), the Data Protection Act 2018 and human rights laws provide a framework to ensure that personal information is processed appropriately. Duties of confidentiality and other rules of law also apply to data processing in different contexts.

For the avoidance of doubt, it is important to note that these laws are not designed to prevent justified information sharing for the prevention of harm to children and young people. The [Independent Care Review](#) highlighted that in many cases with tragic outcomes Significant Case Reviews find that *“key information about a child was not shared timeously or not listened to. In many cases the information shared was not taken account of by the people who needed that information”*.

These laws provide a framework in which the sharing can be carried out fairly and in a manner which respects the rights of the individuals concerned.

Data controllers, information governance leads and senior managers within services should ensure that systems, policies, procedures, protocols and guidance provide the framework for legal information sharing, supported by accessible advice and supervision.

Organisational and service specific systems, policies, procedures, protocols, guidance and supervision support practitioners to work within and apply the law.

Practitioners are not expected to have the same level of knowledge as data controllers or information governance leads, but should understand when and how it is appropriate to share information, and when they may need to seek further advice.

2. Building trusting relationships

GIRFEC is a strengths-based approach that seeks to realise children's rights on a day to day basis and is therefore underpinned by key values and principles:

- **Placing the child and family at the centre**, and promoting choice, with full participation of children and families in decision-making;
- **Working in partnership with families to enable a rights-respecting, strengths-based, inclusive approach**;
- **Understanding wellbeing as holistic and interconnected**, with a child's developmental experiences understood within the wider context and influences of family, community and society;
- **Valuing diversity and ensuring non-discrimination**;
- **Equitably tackling multiple and intersecting forms of inequality**;
- Shifting resources and support towards providing an **early offer of support** to improve outcomes for children, young people and families; and,
- **Joint working in a culture of co-operation and communication** between practitioners and services, both locally and nationally across Scotland.

Transparency in information sharing is key to working in partnership with families, respecting their rights and placing the child and family at the centre, with children and families involved in decision-making.

Where possible, children and families must be informed, from the outset, what personal information the organisation will require, why and what they do with the information. If any routine information sharing is necessary, children and families must be informed with whom it is shared, why and what the recipient will do with the information. If the organisation may share information without consent in certain circumstances, this should be explained.

This is usually included in a Privacy Notice, provided at the time the service collects personal data from children and families. Privacy information can also be given verbally or by other means.

If the information has come from another source, the practitioner will need to inform the child and/or family member concerned:

- within a reasonable period of obtaining the personal data and no later than one month;
- if practitioners use data to communicate with the child and/or family member, at the latest, when the first communication takes place; or
- if the practitioner can foresee a situation where they would need to disclose the information to someone else, at the latest, when they disclose the data.

The privacy notice should make clear that in some circumstances, such as if a practitioner believes a child may be at risk of significant harm, information can be shared immediately, and without informing the child and their family first. Detailed guidance on the distinction between harm and significant harm can be found in National Guidance for Child Protection in Scotland².

More detailed information on Privacy Notices is available from the Information Commissioner's Office: [Right to be informed | ICO](#)

Additionally, the GIRFEC Information Sharing charter (Annex B) explains how children and families can expect services to manage their personal information and respect their rights under the UK GDPR. The charter can be tailored for the needs of individual services and is available in accessible formats. It is good practice for services that engage with children and families to make the charter available.

3. Rights of the child

Scotland is set to incorporate the UN Convention on the Rights of the Child (UNCRC) into domestic law. The GIRFEC approach is informed by the UNCRC and puts the rights of the child at the heart of good practice.

² [National Guidance for Child Protection in Scotland 2021 - gov.scot \(www.gov.scot\)](#)

Article 12 of the UNCRC must inform the approach to participation of children. Article 12.1:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

There is no age limit on the right of the child to express their views. Practitioners should begin with the assumption that a child has the capacity to form their own views and recognise that they have the right to express themselves. It is not up to the child to prove their capacity. A child is able to form views from pre-verbal stages.

Implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.

Children and young people (aged 12-15) with additional support needs have [specific rights under the Education \(Additional Support for Learning\) Act 2004 \(as amended\)](#) which seek to ensure that they can be fully involved in discussions and decisions about their additional support needs and the support that is in place.

Children and young people have the same rights as adults over their personal data. Competent children and young people are able to exercise their own data protection rights: <https://ico.org.uk/media/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr-1-0.pdf>)

Sharing of information will be conditional on the consent of a child or young person. In circumstances where this is not the case, the child or young person still has the right to say what they think about that happening, and to have their views taken into account.

4. Professional Judgement

A culture of appropriate information sharing starts with leadership that values the voice and opinion of children and the workforce. Leaders must model an approach that encourages a culture of speaking up and recognises the judgment of the workforce.

[The Promise](#)

Professional judgement is always needed about the needs, risk or concerns in each set of circumstances and what, if anything, is relevant, proportionate and necessary to share in relation to these. The needs, risks or concern must be placed in the context of available observed and recorded information about the child or young person in their current circumstances. Practitioners should be careful not to over share information. This means that, information that is not relevant to the matter at hand, and not necessary to share in the circumstances, should not be shared. The Promise highlights the importance of children and young adults having ownership of their own stories and data.

5. Seeking advice

If in doubt about any aspect of information sharing, practitioners should seek appropriate advice. Further consultation may be necessary with those responsible for information or care governance. If possible, practitioners should seek advice without disclosing any information that could identify the individual. It should be recorded if advice was sought, from whom and what the advice was, whether information is shared or not at that time.

Within health services, a Caldicott Guardian is a senior person appointed to ensure that personal information about those who use its services is used legally, ethically and appropriately. Caldicott Guardians provide leadership and informed guidance on complex matters involving confidentiality and information sharing ([Caldicott Manual 2017](#)).

6. Recording decisions and the reasons for decisions

If practitioners need to share personal information with another service, they should document their decision and the reasons for those decisions. This will help to demonstrate compliance if required.

If a decision is made not to share information, consider:

- What are the reasons for deciding not to share information?
- What harm could result if this information is not shared?
- What are the possible risks for the child or young person or for others if information is not shared?
- What mitigating actions will be taken to ensure the child or young people's wellbeing is being supported?

Information sharing decisions must be based not only upon considerations about the safety and wellbeing of the individual, but also considering the safety of others.

The following should always be recorded:

- What information you have shared, and with whom;
- Your reasons for sharing information;
- Any views expressed in relation to information sharing;
- If the person concerned has not been informed, the reasons for this;
- Why you think it is necessary and proportionate to share information;
- The lawful basis for sharing; and,
- If the decision is not to share the information, this decision and the reasons should also be recorded.

7. Information sharing with consent

When a practitioner is considering the need to share a child and/or family member's personal information with another service, it is likely they are already asking the five key questions within the GIRFEC framework:

- **What is getting in the way of this child or young person's wellbeing?**

- **Do I have all the information I need to help this child or young person?**
- **What can I do now that is needed and appropriate to help this child or young person?**
- **What can my agency or organisation do now to help this child or young person?**
- **What additional help, if any, may be needed from others?**

When considering sharing information regarding concerns in relation to the child or young person, practitioners should be open and transparent with children and their family about whether the children and family have any influence over the decision to share. It is important that practitioners do not give the impression that they are seeking consent if the information needs to be shared regardless. If appropriate, practitioners should explain the possible consequences of withholding information.

It is important that a real or perceived power imbalance does not result in children and families feeling pressurised into agreeing to their information being shared, and that if they give consent, it is informed and freely given. It may be appropriate to reassure children and families as they may feel under pressure to agree when that is not the intention.

Seeking consent to share information is important to building a trusting relationship with children and families, giving them confidence that their rights are respected. There are important considerations if relying on consent as the lawful basis for information sharing.

7.1 Consent as the lawful basis

UK GDPR sets a high standard for consent and consent is unlikely to be an appropriate lawful basis to rely on.

There are two key matters that need to be carefully considered before being able to rely on consent:

- Consent should be ‘informed’.

The individual (child or young person and if appropriate their parent or carer) must understand what is being asked of them and must give their permission freely.

Although there is no age limit on the right of the child to express their views, in the UK children aged 13 or over are able to provide their own consent ([Children | ICO](#)), unless it is evident that they are acting against their own best interests. Ideally, the parents and practitioner will mutually agree if it is the case that the child or young person is acting against their own interests but due to the power imbalance and child or young person’s desire to please the parent, it cannot always be a mutual agreement and the practitioner will therefore have to decide whether consent has been freely given.

- Consent should be ‘freely given’.

Consent cannot be regarded as freely given if the child or young person is unable to refuse consent without detriment to themselves. There is likely to be a power imbalance, real or perceived, that makes it difficult for children and families to freely give consent. This means consent is unlikely to be a sound basis to rely on for sharing personal information with another organisation.

The current ICO guidance states that public authorities and other organisations in a position of power over individuals should avoid relying on consent unless they are confident they can demonstrate it is freely given ([When is consent appropriate? | ICO](#)).

In order to provide information, practitioners would have to be able to counteract the power imbalance. This might be possible if, for example:

- the nature of the relationship is such that there is no real adverse consequences if consent is not provided; and,
- the optional/voluntary nature of what is being requested is clear; i.e. the offer of help is neutral and optional and makes clear that it is a separate service with no effect on the current service being provided; and,
- the organisation ensures that consent is specific, informed, given by a clear affirmative action, and properly documented; in particular they properly

explain what data they will share with the support service, what it will be used for, and identify the organisation providing the service.

These conditions are in line with the principles of GIRFEC and the relationship between the practitioner and child, young person or parent should reflect this. However, for the purposes of data protection law, the requirement to evidence that the child, young person or parent was not influenced by a perceived power imbalance means that consent is unlikely to be the appropriate lawful basis.

Practitioners must be confident that they can demonstrate that consent is informed and freely given. There may be a need for advocacy, translation or communication support. The individual has the right to withdraw their consent to information being shared at any point.

There must be an effective audit trail of how and when consent was given, so that evidence can be provided if necessary. This evidence should be kept for as long as processing based on the consent is necessary.

8. Sharing Information without consent

There are circumstances where information can be shared without consent, for example, if a practitioner is unable to gain consent from the individual in time to prevent risk of harm; or if gaining consent could place a child or young person at risk. See section 8.1 of this guidance, which discusses cases where they may be a child protection concern.

In such circumstances, there must be another lawful basis in place. In cases of emergency this may be vital interests (if the sharing of the information is necessary to protect someone's life), in other cases it may be public task or legal obligation (if necessary for the purpose of exercising public functions) or if necessary to comply with a legal obligation. Public task is discussed in more detail in section 9.1. There is guidance from the ICO on circumstances in which these may provide a lawful basis.³

³ For lawful bases generally, see [Lawful basis for processing | ICO](#); for public task, see [Public task | ICO](#); for legal obligation, see [Legal obligation | ICO](#).

When the information concerns special category data, additional considerations may apply in relation to considering whether there is a lawful basis for sharing the information (see section 9.5 of this guidance).

Information sharing without consent should not come as a surprise to children and/or their family members, as the organisation should have been transparent with them about when and how this might happen from the very outset. In cases where the information will or may be shared without consent, if children and/or their family members are informed or have the opportunity to give their views, it should be made clear to them to what extent their views will influence the decision.

If an objection is raised by the child and/or family member, the data controller must then balance the necessity for information sharing against the child and/or family member rights. The ICO provide details of the circumstances in which people have the right to object to their information being shared. ([The right to object to the use of your data | ICO](#)).

8.1 Information sharing for Child Protection

The content of this section is taken from sections 1.129 to 1.147 of the National Guidance for Child Protection in Scotland 2021⁴.

Where there is a child protection concern, relevant information should be shared with Police or Social Work without delay, **provided it is necessary, proportionate and lawful** to do so. The lawful basis for sharing information should be identified and recorded. A summary of what constitutes a lawful basis, and what you need to consider in trying to identify the appropriate lawful bases for sharing can be found [in section 9 of this guidance]. Agency data protection leads should be able to advise where doubt about the appropriate lawful basis exists.

8.1.1 Professional judgement

⁴ [National Guidance for Child Protection in Scotland 2021 - gov.scot \(www.gov.scot\)](#)

It is the role of designated Police, Social Work and health staff to consider whether there may be a risk of significant harm, and if so, to progress necessary action through child protection procedures. This will include careful consideration and a plan for how to communicate with the child and family, including where there is no further action required.

Practitioners with child protection concerns may share relevant information in order to:

- clarify if there is a risk of harm to a child
- clarify the level of risk of harm to a child
- safeguard a child at risk of harm
- clarify if a child is being harmed
- clarify the level of harm a child is experiencing
- safeguard a child who is being harmed

Professional judgement must always be applied to the available evidence about each specific emerging concern, and about what is relevant, proportionate, and necessary to share. The concern must be placed in the context of available observed and recorded information about the particular child, their needs and circumstances.

8.1.2 Why relying on “consent” as the basis to share information may not be appropriate

UK GDPR sets a high standard for consent and, in most cases where there are child protection concerns, consent is unlikely to be an appropriate lawful basis to rely upon as it requires that individuals have real choice and control about the processing of their personal data. Relying on “consent” as the lawful basis is not appropriate if, for example, refusal to give consent would prejudice a criminal investigation or might lead to serious harm to the child. Furthermore, due to the power imbalance between a child or families and the authorities, it would be difficult to demonstrate that consent was freely given. In matters of child protection, it is therefore likely that reliance on consent would be the exception and not the rule.

8.1.3 Sharing without consent

Where there may be a child protection concern, information may be lawfully shared without the need for consent to be obtained from the individual(s) to whom the information relates. The following considerations will be helpful to support relevant, proportionate, timely, safe and effective information sharing.

- if there is evidence that a child is at risk of significant harm, relevant information can be shared with a statutory agency without delay. Consent is not required or appropriate because the information must be shared in order to protect the child. Consent should only be sought when the individual has a real choice over the matter. However, where appropriate, agreement and understanding about the sharing of information may be helpful in engaging individuals in the process
- the needs, feelings, views and wishes of the child should be taken into account and documented. They may also need additional support to understand and communicate
- information sharing decisions must be based not only upon considerations about the safety and wellbeing of the individual, but also the safety of others
- information can be shared without consent if, for example, a practitioner is unable to gain consent from the individual in time to prevent risk of harm, or if gaining consent could place a child at risk
- relevant personal information can be shared lawfully if, for example, it is to keep a child or individual at risk safe from neglect or physical, emotional or psychological harm. This must be done in a way that complies with the relevant areas of law such as data protection, human rights and confidentiality
- in all circumstances, it is important to be transparent with children and families so that they know what information is to be shared or has been shared and in what circumstances. In certain exceptional circumstances, it may not be appropriate to advise the individual that information is to be shared

- children and their families should also be aware that they can challenge whether sharing information is proportionate
- a record should be made of the reasons and considerations that informed the decision to share the information

If, where there is a possible child protection concern, a decision is made not to share information, consider:

- what are the reasons for deciding not to share information?
- what harm could result if this information is not shared?
- what are the possible risks for the child or young person or for others if information is not shared and how serious could those risks be?

Reasons for not sharing should be recorded.

8.1.4 Involvement of children

Article 12 of the UNCRC must inform the approach to participation of children in child protection processes. This makes no restrictive presumption about age.

Article 12 states: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

There is no age limit on the right of the child to express their views. Practitioners must not begin with the assumption that a child is incapable of expressing her or his own views, but rather presume that a child has the capacity to form their own views and recognise that she or he has the right to express them. Advocacy, translation or communication support may be needed.

Practitioners must consider whether the child has the capacity to make their own decisions. Under the Data Protection Act 2018, a child under the age of 16 must be treated as though they have capacity to exercise their rights under that Act, if there is reason to believe that the child has a general understanding of what it means to exercise those rights.

If a child is too young or immature to understand the full implications of information sharing practitioners should seek the consent of the parent on behalf of their child unless there are good reasons not to do so, in which case these reasons should be recorded.

In general, it should be assumed that a child who is over the age of 12 years has reached the age where they have the necessary level of maturity to have this understanding, unless there is evidence to the contrary.

Implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.

8.1.5 Guiding principles

Information shared must only be that which is necessary for child protection purposes.

Individuals about whom information is being shared should not be put under pressure to consent to the sharing of their information. They should be informed and involved in such a way that they understand what is happening and why.

They should also be told what information about them is being shared, with whom and why this is necessary, unless to do so would be detrimental to:

- the best interests of a child;
- the health or safety of a child or another person;
- the prevention or detection of crime (e.g. creating a risk of harm to a child);
or
- the apprehension or prosecution of offenders;
or
- it is not reasonably practical to contact the person;

- it would take too long given the particular circumstances (e.g. where you have to act quickly);
- the cost would be prohibitive;
- there is some other compelling reason.

Information sharing must be:

- timely in relation to the child protection concern
- secure in the manner in which it is shared
- explicit in the records about any dispute in facts or opinions shared

Shared information and records held must:

- state with whom the information has been shared and why
- be accurate and up to date
- be explicit about reasons for sharing or not sharing information

Information sharing that may be viewed as interfering with the right to private family life can only be lawful if it is done in a way that is proportionate to the achievement of a legitimate aim.

9. Potential lawful bases for sharing information

Under data protection law, you must be able to rely on lawful bases for processing.

<u>Summary of Lawful bases for sharing personal information</u>	
Public interest or public task	Necessary for performance of a task carried out in the public interest which is laid down by law, or in the exercise of an official authority - for example, a public body's tasks, functions, duties or powers.
Vital interests	Necessary to protect someone's life or, for example, if a child is deemed to be at risk of significant harm.
Legal obligation	Necessary to comply with a common law or statutory obligation.
Consent	Unlikely to be an appropriate basis for sharing information, as outlined at section 7.1 and 8.

Legitimate interests	Only if public authorities are processing data outside the scope of their tasks as a public authority; and therefore unlikely to be an appropriate basis.
Contract	When necessary in performance of a contract entered in to by an individual and therefore unlikely to be relevant in this context.
Reference: Lawful basis for processing ICO	

As explained at 7.1 and 8, even in situations where consent is given, it is unlikely to provide a sound lawful basis given the power imbalance. For this reason, in most cases in order for information sharing to be acceptable practitioners will likely have to rely on a different lawful basis. There may be circumstances where vital interests (i.e. necessary to protect someone's life or, for example, if a child is deemed to be at risk of significant harm) is the most relevant lawful basis, however, in most circumstances, public task is likely to be the most relevant lawful basis, and is discussed below.

9.1 Public Task

Given the potential for a power imbalance in seeking consent, even in situations where consent is required and is obtained, the most relevant lawful basis is likely to be public task.

Public task is the term for processing personal data "in the exercise of official authority". This covers public functions and powers that are set out in law, or to perform a specific task in the public interest that is set out in law. Annex C gives examples of the legislation that is most likely to be relevant in these circumstances, though it is not exhaustive.

Public task is most relevant to public authorities. More information on the position for third sector and independent organisations is given in Section 11.

You do not need a specific statutory power to share personal information, but your underlying task, function or power must have a clear basis in law.

The processing must be necessary. The lawful basis does not apply if the practitioner could reasonably perform the tasks or exercise their powers in a less intrusive way.

The Information Commissioner's Office provide a more detailed explanation of what is meant by public task: [Public task | ICO](#).

9.1.1 How to decide if sharing information is necessary?

In situations where information sharing is necessary to deliver a service, children and families should be informed before they agree to engage with the service, what information needs to be shared, with whom, and for what purpose.

In some cases, it might be necessary to share additional information. For example, to continue or extend provision of the same service, or to provide a different service. In this type of situation, practitioners should inform the child and/or family member that they have a choice as to whether or not they want to use the service.

Practitioners should also explain what information would need to be shared if they chose to use the service.

In many cases, it will be clear whether processing is necessary or not. For example, if a practitioner is concerned about the safety of a child or young person. However, for the processing to be necessary, you have to make sure that any information you share is:

- targeted so that practitioners are not sharing more information than necessary; and,
- proportionate to the aim of protecting the child's safety.

Practitioners should take into account:

- the sensitivity of the information,
- the purpose of sharing, and
- whether there is a less intrusive way to achieve that purpose.

Practitioners must also think about how significant the level of interference is with the person's private and family life.

It may be that the practitioner has to share information about a parent or sibling (not just the child) in order to achieve support for a child or young person. When sharing personal information each individual's rights must be considered and respected.

Practitioners should record their actions, the reasons for them, and any views expressed.

Organisations should ensure that, where appropriate, children and families are provided with detailed fair processing information, for example, by way of a leaflet, and explain the content of this to the person concerned.

9.2 Summary of Data Protection law considerations

- Is sharing this personal data necessary to perform a task in the public interest/substantial public interest (GDPR Art 6.1 and Art 9)?
- Is there a basis in law, such as a specific statutory provision or common law duty, which creates a public function or task (See Annex C)?
- Is the processing "necessary" for the performance of that function?
- Is there a less intrusive way to obtain the same result?
- Is the processing targeted and proportionate? i.e. providing only the minimum information necessary to the necessary services to achieve the required aim?

9.3 Article 8 ECHR

The Human Rights Act 1998 gives effect to the human rights set out in the European Convention on Human Rights (ECHR). Public authorities, like a local authority or the NHS, must follow the Act. Public authorities must not act in a way that would be incompatible with rights under the ECHR.

Article 8 ECHR gives everyone the right to respect for their private and family life, their home and their correspondence. Sharing a child or family member's personal

information is likely to interfere with this right. Relevant authorities are only allowed to interfere with Article 8 ECHR if it is both lawful and proportionate to do so.

Both aspects of the following two part test needs to be met to ensure that practitioners respect children and family member's human rights and that any interference is justified as lawful and proportionate.

9.3.1 Part 1 of the test: Is the interference “in accordance with the law”?

In order for the interference to be in accordance with the law, practitioners must consider the following:

- In the practitioner's opinion, could sharing the information promote, support or safeguard the wellbeing of the child or young person?
- Can practitioners share this in a way that complies with data protection laws (i.e the GDPR and the DPA 2018)?
- Have practitioners complied with all other relevant laws? Such as the law of confidentiality and human rights?
- Annex C sets out some examples of some statutory provisions relevant to sharing information.

9.3.2 Part 2 of the test: Is the interference “necessary in a democratic society”?

To lawfully interfere with a child or family member's private or family life, practitioners must consider if the interference is necessary to achieve a legitimate aim, such as for example:

- the prevention of crime or disorder,
- public safety,
- the protection of health or morals,
- the economic wellbeing of the country,
- the protection of the rights and freedoms of others,
- national security.

9.3.3 Proportionality

Even if practitioners believe that sharing information will help pursue a legitimate aim (for example, safeguarding a child's health), they can only lawfully interfere with an parent or child's private or family life if it is proportionate to do so.

To assess proportionality, practitioners will have to carry out a balancing exercise. There will often be competing interests at play here. Practitioners should weigh up the importance of ensuring the child or family member's rights are respected, against the importance of achieving the "legitimate aim". The impact on the person's ECHR rights must not be disproportionate to the benefit pursued.

In many cases, it will be obvious that intervention is necessary. Practitioners must assess the circumstances of each case and make sure that they can justify any interference as being proportionate to the aim. If there is an alternative option, which is less intrusive but still achieves the aim, then the interference with an individual's private and family life will be disproportionate, unless the alternative option(s) is pursued.

Practitioners must not disclose confidential or sensitive information to a greater extent than is necessary in the interests of the child or young person.

Practitioners should always try to minimise the interference with the child's or family's right.

Practitioners should ensure that the benefits of sharing information to achieve the legitimate aim outweigh any adverse consequences that sharing this information may have. To ensure that practitioners are sharing information proportionately, they should only share the information that is relevant to achieving the legitimate aim.

Practitioners should record their actions and the reasons for them.

9.4 Confidentiality

There is a common law duty of confidentiality when information, particularly information with a degree of sensitivity, is obtained in circumstances where it is reasonable for a

person confiding personal information to expect that it will be held in confidence by the recipient of the information (this may be express or implied from the circumstances). It applies only to information not already in the public domain.

In certain circumstances, there may be a legitimate basis for sharing confidential information. This may arise, for example, where the person to whom the information relates has freely given their consent (although, as noted earlier, this may be difficult to demonstrate in cases of power imbalance). In addition, there may be a legal requirement to share confidential information such as, for example:

- where there is an over-riding interest which is so serious that it outweighs the duty of confidentiality;
- where there is a legal obligation to disclose confidential information
- where there is a court order demanding the release of confidential information,
- where there is an express statutory duty which requires the disclosure of the information, regardless of its confidential quality, for example, sharing information to help in the detection of crime, or to prevent serious harm to a child or young person.

The duty of confidentiality will not be outweighed lightly. There is a high public interest in keeping sensitive information confidential. Practitioners must assess the facts and circumstances of each case before deciding if the public interest favours the disclosure of information.

Therefore, practitioners must only share sensitive and confidential information where it is necessary and proportionate for practitioners to share it (and see the discussion in paragraphs 9.4.2 and 9.4.3 concerning where Article 8 ECHR rights are engaged).

A number of professional regulatory bodies have codes of practice in place which explain the duty of confidentiality as applicable to their members.

9.5 Special Category Data

Information that practitioners are considering sharing will often be “special category data”. This is sensitive personal information that is sensitive and personal (for example, information concerning race, ethnic origin, politics, religion, trade union membership, genetics, biometrics used for ID purposes, health, sex life, or sexual orientation). Data protection law provides greater protection for this data because of its sensitive nature. In addition to requiring identification of a lawful basis for sharing that information, there are additional conditions that require to be satisfied in relation to the sharing of such information, including in relation to being able to rely on consent (which must be explicit).

This is a complex area and organisations should have protocols in place to support practitioners to ensure that if they process special category data, that they do so lawfully. Practitioners should be aware of the need to follow organisational protocols when processing special category data, and to seek advice if in any doubt, however they are not expected to be familiar with the legislation itself on special category data.

Practitioners should be assured that where there are child protection concerns, the Data Protection Act does not present a barrier to sharing information.

Further guidance can be found on the ICO website:

- [What are the conditions for processing? | ICO](#)
- [What are the substantial public interest conditions? | ICO](#)
- [Special category data | ICO](#)

10. Chronologies

Detailed guidance on chronologies will be provided in guidance on planning for children within the GIRFEC approach. In brief, practitioners should apply the same consideration to the information shared within chronologies as they apply to other information sharing.

When contributing to, developing, sharing or storing a chronology particular consideration should be given to the principles that:

- Only the minimum amount of information will be shared that is necessary for the identified purpose.
- Information will not be further shared or processed in any manner incompatible with the purpose(s) specified.
- Information will not be kept longer than is necessary for the purpose identified to the individual to whom it relates.
- If sharing or use of information may negatively interfere with individuals private and or family life then this interference must be legitimate, appropriate and proportionate to the concerns.

11. Third Sector and Independent Organisations

Public task can provide the lawful basis for third sector and independent organisations to share information in situations where the organisation is commissioned to provide a service on behalf of statutory services.

Regardless of whether the organisation is commissioned to provide a service, there should be organisational policies and protocols in relation to child protection. Anyone who has cause for concern about a child or adult at risk of harm should share information according to their organisation's local protocol. Within adult services, consideration should be given to the impact of the additional needs or potential risks relating to a significant person in the child or young person's world.

Annex A - Glossary of Terms

Child or young person

An individual who has not yet attained the age of 18 years.

Child's plan

A personalised child's plan is developed when those working with the child and family identify that a child needs a range of extra support planned, delivered and co-ordinated. The child's plan should reflect the child's voice and explain what should be improved for the child, the actions to be taken and why the plan has been created.

Child Protection

The processes involved in consideration, assessment and planning of required action, together with the actions themselves, where there are concerns that a child may be at risk of harm from abuse, neglect or exploitation.

Getting it right for every child (GIRFEC)

This is Scotland's national approach to promoting, supporting, and safeguarding the wellbeing of children and young people. It provides a consistent framework, shared language and common understanding of wellbeing. GIRFEC puts the child at the centre and helps children get the right support from the right people at the right time.

Lead professional

When children and families require the help of two or more agencies for support, a lead professional will be needed. The lead professional is an agreed, identified person within the network of practitioners who are working alongside the child and family. In most cases, the professional who has the greatest responsibility in coordinating and reviewing the child's plan will undertake this role.

Named person

This is a clear point of contact for times when children and families require information, advice or help. The named person is mainly provided by health and education services and is usually someone who is known to the child and family and

who is well placed to develop a supportive relationship with them. Local arrangements and the term used to describe this role or function may vary from area to area. A named person can help children and families access relevant support for a child's wellbeing.

Wellbeing Indicators

Any assessment of a child's wellbeing should be founded on the 8 wellbeing indicators: Safe, Healthy, Active, Nurtured, Achieving, Respected, Responsible, Included, sometimes referred to as SHANARRI. The SHANARRI wellbeing indicators are informed by the UNCRC rights and requirements. They are overlapping and connect areas that are fundamental to understanding what children need in order to grow, develop and thrive.

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Annex B - Information Sharing Charter

This charter is for children, young people, parents and carers. The charter explains how you can expect information about you/your child to be managed and aims to make your rights easier to understand.

Getting it right for every child (GIRFEC) is Scotland's framework for promoting, supporting, and safeguarding the wellbeing of children and young people. GIRFEC puts the rights of the child at the heart of good practice, including the right to privacy.

We need some information about you/your child so that we can provide a service (e.g. so that we contact you) and so that we can support your child's wellbeing.

The UK General Data Protection Regulation (GDPR) sets out how services (e.g. schools, health services and voluntary services) must manage information. More information can be found at [Home | ICO](#).

1. We will tell you what we are doing with your information and why.
2. We will not put you under pressure to agree to share information. We will tell you what information we need to provide a service.
3. When you engage with our service, we will be clear about what information sharing will be necessary, with whom, why and what will be done with the information.
4. You have a right to ask if we hold information about you or your child, what we use it for, to be given a copy of that information and to be told who the information has been shared with.
5. We will not share information about you or your child further, or use it for anything that we have not told you about, unless there is a law that says we have to, for example if we are concerned that a child may be at risk of harm. If we have to share information without your agreement, we will only share the minimum needed.
6. We will keep information about you and your child accurate and up to date for as long as necessary.
7. If you don't agree with information that we hold about you or your child, you have the right to tell us and ask for it to be changed or deleted. We will explain what happens next. If you are not happy with the outcome you can complain to the Information Commissioner's Office ([Make a complaint | ICO](#)).

8. We store and process information about you/your child securely and protect it from being accessed, used, lost or damaged when it shouldn't be.
9. We have a schedule that sets out how long we can keep information before we have to delete or destroy it.
10. You can find more detail on how and why we keep, use and share information about you/your child in our privacy notice.
11. If you think information about you/your child has not been managed correctly, you can tell us. If you're unhappy with our response or if you need advice, you can contact the Information Commissioner's Office ([Your personal information concerns | ICO](#)).

Annex C – Public Task Statutory Provisions

The examples given below are not an exhaustive list

Statutory Provisions for Health Boards

National Health Service (Scotland) Act 1978

2A Duty of Health Board, Special Health Board to promote health improvement

(1) It is the duty of every Health Board and Special Health Board and of the Agency to promote the improvement of the physical and mental health of the people of Scotland.

(2) A Health Board, a Special Health Board may do anything which they consider is likely to assist in discharging that duty including, in particular—

- (a) giving financial assistance to any person,
- (b) entering into arrangements or agreements with any person,
- (c) co-operating with, or facilitating or co-ordinating the activities of, any person.

Statutory provisions – Local Authorities

Children (Scotland) Act 1995

21. Co-operation between authorities.

(1) Where it appears to a local authority that an appropriate person could, by doing certain things, help in the exercise of any of their functions under this Part of this Act, they may, specifying what those things are, request the help of that person.

(2) For the purposes of subsection (1) above, persons who are appropriate are —

- (a) any other local authority;
 - (b) a health board constituted under section 2 of the National Health Service (Scotland) Act 1978;
 - (c) a national health service trust established under section 12A of that Act;
- and
- (d) any person authorised by the Secretary of State for the purposes of this section;

and an appropriate person receiving such a request shall comply with it provided that it is compatible with their own statutory or other duties and obligations and (in the case of a person not a natural person) does not unduly prejudice the discharge of any of their functions.

22. Promotion of welfare of children in need.

(1) A local authority shall -

- (a) safeguard and promote the welfare of children in their area who are in need; and
- (b) so far as is consistent with that duty, promote the upbringing of such children by their families, by providing a range and level of services appropriate to the children's needs.

(2) In providing services under subsection (1) above, a local authority shall have regard so far as practicable to each child's religious persuasion, racial origin and cultural and linguistic background.

(3) Without prejudice to the generality of subsection (1) above -

- (a) a service may be provided under that subsection -
 - (i) for a particular child;
 - (ii) if provided with a view to safeguarding or promoting his welfare, for his family; or
 - (iii) if provided with such a view, for any other member of his family;
- and

(b) the services mentioned in that subsection may include giving assistance in kind or, in exceptional circumstances, in cash.

Section 93(4)

Any reference in this Part of this Act to a child -

- (a) being "in need", is to his being in need of care and attention because -
 - (i) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless there are provided for him, under or by virtue of this Part, services by a local authority;

- (ii) his health or development is likely significantly to be impaired, or further impaired, unless such services are so provided;
- (iii) he is disabled; or
- (iv) he is affected adversely by the disability of any other person in his family;

Duty to be Health Promoting

Standards in Scotland's Schools etc. Act 2000

S2A (5) states:

(5) In this section, a school or hostel is “health-promoting” if it provides (whether on its own or in conjunction with Health Boards, parents or any other person) -

- (a) activities, and
- (b) an environment and facilities,

which promote the physical, social, mental and emotional health and well-being of pupils in attendance at the school or residing in the hostel.

A school is defined in section 135 of the Education (Scotland) Act 1980 as:

'an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school'.

The definition therefore covers local authority nursery schools but not private nurseries, childminders or free statutory pre-school education provided under contract to the local authority. Thus, local authority nursery schools will be subject to the health promotion duty.