RE: THE CHRISTIAN INSTITUTE

on the possibility of a judicial review in relation to the provisions in the Children and Young People (Scotland) Bill 2013 to set up a network of "named persons" for every child in Scotland

NOTE

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ADVICE	

1. Introduction

- 1.1 I refer to the E-mails from my instructing solicitor dated 16, 18, 19 and 20 December 2013 together with the papers attached thereto. I apologies for my delay in replying.
- 1.2 I am asked to advise on the Convention compatibility of the "named person service" which is proposed to be created under the Children and Young People (Scotland) Bill 2013 which is currently under consideration before the Scottish Parliament. I am asked to consider, in particular:
 - first, the lawfulness of the proposal that a "named person" be appointed in relation to
 every child in Scotland without exception or individual assessment as to whether a
 child needs the services of a name person; and
 - secondly, whether the appointment of a named person accords with the Convention principles of lawfulness given that the functions, duties and powers of and limitation on the named person are not yet set out in terms in any legislation.

2. THE LEGISLATIVE PROVISIONS AT ISSUE: THE NAMED PERSON SERVICE

2.1 The Children and Young People (Scotland) Bill 2013 is a Scottish Government Bill which was introduced before the Scottish Parliament by Alex Neil MSP, the Cabinet Secretary for Health and Wellbeing on 17 April 2013. Part 4 (Sections 19 to 30) of the

Bill makes provision for the creation of a "named person service" in relation to children and young persons in Scotland. The Policy Memorandum to the Bill explains this as being one of the central aims of the Bill:

"Children and young people from birth up to 18 (or beyond if they are still at school) have a Named Person and that relevant public bodies cooperate with the Named Person by sharing relevant information with the Named Person where there is a risk of the wellbeing of a child or young person being impaired."

2.2 The Policy Memorandum continues as follows:

- 68. The Named Person will usually be a practitioner from a health board or an education authority, and someone whose job will mean they are already working with the child. They can monitor what children and young people need, within the context of their professional responsibilities, link with the relevant services that can help them, and be a single point of contact for services that children and families can use, if they wish. The Named Person is in a position to intervene early to prevent difficulties escalating. The role offers a way for children and young people to make sense of a complicated service environment as well as a way to prevent any problems or challenges they are facing in their lives remaining unaddressed due to professional service boundaries. Their job is to understand what children and young people need and quickly make the connection to those services that can help when extra help is needed.
- 69. ... Legislating for the role of Named Person will underpin the national approach and help ensure that children and their families can expect services to work with them in a structured and consistent way, regardless of where they live. When information is to be shared within and across boundaries, then it needs to be directed to the right person with the minimum of delay. This will lead to better coordination of existing services, as well as quicker identification of unmet needs.
- 70. The Bill aims to ensure that every child in Scotland has a Named Person. It will do this by placing duties on different bodies for ensuring the Named Person is in place at different stages in a child's and young person's life:
 - From birth up to school age or when the child starts school, health boards will be responsible for ensuring all children have a Named Person and for the carrying out of the duties of the Named Person set out in the Bill; and
 - From school age up until 18 or beyond if the child is still at school, local authorities or managers and proprietors of independent and grant-aided schools will be responsible for the Named Person and the accompanying duties. A young person who is in secure accommodation is also to have Named Persons provided for them by the managers of the establishment in which they are kept.
- 71. The Bill makes provision to ensure that certain groups of children and young people, with a less typical pattern of involvement with health or educational services, are provided with a Named Person. These include:
 - Children and young persons in gypsy/traveller communities;

- Home educated children;
- Children and young persons who attend school outside Scotland;
- Children and young people with interrupted learning (i.e. those who are unable to maintain a regular pattern of school attendance, or require a period of time out with their normal learning setting, due to a range of factors including, family lifestyle, health issues or risk factors related to their behaviour); and
- Young people who leave school before the age of 18.

72. The Bill also includes provisions to ensure:

- Children, young people and families always know about the role of the Named Person and how to contact them; and
- Other relevant public authorities can identify the Named Person for a particular child or young person quickly.
- 73. In addition to the duty on specific public authorities to put the Named Person in place, the Bill provides for a more wide-ranging duty on all relevant public authorities to cooperate with the Named Person in the conduct of their duties. This will be of particular importance in the following areas.
 - Information sharing. The role of the Named Person will depend on the successful sharing of information between relevant public authorities where there are concerns about the wellbeing of individual children and young people;
 - Planning. In developing a Child's Plan or coordinating support for individual children and young people, the Named Person will require significant cooperation from a range of services; and
 - The role of public authorities. Concerns about individual children and young people may often not come from children's services, but from any of the public authorities listed in schedule 2 to the Bill. The duty to cooperate with the Named Person will extend across all services provided by the relevant public bodies, so that they understand their duty to share concerns with the Named Person, and other services as appropriate, about risks to the wellbeing of children and young people.
- 74. Where a relevant authority (or any person which can provide a Named Person, but is not providing a Named Person for the child or young person who the information is about) has information which it considers may be relevant to the exercise of the Named Person functions, the Bill ensures that the information will be passed to the Named Person unless doing so would prejudice the conduct of any criminal investigation or the prosecution of any offence.

Alternative Approaches

75. The proposal to provide a Named Person for every child and young person was strongly supported by stakeholders, both through the public consultation and the

engagement undertaken. However, concern was expressed about the existing legal framework for information sharing. This was felt to be confusing and potentially insufficient to enable the role of the Named Person to operate as well as anticipated. In particular, there were concerns regarding the sharing of information about children where consent is not given, both between others and the Named Person, and the Named Person and other professionals. It was felt that this could lead to professionals being unsure as to when information should be shared.

76. Currently, information about a child may be shared where the child is at a significant risk of harm. However, the role of the Named Person is based on the idea that information on less critical concerns about a child's wellbeing must be shared if a full picture of their wellbeing is to be put together and if action is to be taken to prevent these concerns developing into more serious issues. Without the necessary power to share that kind of information, the Named Person will not be able to act as effectively as is intended. This was a point raised consistently by practitioners and professionals.

77. Specific provisions in the Bill, therefore, set out arrangements on information sharing, to give professionals and Named Persons the power to share information about those concerns. Duties will be placed on public bodies working with children and adults to share a concern they have about the child's wellbeing with the Named Person, *if it is necessary to safeguard, support and promote the wellbeing of the child*, and *on the Named Person to share with other relevant public bodies* information appropriate to addressing relevant concerns.

. . . .

- 85. If a practitioner as Named Person understands their own role and responsibilities and the roles and responsibilities of other practitioners and services, as well as the language of wellbeing, they will be confident in acting early on concerns about a child and responding quickly when a child needs help. Understanding the role and responsibilities of the Named Person will lend confidence to practitioners from other services to share information with the Named Person, when a child needs help to promote their wellbeing and they are unable to provide that help themselves. Practitioners from all services should feel confident that sharing information to secure services in support of improved wellbeing is a positive choice for most families."
- 2.3 Although the Bill talks about "making available" the service, the Bill in fact creates a *duty* on health boards (in relation to pre-school children Section 20) and separately on local authorities (in relation to children and young persons from school age up to age 18) to provide a named person to "each" child in their area. In other words, every child in Scotland is to be assigned a named person whether or not problems are on the radar. The Bill then establishes functions for the named persons. Amongst other things, they would be empowered to "advise" and "inform" the child or discuss or raise matters about the child with the relevant authorities. The extent to which the named person engages in these functions for any given children will be so far as "the named person considers it to be appropriate" (Section 19(5)).

- 2.4 In summary it would appear that the "Named Person" is a person other than the parent of the child who is a State employee appointed and tasked by the State, *inter alia*,
 - to receive and collate "information" about the child or young person assigned to that Named Person
 - to "monitor" what a child or young person assigned to that Named Person "needs" for the safeguarding, support and promotion of the "wellbeing" of that child or young person
 - to share with relevant public authorities information about the assigned child or young person to allow the Named Person and the public authorities to put together "a full picture of their well-being"
 - to initiative or assist in pre-emptive action or early intervention by public authorities intended to prevent any concerns about the (future) wellbeing of the assigned child or young person "developing into more serious issues".
- 2.5 What is meant by "well-being" is clearly crucial to understanding the role of the Named Person. The Policy Memorandum contains the following explanation:

"Definition of wellbeing

- 58. 'Wellbeing' is a term commonly used about an individual's development. It can mean different things, ranging from mental health to a wider vision of happiness. The term is used in the UNCRC, and by UNICEF when reporting on children's issues. It captures the idea that a child's or young person's condition depends on a range of different factors. Wellbeing reflects the fact that different aspects of a child's and young person's quality of life will affect what they can achieve as they grow and develop and how well they are able to address any difficulties they may encounter. The better a child's wellbeing, the better their outcomes will be. Wellbeing is not just about a child's and young person's economic status, health or educational attainment: it is also about how they take responsibility for their actions, their inclusion in the wider community and whether their views and voices are respected and heard.
- 59. In Scotland, under the GIRFEC approach, wellbeing is defined through eight Wellbeing Indicators, often known by the acronym, 'SHANARRI': Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included. These capture the full range of factors that affect a child's and young person's life and reflect the Scottish Government's view that it is essential for services to take a holistic approach.
- 60. The Bill provides for a number of duties that seek to safeguard, support and promote the wellbeing of children and young people. To ensure that these duties take a holistic view of what a child or young person needs, the Bill provides for a holistic definition of wellbeing by reference to SHANARRI (section 74).
- 2.6 Against such an open-ended definition of what is meant or intended by "well-being" "ranging from mental health to a wider vision of happiness" and including being "safe,

healthy, achieving, nurtured, active, respected, responsible, and included – it would appear that the role which the Scottish Government envisages for the Named Person is one which might be thought to cut across and directly impact upon the rights and responsibilities of parents in relation to their own children, which are fundamental rights recognised within the legal order, notably under and in terms of Article 8 ECHR which imposes a general duty upon the State to respect "private and family life" and the "home".¹

2.7 The Policy Memorandum to the Bill makes little if any reference to these general overarching issues of principle – namely how far should the State be intervening in private and family life with its vision of children's well-being – but instead looks only at discrete issues under the heading human rights, as follows:

"Human Rights

153. The amendments in the Bill to the Children's Hearings (Scotland) Act 2011 [allowing the National Convener to determine the number and location of Area Support Teams ("ASTs") in consultation with local authorities and thereby remove the obligation to obtain consent from each authority before establishing ASTs; and placing a duty on local authorities to provide such administrative assistance to ASTs as the National Convener considers appropriate and to the Criminal Procedure (Scotland) Act 1995 [providing a new right to appeal a local authority decision to place a child in secure accommodation following an order made by the sheriff to detain the child in residential accommodation] potentially raise issues with regard to Article 6 of the European Convention on Human Rights. However, it is considered that in the former case, the amendments have no impact on the children's hearings themselves and in the latter, the amendment makes secure accommodation authorisations more Article 6 compliant. Therefore, neither breach Article 6.

154. The *information sharing provisions* in relation to the Named Person and Scotland's Adoption Register potentially engage Article 8, but it is considered that they are compliant as they have a legitimate aim, they are proportionate and have appropriate safeguards in place.

The widening of access to early learning and childcare for certain 2 year olds potentially engages Article 8, Article 2 of the First Protocol and Article 14, but again the measures in the Bill are a proportionate means of achieving the legitimate aim of improving outcomes for the most vulnerable or disadvantaged children and ensuring those children are properly looked after. Therefore, the Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

155. Consideration has been given as to whether the Bill's *provisions on data sharing* raise any issues in relation to the European Convention on Human Rights, and particularly in relation to the Article 8 right to respect for private and family life. To the extent that the policy will engage this right, the Scottish Government is satisfied that it pursues a legitimate

¹ In Connors v. the United Kingdom (2005) 40 EHRR 9 the Strasbourg Court noted at § 82:

[&]quot;The concept of a 'home' is of central importance to an individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."

aim which is necessary in a democratic society and that the means chosen to achieve the aim are proportionate.

156. The Scottish Government has also considered if privacy implications would arise as a result of the Bill, specifically in relation to data-sharing, and to that end has completed a Privacy Impact Assessment (PIA). The PIA is a living document that will be revisited and reviewed throughout the life of the Bill. There is currently no evidence that any aspect of the Bill should be reconsidered as a result of privacy concerns.

157. It is anticipated that any potential risks can be satisfactorily addressed through adherence to best practice advice from appropriate bodies such as the Information Commissioner and through statutory guidance."

2.8 The Policy Memorandum therefore nowhere addresses the issue of whether it is compatible with respect for fundamental rights for the State to appoint for every child in Scotland – regardless of that child's wishes or the wishes of the parents or family of that child, or of any history of risk or impairment of the child's health or welfare – a State employee charged with: monitoring that child; receiving, collating and disseminating information about that child; and, if so advised, initiating and assisting or otherwise participating in State intervention in relation to that child's "well-being".

3. FUNDAMENTAL RIGHTS TO RESPECT FOR PRIVATE AND FAMILY LIFE AND THE HOME

The principle of subsidiarity

- 3.1 One of the fundamental principles underlying the European Convention on Human Rights is the principle of subsidiarity, which is an idea derived originally from the social teaching of the Catholic church (which was subsequently hugely influential among Continental politicians and intellectuals involved in the post-War reconstruction of Europe).
- 3.2 In the first third of the 20th century Catholic social teaching sought to counter the idea of the State as the sole of value and the only proper focus of loyalty ("the totalitarian State") which the ideologies of both Fascism and Communism proclaimed. ² Instead,

² See Pope John Paul II, Centesimus Annus (1991) at para 46:

[&]quot;a democracy without values easily turns into open or thinly-disguised totalitarianism".

with the principle of subsidiarity this social teaching denied the legitimacy of the absolutist State and emphasised the anti-totalitarian idea of society as being made up of a commonwealth of associations in which individuals participated and to which their loyalties could be given and, accordingly, in which there might be a multiplicity of identities.

- 3.3 With the concept of subsidiarity, Catholic social teaching proclaimed that the State should not presume to arrogate all power to itself, but should respect the nature of society as a commonwealth by permitting power to cascade down to the lowest level at which it could most effectively be exercised. ³ Further this social teaching regards the family as a basic society in its own right and, while acknowledging that family and society at large have complementary functions in defending and fostering the good of each and every human being, stipulates in accordance with the principle of subsidiarity that "the State cannot and must not take away from families the functions that they can just as well perform on their own or in free associations; instead it must positively favour and encourage as far as possible responsible initiative by families." ⁴
- 3.4 The defeat of Fascism and the rise of Communism which marked the ending of the Second World War, gave a new impetus and urgency for this social teaching to be realised as a political force. It was particularly influential as to the terms and structures in which human rights treaties were drafted, notably the Organisation of American States' ("OAS") *American Declaration of the Rights and Duties of Man* of 1948 and the Council

"79. Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

80. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function', the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State."

³ See Pope Pius XI *Quadragesimo Anno* (1931) at para 79-80

⁴ See Pope John Paul II Familiaris Consortio (1981) at para 45

of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 1950. These documents proceeded on the basis that the fostering of a pluralism and a diversity of societies and groupings within the State was a necessary bulwark in the defence of human rights, which is why it was understood that human rights could be properly prayed in aid by associations as well as by individuals. As Professor Brian Simpson has observed:

"[T]he European Movement's draft Convention for human rights protection, that is the starting point in the negotiations of the ECHR, permitted petitions from "any natural or corporate person" (p.35). Even earlier, the *Projet de Déclaration des Droits* of May 1948, drafted by a committee of the European Movement with Alexandre Marc as *rapporteur*, included specific provisions protecting the right of autonomous associations (*collectivités autonomes*). So, continental European thinking always favoured the protection of the rights of companies. It is possible that the underlying reason for this was the belief, particularly associated with Charles de Visscher, that an essential feature of a free society was the diffusion of power which came about through the existence of autonomous associations, whether they be commercial companies, or tennis clubs, whereas in an unfree society such associations could only exist as creatures of the state. Those involved in the post-war human rights movement were continuously looking over their shoulders at the Soviet Union. There were no autonomous commercial companies there, and, I guess, no private tennis clubs either." ⁶

- 3.5 What is startling about the proposed legislative schema for a named person service in the Bill is that it appears to be predicated on the idea that the proper primary relationship that children will have for their well-being and development, nurturing and education is with the State rather than within their families and with their parents. The further remarkable aspect of this schema is that it is intended to be universal in scope applying to every child regardless of any assessment of need and for it to be compulsory for all children to have a named person, without any provision for consent of either the child or its parents or the possibility of opt-out from this State monitoring and mentoring scheme, whether at the instance of the individual child or its parents.
- 3.6 These characteristics of universal and compulsory application of a scheme for the general "well-being" of children, which would supplement and circumvent the child's existing family structures and which (by Section 19(4)) expressly exclude parents from being a

⁵ This text has never, so far as I am aware, been published. It is discussed in AWB Simpson *Human Rights and the end of empire: Britain and the genesis of European* Convention (Oxford, 2001), at pp.608-611

⁶ A.W. Brian Simpson Review of Marius Emberland *The Human Rights of Companies - Exploring the Structure of ECHR Protection*" (2007) 32 European Law Review 419

being able to carry out the named person function in relation to their own children bears, if anything, certain of the hallmarks of a State absolutist model which do not appear to be compatible with the requirements of subsidiarity as properly understood within a modern European democracy governed by the rule of law and respectful of fundamental rights which Scotland aspires to be.

Respect for the rights of parents vis à vis their children

3.7 It is against this background that one has to understand the specific protection given under the ECHR to private and family life and the home and separately the rights of parents in relation to the education of their children.

3.8 Article 8 ECHR provides as follows:

"Right to respect for private and family life

- 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 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.
- 3.9 The Article 8 ECHR decisions of the European Court of Human Rights show the importance which the Court attaches to the State respecting the natural bonds between parent and child and the family and home life which they create together. Thus in *Kutzner v Germany* ⁷ the European Court of Human Rights considered the removal of parental responsibility for their daughters from a couple with learning disabilities. In this case, the children were placed in two separate foster homes, despite evidence that that the parents were capable of meeting their children's needs with support. Although existing levels of educational support had been inadequate to meet the needs of the children, the State had not considered whether greater levels of support could be appropriate. The Court also considered that the parents had very limited opportunities for visitation and that the children had been independently placed with different foster parents. The Court considered that although the State has a wide margin of appreciation in relation to

⁷ Kutzner v Germany, (2002) 35 EHRR 25, particularly paras 65 – 82

individual decisions on child protection, that in this case, the State had acted in breach of Article 8 ECHR. Similarly in *Saviny v. Ukraine* in upholding the complaint by parents who had both been blind since childhood that the placement in public care of their three minor children infringed their rights guaranteed by Article 8 ECHR the Strasbourg court noted:

- "50. [T]he mere fact that a child could be placed in a more beneficial environment for his or her upbringing does not on its own justify a compulsory measure of removal (see, for example, K.A. v. Finland, no.27751/95, § 92 ECHR 2003-I). Neither can this measure be justified by a mere reference to the parents' precarious situation, which can be addressed by less radical means than the splitting of the family, such as targeted financial assistance and social counselling (see, for example, Moser v. Austria, no. 12643/02, § 68, 21 September 2006; Wallová and Walla, cited above, §§ 73-76; and Havelka and others, cited above, § 61).
- 51. Further, in assessing the quality of a decision-making process leading to splitting up the family, the Court will see, in particular, whether the conclusions of the domestic authorities were based on sufficient evidentiary basis (including, as appropriate, statements by witnesses, reports by competent authorities, psychological and other expert assessments and medical notes) and whether the interested parties, in particular the parents, had sufficient opportunity to participate in the procedure in question (see, *mutatis mutandis, Schultz v. Poland* (dec.), no. 50510/99, 8 January 2002; *Remmo and Uzunkaya v. Germany* (dec.), no. 5496/04, 20 March 2007; and *Polášek v. Czech Republic* (dec.), no. 31885/05, 8 January 2007)."
- 3.10 The fact that the State may interfere in family life and the relations between parents and their children only in exceptional cases of the prevention of significant harm to the child is underlined by the Court in its decision in *YC v. United Kingdom* where, in the context of placement proceedings severing natural family ties between a parent and child, the Court notes as follows:

"137 The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening to his or her health or development and, on the other hand, the aim of reuniting the family as soon as circumstances permit.

The Court has indicated that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life, as such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.

The making of a placement order in respect of a child must be subject to the closest scrutiny."

 10 See K (2003) 36 EHRR 18 at [155]; K (2009) 48 EHRR 29 at [34]; and AD (2010) 51 EHRR 8 at [83]; R (2012) 54 EHRR 2 at [81]

⁸ Saviny v. Ukraine (2010) 51 EHRR 33

⁹ See *K* (2003) 36 EHRR 18 at [155]

 $^{^{11}}$ YC v. United Kingdom (2012) 55 EHRR 33 at para137

- 3.11 Separately, the rights of parents in relation to the choices in the manner in which their children are raised and educated is reaffirmed in the second sentence of Article 2 of Protocol No. 1 to the European Convention which is in the following terms:
 - "[i] No person shall be denied the right to education
 - [ii] In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." ¹²
- 3.12 The Grand Chamber of the Strasbourg Court has said that since the aim of this provision

"is to safeguard the possibility of pluralism in education, it requires the state, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the states must not exceed." ¹³

"In accordance with the law"

- 3.13 It is plain that the appointment by the State of a Named Person to a child constitutes an *ex facie* interference with the rights to private and family life and home protected under and in terms of Article 8 ECHR. In order to be lawful, such interference by the State has to be aimed at one of the legitimate ends specified in Article 8(2) (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) and necessary in a democratic society.
- 3.14 Further the interference with individuals' right to respect for their private and family life and home must not only be based on the law but also be "necessary in a democratic society", which is to say that it must answer a "pressing social need" and, in particular, be

¹² The United Kingdom's reservation in relation to Article 2 Protocol 1 states that "the principle affirmed in the *second sentence* of Article 2 ECHR is accepted by the United Kingdom only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure".

¹³ Lautsi v. Italy (2012) 54 EHRR 3 (18 March 2011) at para 62

proportionate to the legitimate aim pursued. ¹⁴ The Strasbourg Court is clear that in the domain of child and family protection there is an even greater call than usual for protection against arbitrary interferences ¹⁵ given that the mutual enjoyment by parent and child of, and trust in, each other's company constitutes a fundamental element of family life. Further whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by that Article. This includes ensuring that parents know and have access to information which may be relied on by the authorities in taking measures of protective care or in taking decisions relevant to the well-being of a child to ensure that parents have the possibility and right of effective participation in any official decision-making process concerning the care and protection of their child. ¹⁶ The Convention duty to respect private and family life and the home means that, in its regulation of matters concerning the well-being of children, the State must not ignore or fail to give proper weight also to the parents' interests in the integrity of their family. ¹⁷

3.15 Perhaps most importantly, any State interference in these areas must be "in accordance with the law" which is to say that the legal framework governing State action and setting out the limits on State powers in relation to children and the family must have the attributes of transparency, accessibility and predictability. As the Strasbourg Court constantly reiterates:

"35 According to the Court's established case-law, the expression 'in accordance with the law' requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects.

A rule is 'foreseeable' if it is formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his conduct. ¹⁸ For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly

¹⁴ See *Zehentner v. Austria* (2011) 52 EHRR 22 at § 56

¹⁵ See *B v United Kingdom* (1988) 10 EHRR 87 at [63]; *X v Croatia* (2010) 51 EHRR 20 at [47]; and *R* (2012) 54 EHRR 2 at [76]

 $^{^{16}\,}P$ and Others v United Kingdom (2002) 35 EHRR 31 at paras 117-120

¹⁷ W. v. the United Kingdom (1988) 10 EHRR 29 at §§ 62 and 64.

¹⁸ See *Rotaru v Romania* (28341/95) 4 May 2000 at [52] and [55]

indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. ¹⁹

The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.²⁰" ²¹

3.16 So individuals have to know what the law is, what their rights are and what is the extent of the powers that the State may lawfully claim to exercise in their situation. The Court is clear that "in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power" because this would provide insufficient legal protection to the individual – and to families – against any possible arbitrary application of those powers. ²² To protect a person against arbitrariness it is not sufficient to provide a formal possibility of bringing adversarial proceedings to contest the application of a legal provision to his or her case. ²³

Presumption against validity of blanket measures impacting on human rights

3.17 In *S and Marper v. UK* ²⁴ the Strasbourg Court held that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. There had been a disproportionate interference with the applicants' right to respect for private life which could not be regarded as necessary in a democratic society. There had, accordingly, been a violation of article 8 ECHR.

¹⁹ See *Malone v United Kingdom* (1985) 7 EHRR 14 at [66]–[68]; *Rotaru* at [55]; and *Amann v Switzerland* (2000) 30 EHRR 843 at [56]

²⁰ Hasan v Bulgaria (2002) 34 EHRR 55 at [84], with further references

 $^{^{21}}$ Peruzzo v. German: re retention of DNA sample and right to informational privacy (2013) 57 EHRR SE17 at para 35

²² See, among other authorities, *Vlasov v. Russia*, no. 78146/01, § 125, 12 June 2008

²³ Kryvitska and Kryvitskyy v. Ukraine [2010] ECHR 30856/03 (Fifth Section, 2 December 2010) para 43

²⁴ S and Marper v. UK (2009) 48 EHRR 50

3.18 The Strasbourg Court has noted in other contexts a blanket law, which by its very nature removes any consideration of the full factual circumstances of the particular case from the scope of the court's examination, would not in principle be Convention compatible. In *Hirst v United Kingdom* (2006) 42 EHRR 41, in the context of the blanket ban on convicted prisoners voting, the Court noted at para 82:

"[A] general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be." ²⁵

3.19 The Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjiyeva, Vučinić and De Gaetano in *Animal Defenders v. UK* has a useful survey of the approach which the Strasbourg Court has taken in relation to blanket legislative measures, noting:

"OII-5 General measures have been considered in the context of three distinct areas. In the context of art.1 of Protocol No.1, in regard to economic and social policy, this Court is, in principle, deferential to legislation (regarding the purpose of the legislation). But it is in the context of the finding of the purpose of the applicable law (i.e. that it served a public interest, e.g. related to housing) that deference was paid to the "general measure" nature of the interference. Needless to say, there is a fundamental difference between the protection granted to possession of property and rights that are protected in arts 9–11: in regard to these rights, and to freedom of expression in particular, "general interest" or "public interest" as such are not recognised grounds for interference in the text of the Convention.

OII-6 Outside of art.1 Protocol No.1, a degree of deference to general measures can be observed in the electoral context, where the Convention is clearly less categorical than in the art.10 context and, consequently, because of the nature of the right at stake, a wider margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised. ²⁶ But even here, general restrictive measures were accepted conditionally, ²⁷ if at all ²⁸: decisive weight was attached to the existence of a time-limit and the possibility of reviewing the measure in question. ²⁹ A general ban was held to be in violation in *Hirst (No.2)* precisely because it did not allow individual consideration, which is exactly the situation in the present case. ³⁰

²⁵ Hirst v United Kingdom (2006) 42 EHRR 41 at para 82

²⁶ See passim *Hirst v United Kingdom* (2006) 42 EHRR 41, and in particular at [60] and [62]; see also *Doyle v United Kingdom* (2007) 45 EHRR SE3.

²⁷ Ždanoka v Latvia (2007) 45 EHRR 17 at [134]–[135].

²⁸ Hirst (2006) 42 EHRR 41.

²⁹ Paksas v Lithuania (34932/04) 6 January 2011 at [109] (extracts).

³⁰ The fact that in *Hirst* (2006) 42 EHRR 41 there was no genuine parliamentary debate since the general measure was first enacted in 1870 was *an additional reason* for finding a violation.

OII-7 There is also deferential reference to general measures in a few rather specific art.8 cases. Thus, for instance, in *Evans v United Kingdom* ³¹ the Court examined whether a regulation on in vitro fertilisation struck a fair balance *between individuals*, not primarily because of the need to eliminate uncertainty, but because of the special challenge the legislature faced in weighing 'entirely incommensurable interests between two citizens. ³² The present case is not one of balancing between the incommensurable Convention rights of two individuals. As to *Pretty v United Kingdom* ³³ the case concerned a right—the right to die—whose existence was contested, and it was in this context that the Court held that it was 'primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created'. ³⁴

OII-8 A general measure, especially if amounting to a total ban (but nonetheless limited in time and to a particular locality) was held legitimate where it was intended to ensure an even application of the law in that it aimed at the exclusion of any possibility for the taking of arbitrary measures against a particular exercise of the right to demonstrate. ³⁵ Nevertheless the then-Commission made it clear that

'a general ban of demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures.'

The acceptability of the measure in that case was unrelated to its source (legislative or administrative). Likewise, in *Société de conception de presse et d'édition v France* ³⁶ the restriction—a general legislative ban—was found proportionate to the purpose, but again the legislative origins of the ban were not a relevant consideration; what *was* relevant was the uncontested European consensus on a general ban in respect of tobacco advertisements (a matter, in any case, involving ab initio a lower level of scrutiny and a wider margin of appreciation because of the nature of the right involved). In other words the Court has repeatedly, expressly or implicitly, held that the fact that a restriction originated in a 'general measure' was not per se a reason to depart from the application of the usual standards applicable to the expressions in question. In *Murphy v Ireland*, ³⁷ the general ban (on advertisements directed to a religious end) was held to be justified because of past experience of unrest in the context of a highly divisive issue in Irish society, namely religious beliefs. ³⁸

OII-9 In the instant case... the Court was confronted with a general ban on 'political' advertisements in broadcasting. The fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights. Nor does the fact that a particular topic is debated (possibly repeatedly) by the legislature *necessarily* mean that the conclusion reached by that legislature is Convention-compliant; and nor does such

³¹ Evans v United Kingdom (2008) 46 EHRR 34.

³² Evans v United Kingdom (2008) 46 EHRR 34 at [89].

³³ Pretty v United Kingdom (2002) 35 EHRR 1.

³⁴ *Pretty v United Kingdom* (2002) 35 EHRR 1 at [74].

³⁵ See Christians against Racism and Fascism v United Kingdom (8440/78) 16 July 1980.

³⁶ Société de Conception de Presse et d'Édition v France 5 March 2009

³⁷ *Murphy v Ireland* (2004) 38 EHRR 13 (extracts).

³⁸ *Murphy v Ireland* (2004) 38 EHRR 13 at [73].

(repeated) debate alter the margin of appreciation accorded to the state. Of course, a thorough parliamentary debate may help the Court to understand the pressing social need for the interference in a given society. In the spirit of subsidiarity, such explanation is a matter for honest consideration. In the present judgment, however, excessive importance has been attributed to the process generating the general measure, which has resulted in the overruling, at least in substance, of VgT, a judgment which inspired a number of Member States to repeal their general ban - a change that was effected without major difficulties. As Judge Martens stated (dissenting):

'A court should ... overrule only if it is convinced "that the new doctrine is clearly the better law". This condition is, of course based on the idea that in principle legal certainty and consistency require that a court follows its own established case-law; it should therefore overrule only when the new doctrine is clearly better than the old one.' ³⁹

OII-10 To conclude on this point, the fact that a ban originates in a general measure does not exempt that measure from a full analysis as to its compatibility with the requirements of art.10(2).

. . . .

[T]here can be no double standards of human-rights protection on grounds of the 'origin' of the interference. It is immaterial for a fundamental human right, and for that reason for the Court, whether an interference with that right originates in legislation or in a judicial or administrative act or omission. Taken to its extreme, such an approach risks limiting the commitment of state authorities to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. Where the determination of the public interest and its best pursuit are left solely and exclusively to the national legislator, this may have the effect of sweeping away the commitments of High Contracting Parties under art.1 of the Convention read in conjunction with art.19, and of re-asserting the absolute sovereignty of Parliament in the best pre-Convention traditions of Bagehot and Dicey. The doctrine of the margin of appreciation, which was developed to facilitate the proportionality analysis, should not be used for such purpose." ⁴⁰

4. Conclusion

4.1 I consider that the provisions of the Bill which would require the appointment of a "named person" to every child in Scotland without exception or any individual assessment as to the whether a child needs the services of a named person may not be lawful on the basis that the blanket nature of this provision constitutes a disproportionate and unjustified interference with the right to respect for individual family's private and family life and home.

4.2 Further and in any event given that the functions, duties and powers of – and crucially the limitation on - the named person are not set out in terms in this legislation, these

³⁹ See *Cossey v United Kingdom* (1991) 13 EHRR 622. See also *Bayatyan v Armenia* (2012) 54 EHRR 15 at [98].

⁴⁰ Animal Defenders v. UK (2013) 57 EHRR 21 at paras OII-5-8, OII-10

provisions would appear to fail the test of being in accordance with law in the sense of having the qualities of accessibility, foreseeability and precision which would provide proper protection against the possible arbitrary and oppressive use of the powers which

would be accorded to State bodies such as the nominated person under this legislation.

4.3 I have nothing more to add at this stage. I trust that the foregoing is sufficient for the purposes of my instructing solicitor at this time. Those instructing me should not hesitate

to contact me again if there is anything arising from the above on which I can usefully

further advise, whether in writing or at a consultation.

13 January 2014

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