Response of Elaine E Sutherland
to the call for evidence by
the Scottish Parliament’s Education and Skills Committee
on
the Children and Young People (Information Sharing) (Scotland) Bill

I am the Professor of Child and Family Law at the Law School, University of Stirling and a Distinguished Professor at Lewis & Clark Law School, Portland, Oregon. This response is offered in my capacity as an individual and does not reflect the views of either law school or the University of Stirling.

I am happy for my submission to be published and to give oral evidence to the Committee. However, I will be in the United States until January 2018. Thus, oral evidence could only be provided if the Committee has the requisite technical facilities for remote communication (for example, Skype).

The Committee is doubtless familiar with the background to the Bill: essentially, it is designed to address the shortcomings in the named person service provisions of the Children and Young People (Scotland) Act 2014 identified by the UK Supreme Court in Christian Institute v Lord Advocate.¹

The two main concerns highlighted by the Court were the lack of clarity in terms of implementing the information-sharing provisions and the lack of safeguards for those whose information might be shared. Regrettably, the Children and Young People (Information Sharing) (Scotland) Bill does not address either concern adequately.

¹ 2017 SC (HL) 29.
**Lack of clarity**

This is a complex area of the law and requires those applying it to engage in a sophisticated process of assessing proportionality.\(^2\) In the words of the Supreme Court,

> “the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined.”\(^3\)

The Supreme Court accepted that a code of practice might be used to assist those applying the law.\(^4\)

The problem is exacerbated by two factors. First, those sharing the information and, thus, attempting to carry out the assessment of proportionality, will not usually be lawyers. Secondly, the named person service is of universal application and, in many (most) cases, there will have been no finding by a court that the child is, in fact, at risk of harm.

It is submitted that the amendments to the 2014 Act, embodied in the Bill, and the draft illustrative Code of Practice simply do not clarify how information is to be shared in a manner that overcomes the original objection.

**Safeguards for those whose information might be shared**

In terms of safeguards for those whose information might be shared, the Supreme Court expressed the shortcomings thus:

> “The central problems are the lack of any requirement to obtain the consent of the child, young person, or his or her parents to the disclosure, the lack of any

\(^2\) This was explained by the Supreme Court, at para 90, as follows: “It is now the standard approach of this court to address the following four questions when it considers the question of proportionality:

(i) whether the objective is sufficiently important to justify the limitation of a protected right,

(ii) whether the measure is rationally connected to the objective,

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

(iv) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure).

\(^3\) 2017 SC (HL) 29, para 80.

\(^4\) 2017 SC (HL) 29, para 81.
requirement to inform them about the possibility of such disclosure at the time when the information is obtained from them, and the lack of any requirement to inform them about such disclosure after it has taken place.”

In this respect, the amendments in the Bill reduce the protection contained in the Children and Young People (Scotland) Act 2014. At present, when considering “whether information ought to be provided, the information holder is so far as reasonably practicable to ascertain and have regard to the views of the child or young person”, taking account of the child’s age and maturity.

This is an important provision it itself and its significance is reinforced by the requirement of the United Nations Convention on the Rights of the Child, article 12(1), that,

“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.”

The United Kingdom ratified the Convention in 1992 and the Scottish Government has consistently expressed its commitment to the principles embodied therein.

The Children and Young People (Information Sharing) (Scotland) Bill would remove the requirement to ascertain and have regard to the child’s views. Instead, that issue is addressed in the illustrative draft Code of Practice. Such codes are not law and have serious limitations. They are not subject to the same level of scrutiny as legislation and can be altered in the future without recourse to the legislative process.

I submit that the obligation to ascertain and have regard to the child’s views should be retained in the statute itself.

EES
24 August 2017

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5 2017 SC (HL) 29, para 100.
6 Children and Young People (Scotland) Act 2014, s 26(5) and (6).