James Dornan MSP  
Convener  
Education and Skills Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP  

04 September 2017

Dear Mr. Dornan,

1. As National Convener of Children’s Hearings Scotland I am grateful for the opportunity to comment on the Children and Young People (Information Sharing) (Scotland) Bill (the Bill) and associated documentation.

2. I welcome the measures in the Bill to provide greater clarity for professionals and others when sharing information to assist in the preparation of reports about vulnerable children and young people.

3. I also support the wider framework of Getting it Right for Every Child within which the Bill’s provisions are to operate.

4. I have some issues which I believe require further consideration which, if not addressed, may cause concern. A summary of these are:

   Unless practitioners, working with children, young people and families, have the confidence to share information where necessary under the Data Protection Act 1998 (the DPA) practice may work against preventive work and early intervention. That is not the intention of the Bill so training, clear guidance and support for professionals will be important. The overarching role and context of the DPA needs to be emphasised more including reiterating that current information sharing is conducted under the DPA with which practitioners should already be familiar.

In implementing the measures, excessive anxiety over whether information should be shared may have an adverse impact on the operation of the children’s hearings system leading to increased referrals to the reporter and possibly to children’s hearings and generate unnecessary delay for Scotland’s most vulnerable children and young people.

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5. The Bill, code of practice, guidance and implementation plans need to be assessed as to how they mitigate against these risks.

6. To assist the Committee my reasoning is set out in the following sections, some of which strays into the work of other parties who will be better placed to advise on their practices. Nevertheless, for me it is how they operate upstream of referral, through the children’s hearings system and afterwards that is of interest to me and panel members.

Sharing of information and preventive/ early intervention

7. Services exist to assist and support children, young people and families whether through health, education and/or social work and are frequently supported by the voluntary sector and community activity which support families and parents. The principles and values of the GIRFEC framework are and always have been to work first with the child, young person and family wherever possible at every stage and to seek consent to share information.

8. This approach works alongside the public duty on agencies to protect children and young people. If consent is not given to share information that should not in itself be a trigger to activate child protection procedures. Parents and children have the right to not consent to information being shared. But where agencies hold information the professionals must always consider under current law whether what they know or are observing generates a concern which is sufficient to justify taking further child protection action (e.g. by sharing information with others to ascertain whether there is a wider picture they are not aware of).

9. As concerns/needs/risks intensify, more targeted intervention from one or more agencies is likely to be required and other agencies may need to be brought in to support co-ordinated working with the child or young person and their parent(s).

10. Responsibility then moves from the Named Person to the Lead Professional to oversee any child’s plan. With discussion and consent, the information sharing to support this plan and to provide appropriate relevant co-ordinated activities can proceed. The plan and any relevant information will then form part of any voluntary decision-making processes with children, young people and families.

11. Where consent is not secured prior to or following the creation of a child’s plan, the professional involved has to exercise his or her professional judgement. They do so informed by their training, their specialist experience and within the structure of their professional regulatory bodies and guidance. They need to decide whether further action is required and whether information should be shared with other agencies (e.g. health/ education to social work (child protection)). Under current law and the DPA they have at present to exercise this judgment with child protection concerns in mind. It is important to note that under the current

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the sharing of information is not limited to written reports but extends to other communication media such as email, letters, phone calls, texts, conversations, discussions at meetings. Current practice needs to comply with these media as well.

12. If there is a significant risk to the child or young person, professionals may share information even if there is no consent available. Professionals are also aware that most significant case reviews and child death enquiries highlight that information was known by agencies but not pieced together early enough to provide the overview: or concerns were known but not acted upon.

13. A policy of taking preventive action and appropriate early intervention adds further to the consideration to share information since evidence of child protection or the need for compulsory measures may not be clear but if action is to be taken in a supportive manner at a less intense level the sharing of information below the level of child protection is desirable. The Bill provides the framework for such consideration.

14. I have set out this background as there is relevance to the children’s hearings system. Any person—including the child or young person themselves, may refer a person to the reporter for consideration for compulsory measures. The reporter has to consider the referral and in order to assist that decision requires reports (information) and under the 2011 Act requires such information to be provided. It is open to professionals who may be considering a child’s or young person’s case to imitate a referral to enable the 2011 Act procedures to cut in. At one level, this shifts the onus onto the reporter to reach a decision. And, as was experienced in the early 2000s many referrals were made to the reporter which were either not appropriate for compulsory measures and the system became silted up with referrals, requests for reports, further consideration and, in many cases, a decision not to refer a child on to a hearing.

15. This clogging up of the system was resolved by more co-ordinated assessment of cases before referral (which requires information sharing) and a better understanding of the criteria required by the reporter. These have been reinforced by the guidance issued by SCRA in 2015 and endorsed by the Children’s Hearings Improvement Partnership (CHIP) and the work under the Whole Systems Approach and increased multi-agency activity. The underlying approach to support this is the child’s plan under the 2014 Act which should appropriately support a young person into and out of any system requiring more intensive measures.

16. Reporters and children’s hearings still have to exercise discretion in the disclosure of information contained in any reports if there is a concern that sharing certain information might place the child or young person at risk of causing significant harm to the child or young person (section 178). This overrides the general principle that all reports going to a children’s hearing are shared by all parties. Section 40 places a similar but not identical requirement on the sheriff to consider a non-disclosure direction in child protection proceedings.

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17. The guidance and practice around the DPA, the forthcoming General Data Protection Regulation (GDPR) and the Bill provisions need to be clear and provide confidence to professionals to support them in sharing information. This will be needed where they, in their role as professionals, have concerns around the test in the Bill. Otherwise the hearings system may witness a return to increased referrals. The culture adopted by professionals will therefore be very important. A risk is the referral process becomes a catch-all trigger to enable information sharing where practitioners may have concerns about sharing information with or without consent but not the confidence that they have the authority to share. If this takes root the prevention objectives of the 2014 Act will be undermined; delay will occur; there may be loss of focus on the most vulnerable; and there will be net widening bringing children and young people into the more intensive systems when that might have been prevented.

18. The reporter may sift out those referrals not meriting consideration of a CSO but there may nevertheless be an increased need for children’s hearings to be held, adding to the demands on the panel members and/or a need for increased recruitment of panel members to ensure hearings are held. From the start of the recruitment campaign in August to securing panel members trained to start sitting on hearings is just under a year so there is a considerable lead in time and resource requirement.

19. The Bill’s provisions have to weave a path between welfare and wellbeing obligations towards children and young people, the Supreme Court’s judgement, the European Convention on Human Rights (ECHR) affecting both parental and children’s rights, the reserved DPA, the forthcoming GDPR and marry up with existing best practice. They need to balance the policies and practices required under the DPA with the focus under the 2014 Act of prevention and early intervention. Ken MacDonald, the Head of the Information Commissioner’s Office Regions confirmed, following the Supreme Court ruling, that the DPA should not stop sharing of data if there is a legal basis (whether consent, or under other legislation): the key is to ensure the data is protected and individuals’ rights are protected (https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2016/09/ico-statement-on-named-person-scheme/).

20. There is an inherent tension in this as professionals, who are subject to their professional standards and practices, also seek to maintain both confidentiality and relations with a child/young person/parent. Yet if they are anxious, if they have emerging concerns, they need to ensure that appropriate action is taken to prevent a child’s circumstances from getting worse or escalating out of control knowing that failure to act may be criticized in the future. The Bill’s provisions appear to provide an appropriate focus for consideration around the sharing of information. But any consideration of the provisions needs to take into account the wider context and be supportive of professionals and others in reaching judgment on whether to share information or not as well as relations with parents and respect for their rights.

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Meaningful Reports

21. A key objective for me as National Convener and for the Principal Reporter is to ensure that the reports presented to reporters/panel members are meaningful, focused and timely.

22. For this to be the case the reports need to contain:
   - accurate information on key aspects of the child or young person’s circumstances;
   - assessment of the positive and negative influences on the child;
   - the child or young person’s views
   - the needs and risks;
   - proposed measures to reduce or negate the adverse aspects and influences on the child or young person’s wellbeing.
   - why compulsion is considered necessary and the anticipated outcomes
   - relevant information from other agencies, whether professional or voluntary, adult or children’s services where their knowledge of the child or young person or their work with the parent(s)/carers can inform the decision making process.

23. Except in rare circumstances the children and young people will be known to one or more professionals. Once the Bill and the 2014 Act are fully operational, a child’s plan will already be in existence or will be being prepared to support the child, young person and parent(s). Not every child in Scotland will have a child’s plan: only those who are considered by professionals and parents and children and young people – to require more targeted action across one or more agencies will have a plan. This plan will be intended to support better outcomes and ideally will have been agreed between the professionals, the child or young person and the parents.

24. Reports to the reporter should therefore not have to be compiled from scratch although they should address the issues set out above in paragraph 22. Reports may require an added focus on the need for compulsion in respect of the child or young person. Under the 2014 Act, the child’s plan should have been drawing on relevant information shared, ideally with consent, among various parties or organisations. Lead professionals will have been nominated to oversee the plan liaising as necessary with a named person.

25. My interest is that the Bill’s provisions support not just co-ordinating relevant professionals when working with children, young people and parents around the plan but, through appropriate and justified information sharing, also ensure the creation of meaningful reports with the minimum of delay. Will all relevant information have been shared to inform these reports around the referral? In considering the referral or in commissioning additional reports, is the reporter aware of who best can advise and inform the report? Is the social

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worker? The lead professional? If not, either the reports will be incomplete or there will be added delay in seeking out reports and relevant information to inform the decision making.

26. It may not be necessary for a holder of information to reveal the detailed information they hold with a wider group but they may wish to indicate that they should be contacted if issues emerge requiring consideration of compulsion. Will the Bill assist or hamper the report writing process? Key to answering that question will be the confidence generated by the guidance and best practice, supported by relevant training.

27. The Code of Practice and the messages around the Bill need to emphasise that what has driven information sharing in the past and currently has been the Data Protection Act 1998 and that whatever is agreed by Parliament in the Bill has to be set within and be compatible with that wider context. It also needs to consider the requirements under the forthcoming GDPR, especially in relation to consent as there are stricter rules and conditions for consent.

Yours sincerely

Boyd McAdam
National Convener and Chief Executive