Dear Sirs,

**Education and Skills Committee Inquiry Call for Views on The Children and Young People (Information Sharing) (Scotland) Bill: Response from Perth and Kinross Child Protection Committee (CPC)**

We refer to the Call for Evidence from The Scottish Parliament's Education and Skills Committee on The Children and Young People (Information Sharing) (Scotland) Bill.

Thank you for the opportunity to contribute to the evidence-gathering on this recently introduced Bill and for the short extension to ensure that this was completed with contributions from our multi-agency partnership. Our partnership response is attached at Appendix 1.

In providing this response, we have consulted with our constituent partners and have restricted our response to Section 26 of The Children and Young People (Information Sharing) (Scotland) Bill and its relevant sub-sections which relate to Information Sharing, and Part 4 of The Act and to the illustrative Draft Code of Practice on Information Sharing.

I hope you will find these comments constructive and helpful.

Should you require any further information or clarification please do not hesitate to contact me.

Yours sincerely,

*Jacquie Pepper*

Chair of Perth and Kinross Child Protection Committee (CPC)
Appendix 1

Call for Evidence - Education and Skills Committee
The Children and Young People (Information Sharing) (Scotland) Bill

Partnership Response from Perth and Kinross Child Protection Committee

Perth and Kinross Context
Within Perth and Kinross, our child protection processes and practices are set and delivered within the Getting it right for every child (GIRFEC) approach, which aims to promote, support, and safeguard the wellbeing of all children and young people and to improve outcomes.

Our evidence-based practices have been shaped by national publications; inspection reports; inquiry reports; significant case reviews; national legislative and policy developments and by national GIRFEC policy and practice developments. We acknowledge that the proportionate sharing of appropriate information and reaching a shared understanding of what that information means in relation to vulnerability and risk is a fundamental prerequisite to the protection of children and young people and in safeguarding their welfare. Appropriate guidance for all relevant staff is therefore a key priority for the Perth and Kinross Child Protection Committee.

In November 2013, prior to the implementation of The Children and Young People (Scotland) Act 2014, we reviewed and published the Perth and Kinross Practitioner’s Guide and Toolkit: Information Sharing, Confidentiality and Consent.

This local guidance was developed in partnership with the Scottish Government's GIRFEC Implementation Team and the Information Commissioner's Office (ICO): Scotland. Our guidance took account of the:

- existing national legislative and policy context (including The Data Protection Act 1998 and GIRFEC);
- emerging legislative requirements of The Children and Young People (Scotland) Act 2014; and

After publication, it was evident that our guidance clarified some pre-existing misconceptions about information sharing, confidentiality and consent, particularly where they may have related to the requirements of The Data Protection Act 1998 and in the interpretation and understanding of the data sharing provisions of Schedules 2 and 3 of that Act.
Following publication, our guidance was positively commended and replicated elsewhere in Scotland. This was because it clarified the existing legislative and policy requirements and an added strength of this resource was that it contained guidance in one place and was compliant with The Data Protection Act 1998 and as a consequence ECHR.

This guidance has been kept under constant review and is supported by a dynamic Practitioner’s Guide and OnLine Toolkit which can be found at: http://www.pkc.gov.uk/article/17692/Information-Sharing-Confidentiality-and-Consent-Toolkit.

The Children and Young People (Scotland) Act 2014 and the UK Supreme Court (UKSC) Judgment of 28 July 2016

Following the UK Supreme Court Judgement of 28 July 2016, we recognised that there was a need to review our existing guidance to prevent any misunderstandings or the potential for confusion on the part of our practitioners. We also recognised that the provisions of Part 4 of the Act on the requirements of The Data Protection Act 1988 were extremely complex and that practitioners needed clarity.

In particular, we took cognisance of the UKSC’s written comments relating to the challenge presented by individual practitioner interpretations and judgments - e.g. “defining when likely to be relevant to the exercise of a function; defining when it may affect wellbeing; the wellbeing definition being notably vague; the vital interest test not being met; understanding the necessity and proportionately test in terms of Article 8 ECHR; a clear lack of practitioner safeguards; the levels of practitioner discretion; interpretation of disclosure thresholds and the significant issues relating to consent”.

In doing so, we also noted and took account of the UKSC’s judgement that the information-sharing provisions of Part 4 of the Act:

a) do not relate to reserved matters, namely the subject matter of the DPA and the Directive;

b) are incompatible with the rights of children, young persons and parents under article 8 of the ECHR because they are not “in accordance with the law” as that article requires;

c) may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents, through the sharing of private information; and

d) are not incompatible with EU law in any way which goes beyond their incompatibility with article 8 of the ECHR.
To ensure our local practices remained lawful and to prevent any possible confusion (on the part of our practitioners) as a result of this UKSC Judgment, we have since agreed and published in February 2017 the **Perth and Kinross Code of Practice: Information Sharing, Confidentiality and Consent.**


The purpose and aim of our Code of Practice is clear. It includes advice and guidance on the principles of The Data Protection Act 1998; the data sharing provisions of Schedules 2 and 3 of The Data Protection Act 1998; describes the requirements and limited rights in terms of Article 8 ECHR; includes the helpful 2013 and 2016 ICO: Scotland Advice Letters; describes the limitations of confidentiality; provides advice on consent and importantly provides some useful practice examples for front line staff.

The strength of this Code of Practice is that it is written for practitioners and feedback confirms that it has been well-received and is easily understood.

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

We welcome the introduction of this Bill to the Scottish Parliament on 19 June 2017 and recognise that there is a specific need to clarify the information sharing provisions in relation to Part 4 of The Act.

As a partnership, we have consulted with our constituent partners and examined the various documents published on the Scottish Government's website, in particular the Policy Memorandum, Explanatory Notes, Bill and the illustrative Draft Code of Practice on Information Sharing.

We now wish to make the following submission in relation Section 26 of The Children and Young People (Information Sharing) (Scotland) Bill (the Bill) and its relevant sub-sections which relate to Information Sharing, and Part 4 of The Act and to the illustrative Draft Code of Practice on Information Sharing.

**Policy Memorandum**

We fully support and agree with the policy objectives of the Bill.

We also note the challenge to Part 4 of The Act and UKSC Judgement. The Court held that, although the underlying policy of the Act was benign, Part 4 of The Act, as drafted, was not sufficiently clear and did not have appropriate safeguards to prevent breaches of Article 8 ECHR (right to private and family life). There remained the requirement that
any interference with Article 8 must be in accordance with the law. We note that this Bill seeks to remedy those issues.

Whilst in paragraph 16, we note the changes proposed to Sections 23 and 26 of The Act, we are however still concerned that the duties require a consideration of the threshold for sharing information in circumstances where ‘wellbeing’ may be at risk of impairment, without the provision of that information. For example:

- "a duty to identify information the sharing of which could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the DPA and other relevant law” and

- "a duty to consider, when new information is acquired, whether the sharing of that information with certain persons could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the DPA and other relevant law”

Our view is that this may not meet the requirement for lawful interference with Article 8 ECHR, irrespective of Section 96 of The Act. The UKSC referred to the definition of wellbeing in some cases as being "notably vague”. This will be, on many occasions, a very complex and sensitive judgement for practitioners to make each and every time they decide to share information. It is our view is that this must be supported by precise and comprehensive guidance which is designed to support and empower those professional judgements.

We also note that paragraph 23 articulates that the “intention of the Bill is to bring consistency, clarity and coherence to the practice of sharing information about children and young people's wellbeing across Scotland” and that paragraph 27 states that “consistent practice will be supported by the introduction in the Bill of the requirement to provide a code of practice”.

Whilst we fully support that approach, we are not persuaded that the definition of wellbeing, as laid out in Section 96 of the Act, allows a sufficient threshold upon which to expect or allow practitioners to share and exchange information in compliance with existing law.

The Bill

We support the introduction of the Bill. However, an examination of Section 26 and its sub-sections leads us to the view that this does not help to eliminate uncertainty for service providers and practitioners when considering a course of action in compliance with the existing legislative framework, in particular with the requirements of The Data Protection Act 1988 and Article 8 ECHR.
Our view is that on balance, this may lead service providers and practitioners to fall short of the *necessity test* in terms of The Data Protection Act 1998 / Article 8 ECHR. It is also not clear what safeguards have been introduced to support practice as recommended by the UKSC. On that basis there remains the potential for service providers and practitioners to share information in a way which is not in accordance with existing law.

**Illustrative Draft Code of Practice**

We note the illustrative draft Code of Practice (the Code) produced by Scottish Ministers in compliance with Part 4 and Section 26b of The Act. We note its intended purpose, but remain uncertain if this is aimed at all practitioners when sharing and exchanging information. We note that it makes references to the need for adequate safeguards. Our view is that these are already in existence, but have not been explained sufficiently.

We note that the Code goes on to describe in detail the requirements for, and reliance upon, consent when sharing information. Our view is that to aid comprehension, the Code should be restructured to include specific guidance on information sharing, confidentiality and consent.

In terms of consent, it is our view that the Code should reflect fully the requirements of Schedules 2 and 3 of The Data Protection Act 1988 and should be future-proofed to take account of the General Data Protection Regulations 2016 (GDPR), which comes into effect in May 2018; otherwise it will be out of date when published.

As presented, the Code provides an overview of the applicable legislative framework e.g. The Data Protection Act 1998 and ECHR, but would benefit from greater depth and clarity to support and empower day-to-day practice.

The Code does not provide enough guidance in relation to the information sharing provisions of the Bill (including how to determine the wellbeing test) and as such, it is our view that it will not be successful in its objective *“to bring consistency, clarity and coherence to the practice of sharing information about children and young people’s wellbeing across Scotland”*. For example, paragraph 26 refers to a power to share information under Part 4 of The Act, but does not develop any further guidance in relation to how that power might be exercised in daily practice other than to direct the reader back to the requirements of The Data Protection Act 1998.

It is our view that it is vital for practitioners to have easy access to clear and helpful guidance which enables them to make day-to-day decisions promptly and with confidence. Ideally that guidance should be contained in one place, or within the minimal number of publications possible. Practitioners would benefit from a document which offers them one-stop guidance and direction and which incorporates
the appropriate extracts from other relevant sources that they need to take into account.

Overall, it is our view that the illustrative draft Code of Practice would have benefited from more careful drafting with a clearer outline of all relevant sources in preference to signposting. Pages 2 to 5 (paragraphs 7 to 18) would benefit from review and redrafting. It is also our view that the guidance provided in part C (paragraphs 32 to 40) does not, in its current form, sufficiently enhance understanding of the necessity and proportionately test in terms of Article 8 ECHR, and how this applies when practitioners make decisions to share information to promote, support, and safeguard wellbeing.

We have not taken the opportunity to complete the online survey, but seek to provide a collective view that the illustrative draft Code of Practice, in its current form, will not assist staff to make day to day decisions about sharing information. Our view is that additional local guidance will still be required to assist practitioners.