

## **Meeting to discuss Code of Practice (at Victoria Quay) – 20 February 2018**

**John Paterson** (Scottish Government Legal Directorate) (chair) (“**JP**”)

**Maureen Falconer** (Information Commissioner’s Office) (“**MF**”)

**Norma Shippin** (Central Legal Office) (“**NS**”)

**Peter Hessett** (Society of Local Authority Lawyers and Administrators ) (“**PH**”)

**Alison Reid** (Clan Childlaw) (“**AR**”) (guest)

### **Welcome and Introduction**

The chair welcomed everyone to the meeting and explained that Ian Welsh, the Chair of Getting It Right For Every Child Practice Development Panel (“the Panel”), has recommended that a legal focus group (the “group”), which includes a small number of Panel members with legal expertise, should be established to look into detail at the technical, legal aspects of drafting the Code. It was agreed at the Panel meeting of 14 February 2018, that the legal focus group would feedback views on consent to the Panel, at the next meeting.

AR, who is not a member of the Panel, has also offered her assistance with these legally focussed discussions.

The chair suggested that following this meeting, the group could use a mixture of teleconference and face to face communication, as required. To help ensure transparency, we would keep a record of topics discussed and action points.

The chair asked AR to set out her involvement with the group. AR explained that she declined to be a member of the Panel, however, she is happy to contribute and provide challenge. Fundamentally, AR believes that SG should not legislate around information sharing. From her perspective, it is unnecessary, repeats and further complicates the existing legal framework, and risks increasing human rights challenges around accessibility and foreseeability Her position in full is set out in her oral and written evidence to the Scottish Parliament in relation to the Bill.

It was agreed that the group’s role was to assist the Panel through discussing the legal aspects of the code, and sharing their different points of view.

### **Code of Practice (the “Code”)**

The group discussed their interpretation of the Supreme Court judgement. It was expressed that, one interpretation was that the Code would help illuminate the law in terms of accessibility.

Group queried and discussed what purpose would be served by making the Code more restrictive than the GDPR. It was felt that the Code should not make it more difficult for people to operate the law in practice.

The group felt that it was important that teachers, social workers, and those working within the NHS, were able to understand the Code and able to work with it.

## **Consent**

The group noted that data protection is a reserved matter and that there was a general misconception that SG could not legislate in relation to consent.

The group discussed the complexities of data protection legislation and it was suggested that there was an issue with people not understanding the current data protection laws. It was noted that consent was not always necessary in order to process data, as other lawful bases for data processing also exist, and may be more appropriate in certain circumstances. It was emphasised that, in terms of GDPR, consent would have to allow meaningful choice on the part of the individual/parent/guardian.

Moreover, GDPR requires that consent should not be considered where there is potential for an imbalance of power between the individual and the data controller. The problem with doing this is that the child, or parent, could – in the particular circumstances of a particular case - be intimidated by the request for consent to the extent that they feel they have no meaningful choice.

The group were in agreement that there were no issues with sharing of information where there was a risk of significant harm. It was suggested by a member of the group that the difficulty often comes when the issue falls below the significant harm trigger but the practitioner believes that the child is on a pathway that is more likely than not to result in significant harm.

However, it was suggested that, arguably, there is no grey area in dealing with these scenarios, as being on such a trajectory is, in itself, a risk of significant harm.

**ACTION: it was suggested that the views of the group would be fed back to the Panel for further discussion.**

## **Structure of Code of Practice**

AR recognised that the Supreme Court thought that a code would be needed but that her view was that they were thinking there would be a legislative scheme on information sharing. AR expressed the view that if a legislative scheme on information sharing was not taken forward, then a code would not be required. Once there is a legislative scheme, the whole scheme including the Code and guidance require to be ECHR compliant which means that it needs to meet the accessibility and foreseeability tests. It means that the links between data protection, the law of confidentiality, human rights, the Bill, the Code and the guidance need to be clear, which is a challenge. AR suggested that current Child Protection, and Underage Sexual Activity guidance materials were good examples of how statutory guidance could work without the need for a Code or for a Bill in relation to information sharing provisions.

The group suggested that an algorithm or flow chart could be helpful when deciding whether to share information. As could the inclusion of a glossary/definition section at the end of the Code.

**Action: The legal focus group recommend that the Panel considers whether the code is for Named Service Providers (as the data controller) or frontline practitioners.**

**Action: Group asking if SG have any examples that they could share of where information should be shared, but cannot be shared, as it falls below the child protection threshold.**

### **Next steps**

Group agreeing that the next panel meeting should:

- clarify who the code of practice is intended to be addressed to
- discuss how we deal with consent.

It was suggested that legal focus group should meet again in person in order to discuss these issues further. This will likely be in April.

Agreed that SG would circulate a short note of this meeting, circulate a previously drafted flowchart, look to see if they are any specific SG examples to share, and be in touch to arrange a second meeting.