Finan ce Committee
Public Services Reform (Scotland) Bill
Submission from the UK Information Commissioner’s Office

1. The Information Commissioner’s Office (ICO) welcomes the opportunity to respond to the Finance Committee’s call for evidence in consideration of the general principles of the Public Services Reform (Scotland) Bill (the Bill). As the regulator for the Data Protection Act 1998 (DPA), the ICO has a particular interest in matters of the privacy of personal information. The comments in this response are therefore limited to those proposals within the Bill which have the potential to impact upon the privacy of individuals.

2. In its call for evidence, the Finance Committee poses specific questions to facilitate its deliberations in reviewing the general principles of the Bill. Most of the questions posed are outwith the locus and areas of interest of the ICO and, as a result, this submission will concentrate on only one of the questions, namely:

3. Whether the proposals in parts four and five of the Bill are consistent with the five guiding principles recommended by the Crerar Review of public focus, independence, proportionality, transparency and accountability?

4. The ICO understands that the Bill effectively consolidates existing legislation in respect of the inspection of social work services, providers of care services and joint inspections, given it repeals the Joint Inspections of Children’s Services and Inspection of Social Work Services (Scotland) Act 2006 (the 2006 Act) and the inspection provisions of the Regulation of Care (Scotland) Act 2001 (the 2001 Act).

5. The ICO has concerns with some of the inspection proposals outlined in parts four, five and six of the Bill, specifically sections 47, 90 (10N) and 97. Each of these sections provides for secondary legislation in the form of Regulations by Scottish Ministers to make further provision in respect of matters pertaining to inspections. The ICO is disappointed to note that the proposed provisions regarding inspection follow those in the 2006 Act rather than those in the 2001 Act, the latter requiring the individual’s consent prior to accessing health records and/or conducting physical examinations.

6. During the passage of the 2006 Act, the ICO urged caution when considering the use of sensitive personal data without patient consent and was disappointed that it was enacted without this safeguard. The ICO believes that to maintain the unrestricted access, perhaps even where duties of professional confidence exist, runs contrary to the principle of proportionality in that the current provisions in the Bill will allow inspections access to sensitive personal information without the need to seek the individual’s explicit consent.

7. The ICO believes that this is a disproportionate measure which runs contrary to the requirement for proportionality which is central to the provisions of the Data
Protection Act 1998 and that it may be challenged under Article 8 of the ECHR. The ICO accepts that there may be situations which merit access or examination in the absence of consent but these should be in exceptional circumstances rather than being the norm. Consent may not be necessary where a relatively rudimentary inspection of records is being undertaken as part of a quality assurance exercise considering management systems but it should normally be sought whenever a more detailed examination is required (for example, when the inspection teams wish to speak to, or access health information relating to, any individual).

8. Also in respect of proportionality, the ICO has serious concerns about the potentially unlimited powers proposed regarding the seizure and removal of anything found during the course of inspection as set out in sections 47(2)(c), 90 (10N(3)(c)) and 97(2)(a). First and foremost, so far as personal information is concerned these powers should be limited only to material which is relevant to the inspection being undertaken. Secondly, the ICO believes that the 2001 Act provides a much more proportionate response by allowing the use of such powers only where there are reasonable grounds to believe that the material in question may be evidence of a failure to comply with the legislation.

9. With regard to the principles of transparency and accountability, the ICO made representations during the consultation on the 2006 Act regarding participation in inspection. Specifically, this concerned access to records by persons or bodies not listed in those prescribed on the face of the Bill. The concern was that the lack of detail could lead to unfair processing in terms of the DPA and that the numbers of bodies having access to the records during any single inspection may become excessive and, thereby, run contrary to the principles of transparency and accountability. The ICO is pleased to note that section 96 of the Bill while making similar provisions, does so in a much more prescriptive manner and on a need-to-know basis.

10. The ICO is also pleased to note the assurance on the face of the Bill at sections 45(4) and 90 (10K(4)&(5)), that the use of information gleaned from the inspection process is to be restricted in terms akin to the provisions of the DPA. The lack of such assurance was one of the major concerns the ICO raised in respect of the 2006 Act, so it is especially welcome in this Bill and will help to facilitate better accountability regarding potentially sensitive disclosures of personal information.

11. However, the ICO has serious concerns regarding the maintenance of confidentiality as a consequence of the lack of detail in respect of sections 47(2)(h), 90(10N(3)(h)) and 97(2)(f). These provisions appear to enable extremely wide-ranging disclosure of information relating to inspections to a person prescribed which will be defined via secondary legislation. In terms of transparency and accountability, the sections outlined at point 11 above provide for this in relation to authorised persons only, while those deemed to be a person prescribed do not appear to be subject to these requirements.

12. In general, the ICO is concerned at the extent of secondary legislation which the Bill currently requires. This means that most of the detail in respect of the
implementation of the provisions cannot be scrutinised at this time. There are questions therefore over the extent to which the Bill as it stands conforms to the principles of transparency and accountability. The ICO has concerns that the ability to scrutinise the provisions in a robust manner is undermined as a result.

In summary:

The ICO believes that the current provisions in respect of the accessing, sharing and disclosure of personal information, as well as those permitting physical or mental examination, run contrary to the principle of proportionality. The ICO believes that a more proportionate provision would be created with the requirement to seek the consent of the individual concerned included on the face of the Bill.

The ICO believes that the current provisions in respect of seizure and removal of material run contrary to the principle of proportionality. The ICO believes that a more proportionate provision would be created if the powers were qualified with the requirement for there to be reasonable grounds.

The ICO believes that the lack of detail on the face of the Bill in respect of the definition of a person prescribed and the extent of disclosure thereto, runs contrary to the principles of transparency and accountability. The ICO believes that a more accountable provision would be created if the person prescribed was included in section 96 of the Bill.

The ICO believes that the extent of secondary legislation currently required throughout the Bill runs contrary to the principles of transparency and accountability in relation to the proper scrutiny of the proposed provisions. The ICO believes that a more transparent and accountable process would be to include more detail on the face of the Bill and publish the draft secondary legislation along with the Bill.

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