



Law Society
of Scotland

Consultation Response

ICO Draft Statutory guidance on our regulatory action

November 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Privacy Law Sub-committee welcomes the opportunity to consider and respond to the Information Commissioner's Officer's consultation on *Draft Statutory guidance on our regulatory action*¹. We have the following comments to put forward for consideration.

Consultation questions

About this Guidance, Aims, Legislative basis and Regulatory Activity

Q1 Are these sections clear and easy to understand?

Unsure / don't know

Q2 If no or unsure/don't know, why not?

No comment.

Q3 Is there anything missing?

Yes

Q4 If yes or unsure/don't know, what other areas would you like to be covered in it?

We would like to see specific reference to the different approach required in Scotland particularly in reference to:

- Criminal prosecution
- Legal Professional Privilege (client confidentiality)

¹ <https://ico.org.uk/media/about-the-ico/consultations/2618333/ico-draft-statutory-guidance.pdf>

Information Notices

Q5 Is it clear and easy to understand?

No comment.

Q6 If no or unsure/don't know, why not?

No comment.

Q7 Is there anything missing?

No comment.

Q8 If yes or unsure/don't know, what other areas would you like to be covered in it?

No comment.

Assessment Notices

Q9 Is it clear and easy to understand?

No comment.

Q10 If no or unsure/don't know, why not? (use approximately 250 words)

No comment.

Q11 Is there anything missing?

No comment.

Q12 If yes or unsure/don't know, what other areas would you like to be covered in it? (use approximately 250 words)

Enforcement Notices

Q13 Is it clear and easy to understand?

No comment.

Q14 If no or unsure/don't know, why not?

No comment.

Q15 Is there anything missing?

No comment.

Q16 If yes or unsure/don't know, what other areas would you like to be covered in it?

No comment.

Penalty Notices

Q17 Is it clear and easy to understand?

No comment.

Q18 If no or unsure/don't know, why not?

No comment.

Q19 Is there anything missing?

Yes

Q20 If yes or unsure/don't know, what other areas would you like to be covered in it? (use approximately 250 words)

We consider that the ICO should make it clear what kind of investigation from the start and to advise organisations that they should consider legal representation to ensure that their rights under Article 6 ECHR are protected. The requirements of Article 6 and the right to a fair trial should be considered throughout this guidance. The ICO state that the aim of the penalty is to punish (page 17) – that brings it squarely within the definition of criminal proceedings and this criminal penalty should be recognised and explained explicitly.

In particular we are concerned that the 20% discount offered to those who do not appeal the ICO's decision is fettering the right of organisations to a fair and impartial tribunal and that is a breach of Article 6. We welcome the ICO seeking to work in co-operation with organisations but it must be clear what this could lead to, not least to ensure that the ICO itself is not challenged.

Q21 Do you have any specific comments on the 9 step process to penalty setting? (use approximately 250 words)

Further guidance is needed as to how turnover will be calculated: it is important that this is absolutely clear. We note there is authority about fining companies in health and safety breaches which states that the turnover should be based on the company being fined and not the parent company apart from in limited circumstances – see *R v Bupa Care Homes (BNH) Limited* [2019] EWCA Crim 1691. Clarity on this issue would be welcomed.

Furthermore, the guidance should reflect the fact that public sector bodies do not have a turnover and account should be taken of the fact that any fine will likely impact on the data subjects – we note that this was not the approach taken by the ICO in the case of Scottish Borders Council. Again health and safety cases take a different approach– see the fine imposed on the Metropolitan Police following the Menezes shooting. Similar considerations may apply to third sector bodies.

Fixed Penalties

Q22 Is it clear and easy to understand?

No comment.

Q23 If no or unsure/don't know, why not?

No comment.

Q24 Is there anything missing?

No comment.

Q25 If yes or unsure/don't know, what other areas would you like to be covered in it?

No comment.

Privileged Communications

Q26 Is it clear and easy to understand?

No comment.

Q27 If no or unsure/don't know, why not?

No comment.

Q28 Is there anything missing?

Yes

Q29 If yes or unsure/don't know, what other areas would you like to be covered in it?

The section on how the ICO would use privileged information does not reference Scotland: we consider that the difference in legal systems should be acknowledged. The guidance should indicate that the ICO will take advice on Scottish law and procedure if necessary.

Effectiveness of Regulatory Action

Q30 Is it clear and easy to understand?

No comment.

Q31 If no or unsure/don't know, why not? (use approximately 250 words)

No comment.

Q32 Is there anything missing?

No comment.

Q33 If yes or unsure/don't know, what other areas would you like to be covered in it?

No comment.

Evaluation and Next steps

Q34 Is it clear and easy to understand?

No comment.

Q35 If no or unsure/don't know, why not? (use approximately 250 words)

No comment.

Q36 Is there anything missing?

No comment.

Q37 If yes or unsure/don't know, what other areas would you like to be covered in it?

No comment.

Miscellaneous

Q38 On a scale of 1-5 how useful is the draft guidance?

No comment.

Q39 Why have you given this score?

No comment.

Q40 To what extent do you agree that the draft guidance is clear and easy to understand?

No comment.

Q41 Please provide any further comments or suggestions you may have about the draft guidance.

No comment.

For further information, please contact:

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