



Law Society
of Scotland

Consultation Response

Data: a new direction

November 2021



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 sub-committee welcomes the opportunity to consider and respond to the Department for Digital, Culture, Media & Sport consultation *Data: a new direction*. The sub-committee has the following comments to put forward for consideration.

Chapter 1- Reducing barriers to responsible innovation

In relation to research there are a lot of provisions in the GDPR which already exist to allow research to take place. The suggestion seems to be that they are complex and so this would be better addressed through consolidation and better guidance which the sector can be involved in creating to share best practice and find a common ground on interpretation. We wish to emphasise that reducing data subject rights is not the way to make this issue less complex – this would undermine and not enhance public trust.

Research

Q1.2.1. To what extent do you agree that consolidating and bringing together research-specific provisions will allow researchers to navigate the relevant law more easily?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are broadly supportive of consolidating the UK GDPR and DPA 2018 into one place for ease access for researchers and professionals more generally.

Q1.2.2. To what extent do you agree that creating a statutory definition of 'scientific research' would result in greater certainty for researchers?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Whilst we accept there is some room for improvement of the definition of “scientific research” we do not recognise this as a major problem.

Q1.2.3. Is the definition of scientific research currently provided by Recital 159 of the UK GDPR (‘technological development and demonstration, fundamental research, applied research and privately funded research’) a suitable basis for a statutory definition?

- Yes
- No
- Do not know

Please explain your answer, providing supplementary or alternative definitions of 'scientific research' if applicable.

Q1.2.4. To what extent do you agree that identifying a lawful ground for personal data processing for research processes creates barriers for researchers?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including by describing the nature and extent of the challenges.

From consulting with DPOs from Universities this does not seem to be barrier but the Society does not have direct experience of that.

Q1.2.5. To what extent do you agree that clarifying that university research projects can rely on tasks in the public interest (Article 6(1)(e) of the UK GDPR) as a lawful ground would support researchers to select the best lawful ground for processing

personal data?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

As far as we understand from contacts in Universities, the public interest grounds are already extensively used by university research projects and as such we feel there is little need to reform the public interest (Article 6(1)(e) of the UK GDPR) as a lawful ground for processing personal data.

Q1.2.6. To what extent do you agree that creating a new, separate lawful ground for research (subject to suitable safeguards) would support researchers to select the best lawful ground for processing personal data?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are not sure that this is necessary based information from universities.

Q1.2.7. What safeguards should be built into a legal ground for research?

We have a number of concerns about the proposals regarding research. Currently, medical research already has significant levels of regulation which are effective in both allowing research to take place and protecting individuals' privacy rights. We are unconvinced of the need to significantly change these existing regulations.

The proposals also appear to be built upon a misunderstanding of consent to process data and consent to be involved in clinical trials.

We are also concerned regarding the apparent focus of the proposed changes on scientific research to the detriment of humanities and social research data.

Q1.2.8. To what extent do you agree that it would benefit researchers to clarify that data subjects should be allowed to give their consent to broader areas of scientific research when it is not possible to fully identify the purpose of personal data processing at the time of data collection?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are not sure that this would encourage trust.

Q1.2.9. To what extent do you agree that researchers would benefit from clarity that further processing for research purposes is both (i) compatible with the original purpose and (ii) lawful under Article 6(1) of the UK GDPR?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q1.2.10. To what extent do you agree with the proposals to disapply the current requirement for controllers who collected personal data directly from the data subject to provide further information to the data subject prior to any further processing, but only where that further processing is for a research purpose and it where it would require a disproportionate effort to do so?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

This would undermine public trust which will not support innovation.

Q1.2.11. What, if any, additional safeguards should be considered as part of this exemption?

Q1.3.1. To what extent do you agree that the provisions in Article 6(4) of the UK GDPR on further processing can cause confusion when determining what is lawful, including on the application of the elements in the compatibility test?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q1.3.2. To what extent do you agree that the government should seek to clarify in the legislative text itself that further processing may be lawful when it is a) compatible or b) incompatible but based on a law that safeguards an important public interest?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer and provide supporting evidence where possible, including on:

- What risks and benefits you envisage
- What limitations or safeguards should be considered

We are of the view that this is what the law says already.

Q1.3.3. To what extent do you agree that the government should seek to clarify when further processing can be undertaken by a controller different from the original controller?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer and provide supporting evidence where possible, including on:

- How you envisage clarifying when further processing can take place
- How you envisage clarifying the distinction between further processing and new processing
- What risks and benefits you envisage
- What limitations or safeguards should be considered

We are nervous about this suggestion and would like to see examples of how the Government envisages this being used before we can comment.

Q1.3.4 To what extent do you agree that the government should seek to clarify when further processing may occur, when the original lawful ground was consent?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

This seems to highlight a confusion between consent to being involved in clinical trials and consent for data processing. This will often not be the legal basis that is relied upon – public interest would be more suitable.

Please explain your answer and provide supporting evidence where possible, including on:

- How you envisage clarifying when further processing can take place
- How you envisage clarifying the distinction between further processing and new processing
- What risks and benefits you envisage
- What limitations or safeguards should be considered

Legitimate Interests

Q1.4.1. To what extent do you agree with the proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The balancing exercise is a very good way to ensure that organisations think about data subjects. Removing the requirement to carry that out would suggest that there is no need because the organisations interest will always ‘trump’ the individual’s. The danger of this is that the balancing exercise is always contextual. For example, the use of CCTV cameras for crime prevention – this is acceptable in the reception area of an office but not in the toilet of a pub.

We would also be strongly against any proposal to remove the right to object to processing if the processing activity is based on an interest on the list.

Whilst we recognise that consent may bring certainty for organisation, it also has other drawbacks for them, and for this reason, there should be the legitimate interests lawful basis, but it must be rooted in the balancing test. There are other lawful basis that an organisation can use, without attempting to bolster legitimate interests in their favour.

Q1.4.2. To what extent do you agree with the suggested list of activities where the legitimate interests balancing test would not be required?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, indicating whether and why you would remove any activities listed above or add further activities to this list.

Whilst the proposal to create a balancing test to determine legitimate interest could help in certain circumstances we have concerns about the system more broadly. In particular, we are worried about how this would affect an individuals’ right to object. Currently, it is not clear how the right to object would apply and before supporting a mechanism such as a this we would need much more clarity and detail regarding the process.

Q1.4.3. What, if any, additional safeguards do you think would need to be put in place?

Ensuring that the right to object when the processing based on legitimate interests remains and can be exercised with the controller justifying any processing that is objected to in context without simply relying on the list.

Overall for the very limited times such a list would be of use we fear it could potentially lead to the creation of a series of broad areas that are opted out of data regulation. This goes too far and in the long term could undermine trust in the broader data protection regulations we have. Since, the current system already allows flexibility for users this seems to be an unnecessary risk.

Q1.4.4. To what extent do you agree that the legitimate interests balancing test should be maintained for children’s data, irrespective of whether the data is being processed for one of the listed activities?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

AI and automated decision making

Q1.5.1. To what extent do you agree that the current legal obligations with regards to fairness are clear when developing or deploying an AI system?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The concept of fairness is difficult to define and therefore to implement. There is a lack of guidance, enforcement action and case law on the fairness principle which can cause organisations to either brush over it or find it difficult to address in a DPIA they are carrying out when developing new technology.

Q1.5.2. To what extent do you agree that the application of the concept of fairness within the data protection regime in relation to AI systems is currently unclear?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible

There is very little guidance on fairness in general other than what is not fair i.e. a couple of fines issued in relation mainly to sharing data unfairly – see Parmacy4U, the Facebook fine and the Experian enforcement action. This makes it difficult to identify what is fair and even more difficult in terms of the use of AI which is often difficult to explain and understand anyway.

Q1.5.3. What legislative regimes and associated regulators should play a role in substantive assessments of fairness, especially of outcomes, in the AI context?

Please explain your response.

The use of representative groups to provide views from across society as to what is expected and unexpected and for these to be published as a fairness framework in relation to what society deems fair at any given time.

This will change as the technology develops and so needs to be updated regularly. It should not be left to industry to develop these frameworks.

Q1.5.4. To what extent do you agree that the development of a substantive concept of outcome fairness in the data protection regime - that is independent of or supplementary to the operation of other legislation regulating areas within the ambit of fairness - poses risks?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree

- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible

Q1.5.5. To what extent do you agree that the government should permit organisations to use personal data more freely, subject to appropriate safeguards, for the purpose of training and testing AI responsibly?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including which safeguards should be in place.

We would want to see this anonymised in some way within the testing environment and to see more details of any system produced.

Q1.5.6. When developing and deploying AI, do you experience issues with identifying an initial lawful ground?

Please explain your answer, and provide supporting evidence where possible.

NA

Q1.5.7 When developing and deploying AI, do you experience issues with navigating re-use limitations in the current framework?

Please explain your answer, and provide supporting evidence where possible.

NA

Q1.5.8 When developing and deploying AI, do you experience issues with navigating relevant research provisions?

Please explain your answer, and provide supporting evidence where possible.

NA

Q1.5.9 When developing and deploying AI, do you experience issues in other areas that are not covered by the questions immediately above?

Please explain your answer, and provide supporting evidence where possible.

One challenge is explaining AI technology in a way that individuals will understand.

Q1.5.10. To what extent do you agree with the proposal to make it explicit that the processing of personal data for the purpose of bias monitoring, detection and correction in relation to AI systems should be part of a limited, exhaustive list of legitimate interests that organisations can use personal data for without applying the balancing test?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- the key benefits or risks you envisage
- what you envisage the parameters of the processing activity should be

Q1.5.11. To what extent do you agree that further legal clarity is needed on how sensitive personal data can be lawfully processed for the purpose of ensuring bias monitoring, detection and correction in relation to AI systems?

- Strongly agree

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q1.5.12. To what extent do you agree with the proposal to create a new condition within Schedule 1 to the Data Protection Act 2018 to support the processing of sensitive personal data for the purpose of bias monitoring, detection and correction in relation to AI systems?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We would support this with the proper safeguards and in particular we would oppose the re-use of that data.

Q1.5.13 What additional safeguards do you think would need to be put in place?

Q1.5.14. To what extent do you agree with what the government is considering in relation to clarifying the limits and scope of what constitutes ‘a decision based solely on automated processing’ and ‘produc[ing] legal effects concerning [a person] or similarly significant effects?’

- Strongly agree
- Somewhat agree

- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- The benefits and risks of clarifying the limits and scope of 'solely automated processing'
- The benefits and risks of clarifying the limits and scope of 'similarly significant effects'

We are not sure that this is confusing but real life examples are always useful. Garante in Italy just issued two fines on this issue (Foodinho and Deliveroo) where they were clear that the decisions being made fell to be regulated when they had an impact on the allocation of work – despite arguments to the contrary.

Q1.5.15. Are there any alternatives you would consider to address the problem?

- Yes
- No
- Don't know

Please explain your answer, and provide supporting evidence where possible.

Q1.5.16. To what extent do you agree with the following statement: 'In the expectation of more widespread adoption of automated decision-making, Article 22 is (i) sufficiently future-proofed, so as to be practical and proportionate, whilst (ii) retaining meaningful safeguards'?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, on both elements of this question, providing suggestions for change where relevant.

Article 22 provides important and essential safeguards for individuals subjected to automated decision making which has an impact on their lives. Individuals must be able to understand what is happening to them and why and they must be able to challenge this to ensure public trust. They should not be watered down at this stage.

Q1.5.17. To what extent do you agree with the Taskforce on Innovation, Growth and Regulatory Reform's recommendation that Article 22 of UK GDPR should be removed and solely automated decision making permitted where it meets a lawful ground in Article 6(1) (and Article 9-10 (as supplemented by Schedule 1 to the Data Protection Act 2018) where relevant) and subject to compliance with the rest of the data protection legislation?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- The benefits and risks of the Taskforce's proposal to remove Article 22 and permit solely automated decision making where (i) it meets a lawful ground in Article 6(1) (and, Articles 9 and 10, as supplemented by Schedule 1 to the Data Protection Act 2018) in relation to sensitive personal data, where relevant) and subject to compliance with the rest of the data protection legislation.
- Any additional safeguards that should be in place for solely automated processing of personal data, given that removal of Article 22 would remove the safeguards currently listed in Article 22 (3) and (4)

The removal of the safeguards in Article 22 would undermine public trust and the likelihood that the public would support and tolerate its use.

Q1.5.18. Please share your views on the effectiveness and proportionality of data protection tools, provisions and definitions to address profiling issues and their impact on specific groups (as described in the section on public trust in the use of data-driven systems), including whether or not you think it is necessary for the government to address this in data protection legislation.

The use of automated decision making in employment or employment-like situations in the gig economy is particularly open to abuse where vulnerable individuals are subjected to automated decisions without knowing they are happening and without any opportunity to challenge them – the impact was that their ability to earn an income was reduced.

Q1.5.19. Please share your views on what, if any, further legislative changes the government can consider to enhance public scrutiny of automated decision-making and to encourage the types of transparency that demonstrate accountability (e.g. revealing the purposes and training data behind algorithms, as well as looking at their impacts).

The issue with providing information about AI is that it is often very difficult to understand what is happening without appropriate technical knowledge but reducing the safeguards attached will simply allow this to happen unchecked. The more members of the public know, the better equipped they will be to challenge what is being done.

Q1.5.20. Please share your views on whether data protection is the right legislative framework to evaluate collective data-driven harms for a specific AI use case, including detail on which tools and/or provisions could be bolstered in the data protection framework, or which other legislative frameworks are more appropriate.

Individuals with data protection expertise must be involved and expertise must be built up in this area – the UK has an opportunity to do this as long as standards are maintained. Without the standards the public trust will disappear. Data protection is the right legislative framework. Data protection expertise, and the development of it, is key.

Anonymisation

Q1.6.1. To what extent do you agree with the proposal to clarify the test for when data is anonymous by giving effect to the test in legislation?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree

Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q1.6.2. What should be the basis of formulating the text in legislation?

- Recital 26 of the UK GDPR
- Explanatory Report to the Modernised Convention 108+
- N/A - legislation should not be amended
- Other

Please explain your answer, and provide supporting evidence where possible.

Maybe not legislation but guidance – which the ICO is working on.

Q1.6.3 To what extent do you agree with the proposal to confirm that the re-identification test under the general anonymisation test is a relative one (as described in the proposal)?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that this should be the test but that it should be clear that the risk of re-identification should be considered on sharing the data.

Q1.6.4. Please share your views on whether the government should be promoting privacy-enhancing technology, and if so, whether there is more it could do to promote its responsible use.

There is a need to ensure that any technology is explained clearly to the public to ensure public trust.

Data intermediaries

Q1.7.1. Do you think the government should have a role enabling the activity of responsible data intermediaries?

- Yes
- No
- Don' t know

Please explain your answer, with reference to the barriers and risks associated with the activities of different types of data intermediaries, and where there might be a case to provide cross-cutting support). Consider referring to the styles of government intervention identified by Policy Lab - e.g. the government's role as collaborator, steward, customer, provider, funder, regulator and legislator - to frame your answer.

Data intermediaries would presumably be commercial creatures which would bring conflict scenarios to the fore. In particular, the Government cannot operate as legislator and collaborator, steward, funder and regulator.

Q.1.7.2. What lawful grounds other than consent might be applicable to data intermediary activities, as well as the conferring of data processing rights and responsibilities to those data intermediaries, whereby organisations share personal data without it being requested by the data subject?

Please explain your answer, and provide supporting evidence where possible, including on:

- If Article 6(1)(f) is relevant, i) what types of data intermediary activities might constitute a legitimate interest and how is the balancing test met and ii) what types of intermediary activity would not constitute a legitimate interest
- What role the government should take in codifying this activity, including any additional conditions that might be placed on certain kinds of data intermediaries to bring them within scope of legitimate interest
- Whether you consider a government approved accreditation scheme for intermediaries would be useful

To enable sharing without consent could undermine trust and make the public less likely to want to use an intermediary. However, the use of informed consent is tricky the more complex and extensive the data sharing is. Transparency is the key to gaining trust.

Q1.8.1. In your view, which, if any, of the proposals in ‘Reducing barriers to responsible innovation’ would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Q1.8.2. In addition to any of the reforms already proposed in ‘Reducing barriers to responsible innovation’ (or elsewhere in the consultation), what reforms do you think would be helpful to reduce barriers to responsible innovation?

Chapter 2 - Reducing burdens on businesses and delivering better outcomes for people

The safeguards introduced by the GDPR included the accountability principle and the documentation of processing activities to ensure that organisations paid attention to data protection. In our view the act of writing something down encourages thinking that would not be there otherwise. This avoids breaches and assist in public trust – the DPIAs that were published during the COVID-19 pandemic were a good example of this. Reducing the requirements risks undermining public trust.

A risk-based approach is welcomed as long as organisations are obliged to identify their risky processing activities and think about them. The ICO should be able to challenge organisations who fail to do this but that will be tricky without legislation mandating documentation.

More detail is required in relation to the privacy management programme to ensure that it maintains the same protections for individuals. It is difficult to determine what better outcomes would be achieved and for whom, if rights and freedoms were eroded.

Accountability

Q2.2.1. To what extent do you agree with the following statement: ‘The accountability framework as set out in current legislation should i) feature fewer prescriptive requirements, ii) be more flexible, and iii) be more risk-based’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Without mandating some aspects of data protection law, the risk assessment will not happen. It will lead to more issues/complaints and it will be more difficult for the ICO to hold organisations to account.

Q2.2.2. To what extent do you agree with the following statement: ‘Organisations will benefit from being required to develop and implement a risk-based privacy management programme’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible and in particular:

- Please share your views on whether a privacy management programme would help organisations to implement better, and more effective, privacy management processes.
- Please share your views on whether the privacy management programme requirement would risk creating additional burdens on organisations and, if so, how.

We think that it how is works just now. Q2.2.3. To what extent do you agree with the following statement: 'Individuals (i.e. data subjects) will benefit from organisations being required to implement a risk- based privacy management programme'?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your choice, and provide supporting evidence where possible.

- Please share your views on which, if any, elements of a privacy management programme should be published in order to aid transparency.
 - What incentives or sanctions, if any, you consider would be necessary to ensure that privacy management programmes work effectively in practice.

As long as there is a clear understanding about what is risky data processing activity – this could come the ICO and from sector guidance.

Data Protection Officers

Q2.2.4. To what extent do you agree with the following statement: ‘Under the current legislation, organisations are able to appoint a suitably independent data protection officer’?

Strongly agree

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your choice, and provide supporting evidence where possible.

It is true to say that the number of data protection officers has increased since the GDPR was implemented and interest in the area has increased exponentially. The skill base is there. The difficulty for smaller organisations is a resource one and appointing someone who is independent of management but who can carry out this role can be challenging. Perhaps there needs to be some leeway with thought given as to how independent advice can be given even if the role is taken by someone in management.

Q2.2.5. To what extent do you agree with the proposal to remove the existing requirement to designate a data protection officer?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are concerned that the protections in place for a statutory DPO (independence, resources, job protection etc) will disappear and that the importance of the role will be diminished at a time when we need to increase public trust. The expertise that has developed over the past few years would be lost which would result in a lack of good advice, knowledge and expertise being available,

Q.2.2.6. Please share your views on whether organisations are likely to maintain a

similar data protection officer role, if not mandated.

It is unlikely that the role would be maintained in the same way with the same, independence, protections and resources in place. Even if the role was maintained initially, over time it is likely that the role would be weakened.

Data Protection Impact Assessments

Q2.2.7. To what extent do you agree with the following statement: 'Under the current legislation, data protection impact assessment requirements are helpful in the identification and minimisation of data protection risks to a project'?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We believe DPIAs are effective and helpful and that they will become a more familiar feature of developers and organisations who will build in more familiarity and expertise to devise and advise on the content. They are a welcome development and should be encouraged more. Q.2.2.8. To what extent do you agree with the proposal to remove the requirement for organisations to undertake data protection impact assessments?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, and in particular describe what alternative risk assessment tools would achieve the intended outcome of minimising data protection risks.

We have come across incidents which were damaging and which could have been avoided by a simple DPIA addressing the risks. The language can be simplified to allow anyone to consider the issues and the use of DPIAs is always beneficial in our experience and improves many aspects of data processing including the provision of information to data subjects about what is happening to their data – essential to ensure public trust. The publication of DPIAs when technology was being deployed during the pandemic was a helpful tool.

Q.2.2.9 Please share your views on why few organisations approach the ICO for ‘prior consultation’ under Article 36 (1)-(3). As a reminder Article 36 (1)-(3) requires that, where an organisation has identified a high risk that cannot be mitigated, it must consult the ICO before starting the processing.

Please explain your answer, and provide supporting evidence where possible.

Q.2.2.10. To what extent do you agree with the following statement: ‘Organisations are likely to approach the ICO before commencing high risk processing activities on a voluntary basis if this is taken into account as a mitigating factor during any future investigation or enforcement action’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, and in particular: what else could incentivise organisations to approach the ICO for advice regarding high risk processing?

ROPAs

Q.2.2.11. To what extent do you agree with the proposal to reduce the burden on organisations by removing the record keeping requirements under Article 30?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The ROPA is an essential tool for getting data protection regulation right. It does not need to be too onerous and addressed the right issues. Without this we simply do not understand how organisations can comply.

Data Breach Reporting

Q.2.2.12. To what extent do you agree with the proposal to reduce burdens on organisations by adjusting the threshold for notifying personal data breaches to the ICO under Article 33?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible and in particular:

- Would the adjustment provide a clear structure on when to report a breach?
- Would the adjustment reduce burdens on organisations?
- What impact would adjusting the threshold for breach reporting under Article 33 have on the rights and freedoms of data subjects?

It is very difficult to advise on what should be reported and organisations will always lean on the side of caution as they can be fined for not reporting the matter. It is important that personal data breaches are reported and triaged.

Voluntary Undertakings

Q.2.2.13. To what extent do you agree with the proposal to introduce a voluntary undertakings process? As a reminder, in the event of an infringement, the proposed voluntary undertakings process would allow accountable organisations to provide the ICO with a remedial action plan and, provided that the plan meets certain criteria, the ICO could authorise the plan without taking any further action.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Any enforcement mechanisms that encourage and result in better compliance are to be welcomed. This would perhaps be a very useful tool in the context of public sector organisations/third sector organisations where fines can be somewhat counterproductive, taking resource away as a punishment when it could be used to address any shortcomings.

Other Safeguards

Q.2.2.14. Please share your views on whether any other areas of the existing regime should be amended or repealed in order to support organisations implementing privacy management requirements.

We would like to see enforcement action being taken by the ICO in relation to non-compliance – in our view this would publicise the requirements in addition to the security breaches which the ICO currently focuses on.

Q.2.2.15. What, if any, safeguards should be put in place to mitigate any possible risks to data protection standards as a result of implementing a more flexible and risk-based approach to accountability through a privacy management programme?

Q2.2.16. To what extent do you agree that some elements of Article 30 are duplicative (for example, with Articles 13 and 14) or are disproportionately burdensome for organisations without clear benefits?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, and in particular address which elements of Article 30 could be amended or repealed because they are duplicative and/or disproportionately burdensome for organisations without clear benefits.

They have a different function and so both are valid.

Q.2.2.17. To what extent do you agree that the proposal to amend the breach reporting requirement could be implemented without the implementation of the privacy management programme?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Data Protections Officers in the public sector

Q.2.2.18. To what extent do you agree with the proposal to remove the requirement for all public authorities to appoint a data protection officer?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We find that proposal risks reducing public confidence – the DPO’s role has become increasingly important for public sector bodies who often process a lot of personal data and in whom public confidence is generally lower. The requirement to ensure appropriate resources is also important. If the role is not mandatory the risk is it will disappear with budget cuts at a time where the use of personal data and AI etc needs to be managed properly to ensure that public confidence is maintained. These technologies can streamline processes and save public money but only if used properly with the correct professional advice from DPOs.

The current regime is still in its early years. Expertise, knowledge and skills are growing and that itself facilitates compliance and reduces burdens.

Q.2.2.19. If you agree, please provide your view which of the two options presented at paragraph 184d(V) would best tackle the problem.

Please provide supporting evidence where possible, and in particular:

- What risks and benefits you envisage
- What should be the criteria for determining which authorities should be required to appoint a data protection officer

Q2.2.20 If the privacy management programme requirement is not introduced, what other aspects of the current legislation would benefit from amendments, alongside the proposed reforms to record keeping, breach reporting requirements and data protection officers?

Subject Access Requests

Q2.3.1. Please share your views on the extent to which organisations find subject access requests time-consuming or costly to process.

Please provide supporting evidence where possible, including:

- What characteristics of the subject access requests might generate or elevate costs
- Whether vexatious subject access requests and/or repeat subject access requests from the same requester play a role
- Whether it is clear what kind of information does and does not fall within scope when responding to a subject access request

Organisations with a large number of legacy systems – whether digital or paper based – will always struggle with finding all the personal data relating to an individual who makes a request. There should be greater support for organisations who engage with the individual making the request to identify what information they are interested in to assist the process to be streamlined for the organisation and the individual. The ICO can play a role in making organisations more confident in taking this approach.

Proportionality must play a role in what an organisation is expected to respond to, and with what. That already applies, but guidance could be clearer.

Q2.3.2. To what extent do you agree with the following statement: ‘The ‘manifestly unfounded’ threshold to refuse a subject access request is too high’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, providing supporting evidence where possible, including on what, if any, measures would make it easier to assess an appropriate threshold.

We do not think that this definition is very clearly interpreted by the ICO at the moment. Currently the request is purpose blind but there has been authority in the past which has challenged that – particularly SARs being made in lieu of seeking proper disclosure of material in litigation. That could be considered again.

Q2.3.3. To what extent do you agree that introducing a cost limit and amending the threshold for response, akin to the Freedom of Information regime (detailed in the section on subject access requests), would help to alleviate potential costs (time and resource) in responding to these requests?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- Which safeguards should apply (such as mirroring Section 16 of the Freedom of Information Act (for public bodies) to help data subjects by providing advice and assistance to avoid discrimination)
- What a reasonable cost limit would look like, and whether a different (ie. sliding scale) threshold depending on the size (based on number of employees and/or turnover, for example) would be advantageous

Introducing a complex way of calculating a fee would be too much of a deterrent for individuals seeking to exercise a fundamental right and many of the organisations who struggle would not charge a fee anyway.

Q2.3.4. To what extent do you agree with the following statement: ‘There is a case for re-introducing a small nominal fee for processing subject access requests (akin to the approach in the Data Protection Act 1998)’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including what a reasonable level of the fee would be, and which safeguards should apply.

We believe that the nominal fee did deter individuals from making SARs but that this is a fundamental right which should not be discouraged if the request is being made for the right reasons. Overall we think this is a retrograde step. Q2.3.5. Are there any alternative options you would consider to reduce the costs and time taken to respond to subject access requests?

- Yes
- No
- Don' t know

Please explain your answer, and provide supporting evidence where possible.

See above – we would encourage organisations to enter into a dialogue with the requester to identify what they actually want. This would then demonstrate a willingness to co-operate and identify what could be an unreasonable complaint

Cookies

Our response is based on the understanding that the terms cookies covers other types of tracking technology – pixels and fingerprinting etc.

Q2.4.1. What types of data collection or other processing activities by cookies and other similar technologies should fall under the definition of 'analytics'?

Q2.4.2 To what extent do you agree with the proposal to remove the consent requirement for analytics cookies and other similar technologies covered by Regulation 6 of PECR?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your choice, and provide supporting evidence where possible, including what safeguards should apply.

We believe that first party analytics cookies where mostly personal data is being used to inform the website operator only who is looking at their websites should not require consent. In our opinion this is non-invasive and very valuable for the organisation.

Q2.4.3. To what extent do you agree with what the government is considering in relation to removing consent requirements in a wider range of circumstances? Such circumstances might include, for example, those in which the controller can demonstrate a legitimate interest for processing the data, such as for the purposes of detecting technical faults or enabling use of video or other enhanced functionality on websites.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including what circumstances should be in scope and what, if any, further safeguards should apply.

We agree that some other types of cookies concerning functionality may be deployed on the basis of LI as long as there is clear information about what purpose they have and that they give a real choice.

Q2.4.4. To what extent do you agree that the requirement for prior consent should be removed for all types of cookies?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including how organisations could comply with the UK GDPR principles on lawfulness, fairness and transparency if PECR requirements for consent to all cookies were removed.

We oppose this in the strongest terms. Some types of cookie are extremely invasive allowing large organisations to gather information about a user across platforms and devices and when these technologies are explained to individuals most find their use at best 'creepy' and at worst 'extremely sinister'. Inferred data is personal data and its uses are damaging to public consent more broadly.

Q2.4.5. Could sectoral codes (see Article 40 of the UK GDPR) or regulatory guidance be helpful in setting out the circumstances in which information can be accessed on, or saved to a user's terminal equipment?

Sectoral guidance is always useful.

Q2.4.6. What are the benefits and risks of requiring websites or services to respect preferences with respect to consent set by individuals through their browser, software applications, or device settings?

Although this seems like the most practical option for individuals to avoid being overwhelmed by complex cookie banners, the organisations running the websites would have to respect the choices of the individuals and to date that has not been the case. Proper enforcement of the law in this area may assist.

Q2.4.7. How could technological solutions, such as browser technology, help to reduce the volume of cookie banners in the future?

A real and enforceable choice at browser level would help.

Q2.4.8. What, if any, other measures would help solve the issues outlined in this section?

Soft Opt-in

Q2.4.9. To what extent do you agree that the soft opt-in should be extended to non-commercial organisations? See paragraph 208 for description of the soft opt-in.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that the soft opt-in should be extended to non commercial organisations and in particular charities who have, for example, received a donation from an individual. This would always be on the basis that the same safeguards are in place – the option to opt out at the time and every time a message is received. We have consulted with the charitable sector who commented that donors are annoyed when we do not update them on the work funded by their donations.

The same principle should also apply to organisations who provide free service such as free seminars. They should be able to assume that people who attended want to hear about their other seminars as long as the option to opt out exists.

Unsolicited marketing calls

Q2.4.10. What are the benefits and risks of updating the ICO's enforcement powers so that they can take action against organisations for the number of unsolicited direct marketing calls 'sent'?

Currently the ICO can only take action on calls which are 'received' and connected. The ICO sometimes receives intelligence of companies sending thousands of calls but which are not all connected, but they cannot take account of the potential risk of harm when determining the most appropriate form of enforcement action.

Q2.4.11. What are the benefits and risks of introducing a 'duty to report' on communication service providers?

This duty would require communication service providers to inform the ICO when they have identified suspicious traffic transiting their networks. Currently the ICO has to rely on receiving complaints from users before they can request relevant information from communication service providers.

Please provide information on potential cost implications for the telecoms sector of any new reporting requirements.

Q2.4.12. What, if any, other measures would help to reduce the number of unsolicited direct marketing calls and text messages and fraudulent calls and text messages?

Q2.4.13. Do you see a case for legislative measures to combat nuisance calls and text messages?

- Yes
- No
- Don't know

If yes, what measures do you propose and why?

If no, please explain your answer, and provide supporting evidence where possible.

Q2.4.14. What are the benefits and risks of mandating communications providers to do more to block calls and text messages at source?

Q2.4.15 What are the benefits and risks of providing free of charge services that block, where technically feasible, incoming calls from numbers not on an 'allow list'? An 'allow list' is a list of approved numbers that a phone will only accept incoming calls from.

PECRs fines and enforcement

Q2.4.16. To what extent do you agree with increasing fines that can be imposed under PECR so they are the same level as fines imposed under the UK GDPR (i.e.

increasing the monetary penalty maximum from £500,000 to up to £17.5 million or 4% global turnover, whichever is higher)?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that the fine levels should be aligned.

Q2.4.17. To what extent do you agree with allowing the ICO to impose assessment notices on organisations suspected of infringements of PECR to allow them to carry out audits of the organisation's processing activities?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that this is a very useful way of encouraging compliance but would be resource intensive. Could you charge organisations for this as per the fee for intervention scheme run by the HSE? Q2.4.18. Are there any other measures that would help to ensure that PECR's enforcement regime is effective, proportionate and dissuasive?

- Yes
- No

Don't know

If yes, what measures do you propose and why?

There should be more use of the power to take action against individual directors and disqualify them from holding that role in the future.

Political and democratic engagement issues

Q2.5.1. To what extent do you think that communications sent for political campaigning purposes by registered parties should be covered by PECR's rules on direct marketing, given the importance of democratic engagement to a healthy democracy?

Please explain your answer, and provide supporting evidence where possible.

Other EU countries do not regulate this kind of messaging under PECRs and so it may be worth considering any issues that this causes in other EU countries.

Q2.5.2. If you think political campaigning purposes should be covered by direct marketing rules, to what extent do you agree with the proposal to extend the soft opt-in to communications from political parties?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

As long as the same safeguards were maintained.

Q2.5.3. To what extent do you agree that the soft opt-in should be extended to other

political entities, such as candidates and third-party campaign groups registered with the Electoral Commission? See paragraph 208 for description of the soft opt-in

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Whilst we do not wish to give specific suggestions this proposal as it stands is too broad for us to support.

Q2.5.4. To what extent do you think the lawful grounds under Article 6 of the UK GDPR impede the use of personal data for the purposes of democratic engagement?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q2.5.5 To what extent do you think the provisions in paragraphs 22 and 23 of Schedule 1 to the DPA 2018 impede the use of sensitive data by political parties or elected representatives where necessary for the purposes of democratic engagement?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree



- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Chapter 3 - Boosting trade and reducing barriers to data flows

Adequacy

Q3.2.1. To what extent do you agree that the UK's future approach to adequacy decisions should be risk-based and focused on outcomes?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer and provide supporting evidence if possible.

The difficulty with that is that risk may depend on the organisation making the transfer and what will be risky for some transfers will not be risky for others. We would need more details about what that would mean in practice.

Q3.2.2. To what extent do you agree that the government should consider making adequacy regulations for groups of countries, regions and multilateral frameworks?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

This would depend on the group having the same or very similar safeguards in place in relation to data protection and privacy. We are not sure that is the case beyond the EU.

Q3.2.3. To what extent do you agree with the proposal to strengthen ongoing monitoring of adequacy regulations and relax the requirement to review adequacy regulations every four years?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

This will significantly reduce the safeguards since the UK's approach to privacy could change significantly in light of a change of government in a country.

Transfer mechanisms

Q3.2.4. To what extent do you agree that redress requirements for international data transfers may be satisfied by either administrative or judicial redress mechanisms, provided such mechanisms are effective?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your choice, and provide supporting evidence where possible.

We would need to see the detail about this before deciding on whether it is a good approach.

Q3.3.1. To what extent do you agree with the proposal to reinforce the importance of proportionality when assessing risks for alternative transfer mechanisms?

- Strongly agree

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are not sure what that means beyond assessing the risks involved in the transfer.

Q3.3.2. What support or guidance would help organisations assess and mitigate the risks in relation to international transfers of personal data under alternative transfer mechanisms, and how might that support be most appropriately provided?

Information about the risks in each country compiled by the Government would assist. It is a difficult and expensive task to ask each organisation to make that assessment themselves for each third country.

Q3.3.3. To what extent do you agree that the proposal to exempt ‘reverse transfers’ from the scope of the UK international transfer regime would reduce unnecessary burdens on organisations, without undermining data protection standards?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q3.3.4. To what extent do you agree that empowering organisations to create or identify their own alternative transfer mechanisms that provide appropriate safeguards will address unnecessary limitations of the current set of alternative transfer mechanisms?

- Strongly agree

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

It will only be available to organisations of a certain size who can afford to develop these mechanisms – they are not generally the organisations who struggle to afford the mechanisms that already exist.

Q3.3.5 What guidance or other support should be made available in order to secure sufficient confidence in organisations' decisions about whether an alternative transfer mechanism, or other legal protections not explicitly provided for in UK legislation, provide appropriate safeguards?

Sharing information about the third countries in a centralised way would assist. Having a standard of safeguard approved by the ICO may assist.

Q3.3.6. Should organisations be permitted to make international transfers that rely on protections provided for in another country's legislation, subject to an assessment that such protections offer appropriate safeguards?

- Yes
- No
- Don't know

Please explain your answer, and provide supporting evidence where possible.

This seems to suggest that carrying out the risk assessment and assessing that a country is adequate could be done by an organisation on a case by case basis which we think would be unduly risky.

Q3.3.7. To what extent do you agree that the proposal to create a new power for the Secretary of State to formally recognise new alternative transfer mechanisms would increase the flexibility of the UK's regime?

- Strongly agree

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We cannot answer this without understanding what criteria would applied to allow for that approval to take place.

Q3.3.8. Are there any mechanisms that could be supported that would benefit UK organisations if they were recognised by the Secretary of State?

- Yes
- No
- Don't know

Please explain your answer, and provide supporting evidence where possible.

Certification and accreditation

Q3.4.1. To what extent do you agree with the approach the government is considering to allow certifications to be provided by different approaches to accountability, including privacy management programmes?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q3.4.2. To what extent do you agree that allowing accreditation for non-UK bodies will provide advantages to UK-based organisations?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q3.4.3. Do you see allowing accreditation for non-UK bodies as being potentially beneficial for you or your organisation?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain the advantages and risks that you foresee for allowing accreditation of non-UK bodies.

Q3.4.4. Are there any other changes to certifications that would improve them as an international transfer tool?

Q3.5.1. To what extent do you agree that the proposal described in paragraph 270 represents a proportionate increase in flexibility that will benefit UK organisations without unduly undermining data protection standards?

- Strongly agree
- Somewhat agree

- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q3.6.1. The proposals in this chapter build on the responses to the National Data Strategy consultation. The government is considering all reform options in the round and will carefully evaluate responses to this consultation. The government would welcome any additional general comments from respondents about changes the UK could make to improve its international data transfer regime for data subjects and organisations.

The situation brought about by the Schrems II decision is unworkable. We believe that the Commission will have to address the disproportionate burden on organisations caused by the requirement to carry out a risk assessment in relation to all transfers to third countries.

The UK has the opportunity to address this issue but must do so in a way that does not jeopardise the adequacy decision. We must ensure that adequate safeguards are in place and doing this on a risk based assessment of the actual data being transferred seems to be the correct way to do this.

Q3.6.2. In your view, which, if any, of the proposals in ‘Boosting Trade and Reducing Barriers to Data Flows’ would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Q3.6.3. In addition to any of the reforms already proposed in ‘Boosting Trade and Reducing Barriers to Data Flows’ (or elsewhere in the consultation), what reforms do you think would be helpful to make the UK’s international transfer regime more user-friendly, effective or safer?

Chapter 4 - Delivering better public services

Extending delivery powers under the Data Economy Act

Q4.2.1. To what extent do you agree with the following statement: ‘Public service delivery powers under section 35 of the Digital Economy Act 2017 should be extended to help improve outcomes for businesses as well as for individuals and households’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Public task lawful basis

Q4.3.1. To what extent do you agree with the following statement: ‘Private companies, organisations and individuals who have been asked to process personal data on behalf of a public body should be permitted to rely on that body’s lawful ground for processing the data under Article 6(1)(e) of the UK GDPR’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, providing supporting evidence where possible.

We understood that this lawful basis could be relied upon by a non-public sector body if they are exercising official authority or carrying out a specific task in the public interest.

Q4.3.2. What, if any, additional safeguards should be considered if this proposal were pursued?

Consideration should be given to human rights legislation and freedom of information legislation applying to non-public sector bodies when processing data to carry out public tasks.

Substantial public interest and health data

Q4.3.3. To what extent do you agree with the proposal to clarify that public and private bodies may lawfully process health data when necessary for reasons of substantial public interest in relation to public health or other emergencies?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, providing supporting evidence where possible.

Q4.3.4. What, if any, additional safeguards should be considered if this proposal were pursued?

Documenting the decision making process.

Reporting on the use of algorithms

Q4.4.1. To what extent do you agree that compulsory transparency reporting on the use of algorithms in decision-making for public authorities, government departments and government contractors using public data will improve public trust in government use of data?

- Strongly agree
- Somewhat agree

- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your choice, and provide supporting evidence where possible.

Q4.4.2. Please share your views on the key contents of mandatory transparency reporting.

Q4.4.3. In what, if any, circumstances should exemptions apply to the compulsory transparency reporting requirement on the use of algorithms in decision-making for public authorities, government departments and government contractors using public data?

Processing using schedule 1 DPA – substantial public interest

Q4.4.4. To what extent do you agree there are any situations involving the processing of sensitive data that are not adequately covered by the current list of activities in Schedule 1 to the Data Protection Act 2018?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer and provide supporting evidence where possible, including on:

- What, if any, situations are not adequately covered by existing provisions
- What, if any, further safeguards or limitations may be needed for any new

We have identified that some organisations need to gather health information to allow them to take special measures in relation to that individual. Where that individual is not an employee then there is no condition

other than explicit consent and this does not seem like the correct legal basis given that the information may be required for safety reasons, equality reasons and that it may be shared. Examples are: students being supported by an accredited provider; participants in a dance class etc. If there is a condition to allow this processing to take place without consent then it should be specifically limited in time.

We have come across a gap where organisations gather information about individual's dietary requirements for conferences etc which could reveal either health or religious information. Consent does not seem like the correct legal basis for this activity but none of the other conditions apply. This condition would include an explicit requirement to anonymise this information as far as possible and to delete the information as soon as possible.

Q4.4.5. To what extent do you agree with the following statement: 'It may be difficult to distinguish processing that is in the substantial public interest from processing in the public interest'?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q4.4.6. To what extent do you agree that it may be helpful to create a definition of the term 'substantial public interest'?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- What the risks and benefits of a definition would be

- What such a definition might look like
- What, if any, safeguards may be needed

Q4.4.7. To what extent do you agree that there may be a need to add to, or amend, the list of specific situations in Schedule 1 to the Data Protection Act 2018 that are deemed to always be in the substantial public interest?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on:

- What such situations may be
- What the risks and benefits of listing those situations would be
- What, if any, safeguards may be needed

Police and law enforcement processing

Q4.4.8. To what extent do you agree with the following statement: ‘There is an opportunity to streamline and clarify rules on police collection, use and retention of data for biometrics in order to improve transparency and public safety’?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, providing supporting evidence where possible.

Q4.5.1. To what extent do you agree with the proposal to standardise the terminology and definitions used across UK GDPR, Part 3 (Law Enforcement processing) and Part 4 (Intelligence Services processing) of the Data Protection Act 2018?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Impact on equality

Q4.6.1. In your view, which, if any, of the proposals in ‘Delivering Better Public Services’ would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Q4.6.2. In addition to any of the reforms already proposed in ‘Delivering Better Public Services’ (or elsewhere in the consultation), what reforms to the data protection regime would you propose to help the delivery of better public services?

Chapter 5 - Reform of the Information Commissioner's Office

ICO objectives and duties

Q5.2.1. To what extent do you agree that the ICO would benefit from a new statutory framework for its objectives and duties?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.2.2. To what extent do you agree with the proposal to introduce an overarching objective for the ICO with two components that relate to upholding data rights and encouraging trustworthy and responsible data use respectively?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.2.3. Are there any alternative elements that you propose are included in the ICO's overarching objective?

- Yes
- No

Don't know

Please explain your answer, and provide supporting evidence where possible.

Q5.2.4. To what extent do you agree with the proposal to introduce a new duty for the ICO to have regard to economic growth and innovation when discharging its functions?

Strongly agree

Somewhat agree

Neither agree nor disagree

Somewhat disagree

Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

This seems to suggest that economic interests could override fundamental rights in relation to privacy. This is not something to aspire to and not the way we have developed privacy regulations in the UK to this point.

Q5.2.5. To what extent do you agree with the proposal to introduce a duty for the ICO to have regard to competition when discharging its functions?

Strongly agree

Somewhat agree

Neither agree nor disagree

Somewhat disagree

Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We would recommend working more closely with the CMA.

Q5.2.6. To what extent do you agree with the proposal to introduce a new duty for the ICO to cooperate and consult with other regulators, particularly those in the DRCF (CMA, Ofcom and FCA)?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

It should be recognised that the ICO regulates organisations across all sectors whereas these regulators operate in a limited number of sectors which tend to consist of well-funded organisations.

Q5.2.7. Are there any additional or alternative regulators to those in the Digital Regulation Cooperation Forum (CMA, Ofcom and FCA) that the duty on the ICO to cooperate and consult should apply to?

- Yes
- No
- Don' t know

Please explain your answer, and provide supporting evidence where possible.

Other regulators

Q5.2.8. To what extent do you agree with the establishment of a new information sharing gateway between relevant digital regulators, particularly those in the DRCF?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree

- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.2.9. Are there any additional or alternative regulators to those in the DRCF (ICO, CMA, Ofcom and FCA) that the information sharing gateway should include?

- Yes
- No
- Don' t know

Please explain your answer, and provide supporting evidence where possible.

Public safety

Q5.2.10. To what extent do you agree with the government's proposal to introduce specific language recognising the need for the ICO to have due regard to public safety when discharging its functions?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer and provide supporting evidence where possible.

We are not sure what this proposal means.

ICO strategy

Q5.2.11. To what extent do you agree with the proposal for the Secretary of State for DCMS to periodically prepare a statement of strategic priorities which the ICO must have regard to when discharging its functions?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We believe that this undermines the independence of the ICO which must be maintained to ensure public confidence.

Q5.2.12. To what extent do you agree with the proposal to require the ICO to deliver a more transparent and structured international strategy?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.2.13. To what extent do you agree with the proposal to include a new statutory objective for the ICO to consider the government's wider international priorities when conducting its international activities?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We believe that this could undermine the independence of the ICO which must be maintained to ensure public confidence.

New governance model for the ICO

Q5.3.1. To what extent do you agree that the ICO would benefit from a new governance and leadership model, as set out above?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that a board would enhance the credibility of the organisation as long as the board was diverse and represented all sectors and opinions.

Q5.3.2. To what extent do you agree with the use of the Public Appointment process for the new chair of the ICO?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We would like the process to be as independent as possible from government.

Q.5.3.3. To what extent do you agree with the use of the Public Appointment process for the non-executive members of the ICO's board?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

As said previously, independence is important.

Q5.3.4. To what extent do you agree with the use of the Public Appointment process for the new CEO of the ICO?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Same as above.

Q5.3.5. To what extent do you agree that the salary for the Information Commissioner (i.e. the proposed chair of the ICO in the future governance model) should not require Parliamentary approval?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree

- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.4.1. To what extent do you agree with the proposal to strengthen accountability mechanisms and improve transparency to aid external scrutiny of the ICO's performance?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.4.2. To what extent do you agree with the proposal to introduce a requirement for the ICO to develop and publish comprehensive and meaningful key performance indicators (KPIs) to underpin its annual report?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.4.3. To what extent do you agree with the proposal to require the ICO to publish the key strategies and processes that guide its work?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.4.4. What, if any, further legislative or other measures with respect to reporting by the ICO would aid transparency and scrutiny of its performance?

- Yes
- No
- Don't know

Please explain your answer, and provide supporting evidence where possible.

Q5.4.5. Please share your views on any particular evidence or information the ICO ought to publish to form a strong basis for evaluating how it is discharging its functions, including with respect to its new duties outlined above.

DCMS involvement

Q5.4.6. To what extent do you agree with the proposal to empower the DCMS Secretary of State to initiate an independent review of the ICO's activities and performance?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree

- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The implication of this is that it would form the basis for the Government to interfere in the ICO's work

Q5.4.7. Please share your views on what, if any, criteria ought to be used to establish a threshold for the ICO's performance below which the government may initiate an independent review.

Q5.5.1. To what extent do you agree with the proposal to oblige the ICO to undertake and publish impact assessments when developing codes of practice, and complex or novel guidance?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Given that the ICO's work impact on every sector, this would seem like a very difficult task.

Q5.5.2. To what extent do you agree with the proposal to give the Secretary of State the power to require the ICO to set up a panel of persons with expertise when developing codes of practice and complex or novel guidance?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are not sure why the DCMS should be responsible for this this – the ICO could do that itself and we agree that is a good idea it as long as these appointments were independent and representative.

Q5.5.3. To what extent do you agree with the proposal to give the Secretary of State a parallel provision to that afforded to Houses of Parliament in Section 125(3) of the Data Protection Act 2018 in the approval of codes of practice, and complex and novel guidance?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Strongly disagree as this would wholly underline the independence of the ICO.

Q5.5.4. The proposals under this section would apply to the ICO's codes of practice, and complex or novel guidance only. To what extent do you think these proposals should apply to a broader set of the ICO's regulatory products?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and describe alternative or supplementary criteria if appropriate.

Impact assessment on ICO guidance

Q5.5.5 Should the ICO be required to undertake and publish an impact assessment on each and every guidance product?

- Yes
- No
- Don't know

Please explain your answer, and provide supporting evidence where possible.

Complaints and investigations

In our view the ICO investigations are not fit for purpose particularly given the high level of fines that they can now impose. They need to be carried out as if they are quasi-criminal investigations backed up with the powers that other regulators use. In our experience the organisation being investigated is not involved and is not asked to provide an input until the NOI stage at which point they identify information that could assist the investigation. The Doorstep Dispensaree appeal highlights this – this issue should have been resolved much earlier in the investigation perhaps avoiding an expensive appeal.

Q5.6.1. To what extent do you agree that the ICO would benefit from a more proportionate regulatory approach to data protection complaints?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The complaints process is often driven by the information provided by the person complaining who either does not have the full facts or does not provide all the facts and this makes the process very cumbersome for the organisation.

Q5.6.2. To what extent do you agree with the proposal to introduce a requirement for the complainant to attempt to resolve their complaint directly with the relevant data controller prior to lodging a complaint with the ICO?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We agree that this should happen and that organisations should be given the opportunity to resolve the issue and that this would assist the ICO to get a fuller picture before deciding what to do in relation to any investigation.

Q5.6.3. To what extent do you agree with the proposal to require data controllers to have a simple and transparent complaints-handling process to deal with data subjects' complaints?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Please also indicate what categories of data controllers, if any, you would expect to be exempt from such a requirement.

Q5.6.4. To what extent do you agree with the proposal to set out in legislation the criteria that the ICO can use to determine whether to pursue a complaint in order to provide clarity and enable the ICO to take a more risk-based and proportionate approach to complaints?

- Strongly agree
- Somewhat agree

- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Any information to manage expectations would be helpful.

Q5.7.2. To what extent do you agree with the proposal to introduce a new power to allow the ICO to commission technical reports to inform investigations?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including:

- Whether there are any other risks or benefits you can see in this proposal
- If you foresee any risks, what safeguards should be put in place

Absolutely agree – this is essential for the ICO as some of the investigations are clearly very technical and independent expertise is required.

Q5.7.3. Who should bear the cost of the technical reports: the organisation (provided due regard is made to their financial circumstances) or the ICO?

It would not make sense to charge the organisation - this would detract from the independence of the report and would cause disputes between the ICO and the organisation.

The ICO could consider going down the line of the HSE who charge for carrying out investigations when they identify a breach of health and safety laws.

Q5.7.4. If the organisation is to pay, what would an appropriate threshold be for exempting them from paying this cost?

NA

Q5.7.5. To what extent do you agree with what the government is considering in relation to introducing a power which explicitly allows the ICO to be able to compel witnesses to attend an interview in the course of an investigation?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible. In particular, please give your views on any benefits or risks you envisage and what measures could mitigate these risks.

In our experience the ICO struggle to investigate matters fully prior to issuing a NOI and so interviewing witnesses would assist.

This could be useful as long as it was made clear to the person being interviewed what the interview was for i.e. that the information will be used in relation to the investigation and that this is not a cosy chat and that what they say will be used for the purposes of deciding whether there has been a breach and whether the ICO will take enforcement action.

The individual would have to have the opportunity to see and approve the statement before it could be used. There would often be a request for legal representation. Consideration would have to be given to disclosing evidence in advance to make the interview as effective as possible.

Q5.7.6. To what extent do you agree with extending the proposed power to compel a witness to attend an interview to explicitly allow the ICO to be able to compel witnesses to answer questions in the course of an investigation?

- Strongly agree
- Somewhat agree

- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible. In particular, please give your views on:

- Any benefits or risks you envisage
- What, if any, additional safeguards should be considered

Again the HSE can do this when investigating breaches but it is complex in terms of compliance with Article 8 ECHR and would require additional safeguards to be built in for the individual and the organisation – which may also have Article 8 rights. Care would have to be taken in relation to any individual who is expected to speak on behalf of an organisation and consideration would have to be given to disclosure of information prior to interview.

Q5.7.7. To what extent do you agree with the proposal to amend the statutory deadline for the ICO to issue a penalty following a Notice of Intent in order to remove unnecessary deadlines on the investigations process?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

We are not sure what the penalty would be for delay although it is important that matters are dealt with expeditiously. A more transparent investigation process where the organisation being investigated is involved would be beneficial to reducing the time between NOI and final MPN.

Q5.7.8. To what extent do you agree with the proposal to include a ‘stop-the-clock’ mechanism if the requested information is not provided on time?

- Strongly agree

The government welcomes views on the following questions:

- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Q5.7.9. To what extent do you agree with the proposal to require the ICO to set out to the relevant data controller(s) at the beginning of an investigation the anticipated timelines for phases of its investigation?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

Biometrics and Surveillance Camera Commissioner

Q5.8.1. To what extent do you agree that the oversight framework for the police's use of biometrics and overt surveillance, which currently includes the Biometrics Commissioner, the Surveillance Camera Commissioner and the ICO, could be simplified?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree

Strongly disagree

Please explain your answer, and provide supporting evidence where possible.

The Commissioner's work does not cover Scotland. This should be made clear by the DCMS. However, we note the current Commissioner's response and the different role that they have which is quasi-judicial and not regulatory. This is not something that the ICO currently does.

Q5.8.2. To what extent do you agree that the functions of the Biometrics Commissioner and the Surveillance Camera Commissioner should be absorbed under a single oversight function exercised by the ICO?

Strongly agree

Somewhat agree

Neither agree nor disagree

Somewhat disagree

Strongly disagree

Please explain your answer, and provide supporting evidence where possible.



For further information, please contact:

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