



# SCRA Consultation Response FULL VERSION 2021

## DATA - A NEW DIRECTION UK CONSULTATION

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?

### Somewhat agree

At the beginning of this extensive and varied consultation exercise we wanted to be very clear about our organisational position. In the Scottish Children's Reporter Administration we employ Children's Reporters as part of the Scottish Children's Hearing. The Children's Hearing is the distinct statutory way in which Scotland responds to concerns about a child's circumstances (whether about the care or treatment of the child by adults or the behaviour of the child). Such concerns are assessed by professionals and are then considered by Children's Reporters and if required by panel members in a Children's Hearing, who make a decision about whether there needs to be compulsory professional involvement with the child and family. This compulsory involvement takes the form of a Compulsory Supervision Order.

### In the Children's Hearing:

- the rights of children and families are respected
- the needs of children or young people are addressed through a single holistic and integrated approach which considers all the circumstances of the child and the child's welfare
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

### The role and purpose of SCRA is:

1. Receiving referrals for children/young people who may be at risk.
2. Ensuring that other public agencies carry out enquiries and assessments into children's circumstances so we can make informed decisions about children referred to us.
3. Making decisions on whether to refer a child to a Children's Hearing if they need compulsory measures of supervision.
4. Drafting the grounds for the Hearing.
5. Arranging for Hearings to take place when we decide that compulsory measures of supervision are warranted and where there is sufficient evidence to prove the grounds.
6. Ensuring fair process takes place within the Hearing, including the rights of those in attendance being met.
7. Having a key role in establishing grounds of referral in court, where these are contested, and in defending decisions of Children's Hearings which are subject to appeal.

# SCRA Consultation Response FULL VERSION 2021



We are very clear that the current data protection regime and framework is one which is positive for vulnerable children and families, as well as for our staff. Under the current regime we have been able to focus clearly on privacy and information rights and we now manage processes where these rights are prioritised and protected. Whilst we agree that there are improvements that could be made by government to strengthen the current regime we are not of the overall view that a new direction is required at this time. In relation specifically to Q1) Although we need more of a sense of the detail of the provisions and of how they are going to be consolidated to be really confident in our answer.

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

## Neither agree nor disagree

We are not sure why scientific research is the definition being developed or how that is distinct from other types of research as listed in the Recital 159 definition.

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?

## Do not know

A stronger sense of how this will affect the current academic, government and private sector research communities is needed. A statutory definition will mean that areas of work currently possible will no longer fit the definition (and vice versa).

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?

## Neither agree nor disagree

Identifying a lawful ground means research teams need to be acutely aware of the environment they are working in and conscious of the data landscape. Whilst at times this can be difficult there are positives to the current approach.

## SCRA Consultation Response FULL VERSION 2021



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?

**Neither agree nor disagree**

This clarifies things in part – but research teams still need to provide full justification of the approach they are intending to take along with the data requirements of the work in order to fulfil ethic committee requirements to approve the research.

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?

**Neither agree nor disagree**

In and of itself research doesn't seem to be a strong enough lawful ground.

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

1. A strong framework for lawful grounds – for researchers to actively use as a tool.
2. Guidance on explaining lawful grounds in any research proposal.
3. Support for research teams with specific questions on lawful grounds in relation to UK GDPR.

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 disagree**

We are not sure that further processing will:

- 1) always be compatible
- 2) should be lawful and require a level of assessment based on the nature of the data.

We think this could undermine integrity and result in people's data being used in research they would not agree to.

# SCRA Consultation Response FULL VERSION 2021



We understand the need to innovate and create energy in the research community but we feel strongly that the ethics of any research should be rooted in transparent and fully considered research design which is always full communicated.

We think the provision needs to be more specific and related to anonymous and or aggregated data or risks the potential for the wide scale sale /purchase of data which we would be wholly against.

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?

## Somewhat agree

A clear and accessible summary of compatibility and lawfulness would help the research community, but research teams would still need to provide justification of their method in order to satisfy the ethical guidelines they also work within.

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 disagree

The UK is used to the data principles of GDPR and people expect to know what their information is to be used for. This approach would open up the possibilities of data being used without knowledge and could undermine the trust people have in data controllers and systems.

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

Any research which would have a direct impact on the data subject should not be treated in this way and there should be strict criteria for research which has an indirect impact on the data subject.

## SCRA Consultation Response FULL VERSION 2021



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?

### Somewhat disagree

Whilst the determination of lawful processing is not a simple activity we are satisfied that a) these decisions should be layered and as a result complex and b) the current legislative framework is strong in protecting individuals information and in the principles of consent which apply to that information. We think change is unnecessary, would be confusing and would dilute the positives inherent in the current system.

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?

### Somewhat disagree

We don't fully understand the proposal, we think the use of 'may be compatible' is not helpful and we think the additional criteria in relation to an important public interest are very wide and could be open to very wide interpretations.

Risks- that the data we collect on vulnerable children could be sold to companies seeking to establish businesses in areas with a certain demographic. That data becomes seen as a potential income stream for public bodies. That data collected by public bodies becomes anonymised and disaggregated and used in ways which the public body no longer has any control over.

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

Whilst we are of the view that data should not easily pass from controller to controller and would prefer that the current boundary lines remain, we think that in the event of change then there should be clear and strict criteria and regulation of any further secondary, tertiary etc processing.

We think there should be a distinction between further processing and new processing and we feel strongly that any activity which would have a direct impact on the original data subjects should not occur without consent, or we risk a creation of a data Wild West.

# SCRA Consultation Response FULL VERSION 2021



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

For any significant changes to the ways in which data is currently handled the Government should provide clear criteria and enforce regulation.

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?

## Somewhat agree

We can see benefits for public bodies in there being such a list. Our reservation is in the potential release of information from the public to the private sector and the potential ramifications of that for data controllers and subjects. The work of SCRA all focuses on children and families, so we are pleased that additional safeguards through maintaining the balancing test would be in place. However, as an employer we also hold data in relation to our staff and we are less clear about how this would be managed / protected.

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?

## Somewhat agree

We are not experts but the list seems proportionate and relevant.

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

Specifying the exemptions to the data which can be subject to the approach is critical.

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

Consent issues in relation to the data of children are already well known and managed. This would mean less change to the current approach, which can be tricky to navigate but which is designed to provide the higher standards levels of protection which we think should remain.



# SCRA Consultation Response FULL VERSION 2021

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?

## Neither agree nor disagree

The current legislative landscape is complicated, but the principle that a data subject gives consent for their data to be used in certain ways is clear. AI potentially complicates this data purpose at both development and deployment stage, in that it is much more difficult for data subjects to give consent in relation to the application of AI across their data. It may be that a blanket explanation of AI processing built into a system at development stage and therefore applicable across the whole data set gives enough information, but this seems insufficient later on. When AI processes are to run against data collected with the consent of a data subject it is out of kilter with the current regime to NOT have the data subject consent to that specific processing.

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?

## Neither agree nor disagree

The concept of fairness has to be applied to specifics and only makes sense when applied to the scope of the original consent given and the intention of the AI development or deployment.

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?

This should be an area of expertise for the ICO, but perhaps is an area where open and transparent regulation needs to be developed. The potential of algorithms across social media to disrupt / affect / impact has been seen in recent years and lack of transparency has allowed this to flourish. If AI is being developed / deployed then people should be cognisant of that.

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?

## Neither agree nor disagree

We do not understand the question. We think that to start to categorise aspects of fairness in relation to input / output has some merit but actually this needs to be done within the scope of reference of an data

# SCRA Consultation Response FULL VERSION 2021



subject - not the data controller or the data protection regime. At all parts of any data process (AI or not ) the data subject should be satisfied that their information is subject to fair and lawful processing, and it is for data controllers to manage that.

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 disagree**

We think organisations should have to apply their intention to the use of data within the current frameworks, which do allow sandbox testing and regulation.

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

**No.**

It should not be easy to develop or deploy AI and robust justification for its use should be required and provided.

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

**No.**

We have no direct experience of this. Our answer above continues to apply.

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

**No.**

Our answer above applies.

## SCRA Consultation Response FULL VERSION 2021



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

**No.**

Our answer above applies.

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?

**Neither agree nor disagree**

We are not sure the approach is framed correctly. We wonder if it would be clearer to regulate for any AI development of deployment and to state that bias monitoring, detection and correction should be an integral part of that work. In principle we would support the automation of existing processing which has historically been manual – as long as the automation only replaces the existing process.

Q5.1.11 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**

Additional processing of sensitive data needs to be done with integrity and within a crystal clear legislative framework.

Q5.1.12 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?

**Neither agree nor disagree**

Our preferred approach is outlined in 1.5.10 above.

Q 5.1.13 What additional safeguards do you think would need to be put in place?

## SCRA Consultation Response FULL VERSION 2021



We are not advocating additional safeguards as we are not in a position to support an AI environment / approach where additional safeguards would be required.

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'?

### Somewhat agree

We think the nature of decision making requires to be clear. Our business is decision making, where the human element is absolutely crucial. We are not entirely clear from the question what the proposal is and we are concerned that the definition of significant effects may not be easy to provide, as it will be in part determined on a case by case / industry specific basis.

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

### Yes

Guidance on the professional application of Article 22 could be developed.

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'?

### Somewhat agree

We think Article 22 provides a strong basis, which would be made more robust with the development of guidance.

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?

## SCRA Consultation Response FULL VERSION 2021



### Strongly disagree

We think that this removes an essential check and balance and that for automated decision making the most robust approach should be taken for public trust in the decision making to be maintained.

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.

We think that this would need to be addressed.

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).

We think that transparent explanation of all automated decision making should be provided and that the possibility of challenge should always include the option of human review, with representation from the data subject concerned.

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.

Yes, data protection is the right framework for data drive harms resulting from AI development or deployment, particularly if the data protection legislation keeps data integrity for the data subject at its heart.

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

# SCRA Consultation Response FULL VERSION 2021



We think this is an improvement to the current regime.

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

The Explanatory Report to the Modernised Convention gives a clear and holistic framework. Perhaps Recital 26 of UK GDPR could be redrafted to more closely align with this, and then it too would provide the level of clarity required.

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)?

**Somewhat agree**

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.

We do not know enough about privacy enhancing technology to comment other than to say we agree with the principals of data privacy and ownership and if PET can enhance these then it requires further consideration.

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

**No**

From the information provided, whilst it appears that the data intermediary role has some – perhaps wide – potential across a variety of areas - it is as yet untested and largely an unknown. We can see a role for Government in supporting further development of the role but we do not think that the role is at a stage where it (or the Government) would benefit from further political enabling.

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?

# SCRA Consultation Response FULL VERSION 2021



We don't know. We are not certain there is a need to develop further lawful grounds in relation to data intermediary activities and indeed think that to do so may complicate the landscape and the activities of those handling data, to the detriment of the general public and their trust.

We think an accreditation scheme for intermediaries would be essential.

## Q1.8.1 (impacts under the equalities act)

We think that the equalities (and human rights and other) impacts of the proposals once determined should be assessed. We think the nature of the questions posed throughout this consultation make it very difficult to accurately assess impact at the current time.

## Q1.8.2 (reforms to reduce barriers)

We think we may want to see a further analysis of the perceived existing barriers before we could answer this question.

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'?

### **Somewhat disagree.**

We agree with the importance of proportionate risk assessment in relation to data processing but the approaches outlined seems to suggest that the strong legislative framework we currently have be removed to allow the development of individual privacy management programmes. We think the quality of these could vary massively; expertise in this complex and specialist field could be diluted or lost and the focus of organisations on best practice could go. We are concerned about these proposals.

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'?

### **Neither agree not disagree**

## SCRA Consultation Response FULL VERSION 2021



We don't know enough about the international frameworks referred to and their operations to be able to compare them to the work we currently do – so we would want to see more cost benefit analysis of the propose approach. A privacy management programme approach could create an additional burden, potentially in an environment where we have lost specific data protection expertise. We are not sure of the wisdom of this – given the stated intention that a privacy management programme, if well developed and implemented 'is likely, in practice, to exhibit many of the same features as the current legislation' (Data a new Direction Consultation p57).

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 riskbased privacy management programme'?

### Neither agree not disagree

We don't know. We suspect the impact on individuals is likely to be negative – with poorly developed risk management programmes which are not supported by data protection experts. We don't understand when it would be appropriate to NOT publish a privacy management programme. In the new world of individualised approaches we can't see how anyone would know what a privacy management programme involved or what to expect of it – without some research. At the very least the privacy management programme would need to be published so that affected individuals could assess compliance.

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

The current legislative framework allows for organisations to employ data protection professionals to fulfil a specific and specialised function.

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

### Strongly disagree

## SCRA Consultation Response FULL VERSION 2021



The data protection role is one which focuses thinking on protections. It is also a role which requires significant skill and expertise. Without it some organisations will not prioritise data protection, will see a money saving opportunity and this will be to the detriment of the service they provide.

Q2.2.6 Please share your views on whether organisations are likely to maintain a similar data protection officer role, if not mandated.

**No.**

We do not think many organisations will continue to maintain a role if it is not mandatory.

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**

DPIA's are really important in focusing those without data protection expertise on specific data issues which they may not have had sight of or considered.

Q2.2.8 To what extent do you agree with the proposal to remove the requirement for organisations to undertake data protection impact assessments?

**Strongly disagree**

We think the DPIA approach is becoming embedded. If we lose the requirement it just won't be done. This would be to the detriment of the work and the detriment of people affected by the work. Contrary to the consultation document we are not of the view that DPIA or data protection is merely a 'tick box' exercise. Instead we are clear that it is integral to our data integrity and our understanding of data receipt, storage and transmission and our responsibilities as data handler and controller.

Q2.2.9 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.

## SCRA Consultation Response FULL VERSION 2021



We don't know why the numbers for this are low – but we think it is likely to be something to do with the expert and active approach organisations apply to mitigations – so the requirement doesn't exist.

Q2.2.10 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'?

### Somewhat disagree

We think organisations are more likely to miss this step out and to deal with it if the ICO takes enforcement action.

Q2.2.11 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 disagree

This appears to suggest a world where there is no data trail; no accountability and therefore no enforcement possible. The privacy management programme would be focused, individualised and possibly not published so no-one would know what the expectations are - or how to respond if they felt expectations (such as they understood them) were not being met.

Q2.2.12 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?

### Neither agree nor disagree

We agree that the reporting requirements to the ICO place a burden on organisations. However, we understand this and agree with the principles. We think that they ensure organisations place sufficient emphasis and resources on this work. Without the reporting requirements the work won't have any organisational emphasis. We are not clear that the proposed adjustment would provide a clear breach reporting structure and we think the proposed changes would need to be piloted and evaluated. The proposed adjustment might possibly reduce the burden on organisations but we think that it would also affect the rights of data subjects. The definition of 'material' is always quite subjective and the new provided definition may not capture enough.

## SCRA Consultation Response FULL VERSION 2021



Q2.2.13 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.

### Somewhat agree

We think this way of working with the ICO could be mutually beneficial.

Q2.2.14 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 don't think the changes are required and think that further time for existing approaches to embed and become the norm is a stronger approach to take.

Q2.2.15 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?

On the change model provided we are not sure how the current data protection standards can possibly be maintained in the proposed new regime.

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?

### Neither agree not disagree

The benefit of the current data protection framework is consistency of approach and application – so that the general public know their rights, what to expect and when something is not meeting their expectations they know how to question or challenge that. The benefit of the proposed change for the general public is not clear – it is more obvious for business and public sector organisations. We are not sure this is the right focus or balance.

Q2.2.17 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?

### Somewhat agree

We agree these changes could be made without moving to a privacy management programme approach.



## SCRA Consultation Response FULL VERSION 2021

Q2.2.18 To what extent do you agree with the proposal to remove the requirement for all public authorities to appoint a data protection officer?

### Strongly disagree

Removing this requirement at the very least dilutes expertise and focus and at the worst loses it altogether. It could be that an approach where a public body has to justify (to the ICO or other regulator / body) why a data protection officer is not required, based around specific criteria could work. We would consider supporting that.

Q2.2.19 If you agree, please provide your view which of the two options presented at paragraph 184d(V) would best tackle the problem.

See our answer to 2.2.18 above.

Q2.2.20 If the privacy management programme requirement is not introduced, what other aspects of the current legislation would benefit from amendments, alongside 69 the proposed reforms to record keeping, breach reporting requirements and data protection officers?

There could be change to the thresholds for reporting breach within the current robust and embedding framework. Guidance on this could be issued by the ICO.

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:

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

### Not really.

The SCRA receives a steady flow of Subject Access Requests, so resourcing the process is not problematic. However, we appreciate that human resourcing could be problematic for organisations who experience significant fluctuations in the number of requests received.

## SCRA Consultation Response FULL VERSION 2021



Cost can be elevated for cases that contain a large volume of information that requires extensive redaction of third party data.

Vexatious requests can consume a disproportionately high amount of our resources. The existing measures of deeming a request to be 'manifestly unfounded' is adequate for dealing with the majority of such cases.

It can initially be unclear what information falls into the scope of a subject access request as there are normally a number of factors to consider and work through, but once all the relevant factors are considered it is normally clear what information falls into the scope of the request.

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'?

### Neither agree nor disagree

'Manifestly unfounded' is a high test – but we have been satisfied with this threshold as subject access requests are in relation to data which is specifically related to individuals. Our real difficulties arise because the information we hold is often about families – and as such will be relevant to a number of different people, so will require often very extensive redaction prior to release, so that we are just providing the information pertinent to the relevant subject.

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?

### Somewhat agree

We can see that an approach which mirrors the FOISA regime could be simpler for both organisations and for the general public. We think that advice and assistance should be provided and that a mechanism for this to occur should be developed; we don't think we are in a position to comment on the cost amounts – but agree that a mirror of FOISA could be less complicated for all concerned.

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)'?

## SCRA Consultation Response FULL VERSION 2021



### Neither agree not disagree

We can see the merit in a nominal fee – however, we deal with information about vulnerable children and families and would not be in agreement with a blanket fee being imposed in relation to them accessing their information. This would seem to be punitive. There should be some exemptions to the fee regime and we would hope that vulnerable children and their families would be in this category.

Q2.3.5 Are there any alternative options you would consider to reduce the costs and time taken to respond to subject access requests?

### Don't know

There could be a different approach to the timescales for responding to SAR's based on the level of complexity in the work – which could be communicated to the data subject after the timescale has been determined by the data controller. This could make the work more manageable.

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'?

Any activity by a Data Controller which uses data collected during the interaction of a member of staff or a member of the public with a 'system' should fall under the definition of analytics. This should be clearly communicated – and often isn't.

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 disagree

We think the principles of privacy and data subject ownership are key here – people should be able to proactively give consent about their data as and when that data may be used for other purposes. We would be concerned with an operating environment where businesses use excuses to avoid having to get the user's consent (e.g. detecting technical faults) so they can use targeting cookies which may generate them a revenue stream (targeting / tracking cookies that may be set through the website by the business's advertising partners. They may be used by those companies to build a profile of your interests and show you relevant adverts on other sites. They do not store directly personal information, but are based on uniquely

## SCRA Consultation Response FULL VERSION 2021



identifying your browser and internet device. A user disallowing these cookies, will experience less targeted advertising.).

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 disagree

This approach appears to remove data subject 'ownership and places 'data power' and decision making in the hands of data controllers. We are not convinced this is a fair or proportionate approach to take. The lack of clear guidance and education on the use of cookies means that digital users do not understand what they are agreeing to when asked to allow cookies. They are more inclined to accept all cookies in case they are blocked from the information they are seeking. Although many sites offer the ability to consent your preferences, most users are not IT literate and are more focused on the task at hand than their privacy.

For government and for data controllers the privacy and protecting the privacy of system users should be a primary consideration.

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

### Strongly disagree

Whilst at times irritating people are used to the operation of cookies and whilst not fully understanding the technical detail are able to make decisions about whether they accept the analytics alongside the need they have to access the information subject to the analytics. We think this is important and should remain.

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?

Yes, guidance may be useful.

## SCRA Consultation Response FULL VERSION 2021



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?

If and when people express preferences in any of the ways outlined then those preferences should be respected.

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

We are not convinced that developing browser technology effectively addresses this issue – most people are ‘browser loyal’ - but would not necessarily want to have the same approach in relation to analytics on every site they visit.

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

Clear government guidance on cookies, analytics and privacy in plain English would be very welcomed.

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.

### **Somewhat agree**

This approach is familiar to people and designed to be easy to use. If people are interested in an area then they would be able to get information and opt out of that at any time.

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’?

We see some merit in pursuing / developing this idea.

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

We see some merit in pursuing / developing this idea. There should be minimal cost to this development if the provider is already monitoring traffic.

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?

## SCRA Consultation Response FULL VERSION 2021



A central reporting mechanism to combat nuisance telecommunications which is easy to access.

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

**Yes**

There should be a centralised / single method for users to have repeat nuisance messaging blocked from both text messaging and email inboxes.

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

There are risks in providing telecoms giants with the powers to prevent messaging at source – particularly in relation to messages which may be beneficial, useful or actually well received. We are more supportive of approaches which support individuals to take action in the simplest way possible.

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.

This is one possible solution but we feel others should also be explored and considered. We do not have enough technical expertise to suggest other solutions but think that telecoms companies and tech entrepreneurs could be tasked with developing a suite of alternatives for further consultation.

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)?

**Somewhat agree**

We are not convinced the risk is the same and we are not convinced that the financial penalty should be equivalent to the UK GDPR penalty.

## SCRA Consultation Response FULL VERSION 2021



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

The ICO should be able to scrutinise this area of activity.

Q2.4.18 Are there any other measures that would help to ensure that PECR's enforcement regime is effective, proportionate and dissuasive?

### Don't know

We would suggest perhaps statutory guidance rather than the voluntary charter – perhaps with an ultimate criminal or civil sanction if continued infringement of PECR occurs.

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?

### Strongly agree.

There is nothing democratic in subjecting someone who hasn't consented to unwarranted and potentially unwanted political messaging. This is more about manipulation than engagement and as a result we think that political campaigning communications HAVE to be covered by the existing rules on direct marketing.

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 option to communications from political parties?

### Somewhat disagree

Looking at the available options does not equate to consent for further information to be given. If people want to sign up for direct communications they can. This political racketeering through a back door should not be allowed.

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

# SCRA Consultation Response FULL VERSION 2021



## Somewhat disagree

We do not agree with this.

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 disagree

We do not agree with this. We think Article 6 UK GDPR provides a necessary protection and control.

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 disagree

We do not agree with this. We think Paras 22 & 23 of Schedule 1 to DPA 2018 provide a necessary protection and control.

Q2.6.1 In your view, which, if any, of the proposals in 'Reducing burdens on business and delivering better outcomes for people', 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)?

All of the proposals could have an impact in that they ostensibly remove the framework of system protections which is in place.

Q2.6.2. In addition to any of the reforms already proposed in 'Reducing burdens on business and delivering better outcomes for people', (or elsewhere in the consultation), what reforms do you think would be helpful to reduce burdens on businesses and deliver better outcomes for people?

A streamlined approach would reduce the burden on business, but we are not sure what 'better' outcomes are intended here and would like this to be explained in more detail.

# SCRA Consultation Response FULL VERSION 2021



Q2.6.3. In addition, the Government would welcome views on the desirability of consolidating the UK GDPR and the Data Protection Act 2018.

If we are to make changes to the legislation in this area then simplifying the landscape by consolidating the relevant legislation makes sense.

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

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?

### Neither agree nor disagree

In principle we accept this is an approach which opens up data markets. However, we would need to see further detail to be convinced this is efficient and an improvement to the four year review – accepting that the pace of change in the digital environment may mean that four years is a very long time.

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?

### Neither agree nor disagree

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?

### Neither agree nor disagree

We don't really know what 'effective' in this context means – and we also think that redress mechanisms should be clear and accessible, as well as effective, in providing a response to concerns.

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?

### Neither agree nor disagree

# SCRA Consultation Response FULL VERSION 2021



We did not read the proposal as focused on proportionality – we read it as proportionate to the risk in relation to individual data, which is different. We agree with the approach as laid out in para 257 (a).

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?

A list of alternative transfer mechanisms that is publically available could be considered. In addition the following should be considered:

- 1) clear responsibility – where does responsibility sit?
- 2) A clear risk assessment framework for ATM's.
- 3) Clear routes for challenge in relation to ATM's.

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?

## Somewhat agree

Although we think reciprocal transfer is a more accurate description and would lead to a more robust framework for assessment and mitigation.

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?

## Neither agree nor disagree

We can see benefits from this – but don't see how bespoke mechanisms will be comparable to ATM's as agreed or designed by the regulator or centrally by Government.

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?

# SCRA Consultation Response FULL VERSION 2021



A list of ATM's and the detail of them and a requirement to make the publically available, so they can be replicated by others would help develop confidence and understanding.

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?

## Don't know

We see the benefits of this but don't see how the proposed assessment provides a strong enough guarantee of security.

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?

## Somewhat agree

We somewhat agree - if this was linked to the list of / descriptor of the ATM's if these became a public document.

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?

## Don't know

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?

## Somewhat agree

We see benefits to this but can't see from the information here how this will be monitored or how a consistent standard will be met.

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

## SCRA Consultation Response FULL VERSION 2021



### Somewhat agree

Again we see benefits to the approach – but this there requires to be some sort of UK based sign off to ensure consistency and quality of standards.

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

### Somewhat disagree

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

An internationally recognised 'bank' of certification approaches or schemes would build trust / credibility / reliability in the approach.

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?

### Somewhat disagree

We think the approach could make the repetitive use of derogations 'business as usual' – which doesn't seem to fit with the regulatory framework of this work as a whole.

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.

### No additional comments.

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.

# SCRA Consultation Response FULL VERSION 2021



age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

The proposals could make the data landscape less formal and as result less obvious and less accessible.

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?

A strong and consistent technical framework and a strong and consistent regulatory framework.

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'?

## Somewhat disagree

This legislative provision was written and is in force in relation to public service delivery – not in relation to competitive private business with a profit margin as the bottom line. The provision may be appropriate to expand but it may not be. Further assessment of this should be done before change is scoped and considered.

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

This places the onus on the public body to do the required assessment; is more efficient, streamlined and has a clear decision maker who can be challenged if required.

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

Public bodies should have a duty to publish their decision making in relation to Article 6 (1) (e) in these circumstances.

## SCRA Consultation Response FULL VERSION 2021



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?

### Neither agree nor disagree

We would want to see the criteria that would be applied to this proposal before making a definitive decision.

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

We would want to see the criteria that would be applied to this proposal before making a definitive decision.

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

Where algorithms are employed this should be clear. We would also be strongly in favour of the use of a public and accessible AI register, so that those with an interest can see exactly where AI is operating across the public and private sectors. We firmly believe that all progress in this area should be open and transparent and a public register would be a robust way of guaranteeing this.

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

All of the areas suggested in para 290 are relevant here and should be reported.

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?

We can't envisage circumstances where exemptions would apply.

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?

### Neither agree nor disagree

# SCRA Consultation Response FULL VERSION 2021



We think the list in Schedule 1 is comprehensive – it would be for those who felt there were gaps to make the case for that.

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'?

### Somewhat disagree

We agree that further specification around the definitions of these terms would be helpful – but there is a distinction that can be made.

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

### Somewhat agree

Clear definitions aid interpretation – but there needs to be some mechanism for determination of 'substantial public interest' as well – which is over and above the definition. Some worked examples or a way of making the determination would be helpful.

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?

### Somewhat disagree

We don't know what evidence there is to suggest that the Schedule 1 list is not full enough, or how much work is generated as a result of things which should be on it not being there. There should possibly be a review of the list resulting in alterations to the list if required.

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'?

### Neither agree not disagree

## SCRA Consultation Response FULL VERSION 2021



As this question relates to matters within the devolved powers of the Scottish parliament, and as the legislative framework within Scotland would be unaffected by the proposed change, we have declined to answer this question.

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?

### Somewhat agree

This proposal is sensible.

### On line Questions not included in the consultation document:

#### 4.6 . Further Questions

Q4.6.1. In your view, which, if any, of the proposals in the chapter on '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)?

All of the proposals would potentially have an impact on vulnerable or disadvantaged members of society, as well as those with protected characteristics.

Q4.6.2. In addition to any of the reforms already proposed in the chapter on '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?

This is a key question and one which for some reason was not included in the consultation document. This area of improvement should be a focus for co-development alongside public service users and as a result we won't go into detail in this response.

End of chapter Q. Do you have any general comments about this chapter not yet captured by your responses to the questions above?

# SCRA Consultation Response FULL VERSION 2021



**No.**

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

**Neither agree nor disagree**

A firm statutory framework for the ICO is at the heart of a robust, credible data protection landscape. Any strengthening - where it is needed – we welcome.

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?

**Somewhat agree**

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

**Yes**

We are not sure why the objectives are ordered in the current way. The overriding importance of the ICO is surely keeping the UK safe and secure online and shaping the digital / information environment. We think the consequences in relation to competition, innovation and the digital economy emanate from the key objectives and are not objectives themselves.

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?

**Neither agree nor disagree**

We think there is merit in the ICO having regard to innovation. We are less certain that a corresponding regard to economic growth is required – whilst accepting correlation on at least some level between the economic market and the information environment.



## SCRA Consultation Response FULL VERSION 2021

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?

**Neither agree nor disagree**

We think there is merit in the ICO having regard to competition. However, we are concerned that this could result in the ICO prioritising economic objectives over data subject's privacy rights.

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)?

**Neither agree nor disagree**

We are not convinced that this needs to be expressed as a duty for the ICO. The collaboration needs to be across partners in an equal way – and could perhaps be established more systematically through the development of the information sharing gateway and guidance in relation to that. This would ensure the relevant parties are working with each other (not just place a duty on one of the parties which doesn't seem to be reciprocal). If this fails to achieve the desired outcomes then perhaps a statutory approach could be the next step.

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?

**Don't know**

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?

**Somewhat agree**

We think an information sharing gateway with guidance could achieve the desired outcomes.

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?

**Don't know**

## SCRA Consultation Response FULL VERSION 2021



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?

### Somewhat agree

We can see the benefit of due regard to public safety for the work of the ICO. We also think due regard to private / individual safety should also be considered.

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?

### Neither agree nor disagree

This seems to be a question for the ICO to respond to and we would agree with their position. We have some concern that this new power for the Secretary of State for DCMS could be used to assert undue pressure on an independent regulator that is not within the express control of the Secretary of State.

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?

### Neither agree nor disagree

This seems to be a question for the ICO to respond to and we would agree with their position. We can see why they may want to develop such an international element within their strategic approach in the current global information environment.

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?

### Somewhat disagree

We are not of the view that this is an appropriate proposal for an independent regulator.

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?

### Neither agree not disagree



## SCRA Consultation Response FULL VERSION 2021

This seems to be a question for the ICO to respond to and we would agree with their position. We do see benefits to the proposed new governance structure in relation to clarity and certainty and through scrutiny through the public appointments process.

Q 5.3.2 To what extent do you agree with the use of the Public Appointment process for the new chair of the ICO?

**Neither agree nor disagree**

This seems to be a question for the ICO to respond to.

Q5.3.3 To what extent do you agree with the use of the Public Appointment process for the non-executive members of the ICO's board?

**Neither agree nor disagree**

This seems to be a question for the ICO to respond to.

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

**Neither agree nor disagree**

This seems to be a question for the ICO to respond to.

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?

**Neither agree nor disagree**

This seems to be a question for the ICO to respond to.

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?

## SCRA Consultation Response FULL VERSION 2021



### Neither agree nor disagree

This seems to be a question for the ICO to respond to.

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?

### Neither agree nor disagree

This seems to be a question for the ICO to respond to. We can see there is a benefit to comprehensive and meaningful KPI's.

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?

### Neither agree nor disagree

This seems to be a question for the ICO to respond to. We would be surprised if relevant key information wasn't already made available by the ICO in a transparent way.

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?

### Don't know

We are not sure who is intended to be scrutinising the performance of the regulator and perhaps this could be more clearly explained.

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.

We are perhaps naïve but our view is that the Annual Report from the ICO should be the key document which demonstrates how it is fulfilling its functions and how successful that work has been.

## SCRA Consultation Response FULL VERSION 2021



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?

### Somewhat disagree

We are concerned that this proposal could in effect create a further regulator of the regulator. If such an office is needed surely it is needed across all the existing regulatory bodies and not just across the ICO. We are not sure why this is particularly relevant to the functions of the ICO and therefore question the approach.

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.

The Annual Report of the ICO should have visibility in Government and there should be some sort of approvals process which could result in additional actions being taken to remedy any perceived or evidenced failings which require to be addressed.

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?

### Neither agree nor disagree

We are an organisation who have spent a lot of time developing a robust process of impact assessment and review. We are entirely of the opinion that this is helpful to all of our work and we cannot see that this would be any different for the ICO. Equality impact assessment is already a statutory requirement and there are other specific assessments in Scotland that are also required. We think the ICO should be supported to develop this approach as a result of the benefits it brings but do not think this should be an obligation for the ICO.

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?

### Neither agree not disagree

We think a panel of experts could be really helpful – but that the ICO is able to establish such a panel at any time if they so desire. We do not think this needs to be required by the Secretary of State and indeed would

## SCRA Consultation Response FULL VERSION 2021



go as far as saying that this could result in the Secretary of State meddling in the affairs of an independent regulator in an inappropriate way.

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?

### **Somewhat disagree**

We cannot see the parallels between the proposal in respect of approval for the Secretary of State and the Houses of Parliament function. We refer you to our answer at Q5.5.2.

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?

### **Neither agree nor disagree**

We don't think the proposals are proportionate.

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

### **Don't know**

We think that the principles of impact assessment should be actively applied by the ICO and that a robust approach to appropriate, relevant and proportionate impact assessment across the work of the ICO should be developed. We are not sure that this should be a requirement specifically for the ICO.

Q5.6.1 Should the ICO be required to undertake and publish an impact assessment on each and every guidance product?

### **Somewhat agree**

## SCRA Consultation Response FULL VERSION 2021



We agree - in that a proportionate regulatory approach to data protection complaints could simplify the landscape for data controllers and data subjects alike.

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?

### **Neither agree nor disagree**

Whilst we can agree with this approach in principle we are not convinced there is a need to change the status quo. We are of the view that the current discretionary approach of the ICO works well and does not require to be changed. Making the requirement as outlined in Q5.6.2 may result in an additional burden of work across the public sector and would result in the public sector being unable to draw a line under the response they have been able to give, and refer to the independent decision making of the ICO. On occasion it is also useful for a data subject as well as a public authority for the ICO to become involved early in a process – as they can be a helpful conduit of information between an individual and an authority.

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.**

This makes complete sense – with or without reform to the wider ICO functions or data protection landscape. We are not sure why any data controllers should be exempt from the approach.

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?

### **Somewhat agree**

We think this could clarify and simplify the landscape.

## SCRA Consultation Response FULL VERSION 2021



Q5.7.1 To what extent do you agree that current enforcement provisions are broadly fit for purpose and that the ICO has the appropriate tools to both promote compliance and to impose robust, proportionate and dissuasive sanctions where necessary?

### Strongly agree

We think the current enforcement tools are fit for purpose and are understood. We also think that the staged approach to enforcement through the Information Notice / Information Order etc is proportionate and appropriately balanced between enforcement and support.

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?

### Neither agree nor disagree

This seems to be a question for the ICO to respond to in respect of the added value of such a technical report and whether the new power would be useful. We are not sure whether the ICO would be able to instruct such a report under the current framework – but if such a report was perceived to be necessary we would hope that this would be possible. We think there are risks in respect of making the decision to instruct such a report – and therefore think the ICO is best placed to think about how such instruction could and should be made. As the global data environment becomes more technical it maybe that this approach becomes required more frequently – which doesn't seem to be considered by the consultation document. We think this should be given further thought.

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?

We don't know where the financial burden of this should sit. We think this should be the subject of further specific consultation with parties.

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

We don't know where the financial burden of this should sit. We think this should be the subject of further specific consultation with parties.

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?

## SCRA Consultation Response FULL VERSION 2021



### Neither agree nor disagree

We are not sure that this quasi-legal approach is one which should be developed for the ICO. If a legal interview is required then there are professionals able to do that.

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?

### Neither agree nor disagree

We are not sure that this quasi-legal approach is one which should be developed for the ICO. If a legal interview is required then there are professionals able to do that.

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?

### Neither agree nor disagree

We understand the argument and think this approach to an unnecessary deadline can be supported – but we think the view of the ICO is crucial here.

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?

### Neither agree nor disagree

We understand the argument and think this approach to timescales can be supported – but we think the view of the ICO is crucial here.

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

## SCRA Consultation Response FULL VERSION 2021



We think that this makes complete sense.

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?

**Neither agree nor disagree.**

As this question relates to matters within the devolved powers of the Scottish parliament, and as the legislative framework within Scotland would be unaffected by the proposed change, we have declined to answer this question.

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?

**Neither agree nor disagree.**

As this question relates to matters within the devolved powers of the Scottish parliament, and as the legislative framework within Scotland would be unaffected by the proposed change, we have declined to answer this question.

**SCRA Data, Information, IT and Policy Teams October 2021**