

Ms Christine Darrah
The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

15 September 2014

Dear Ms Darrah

ICO Response - Justice Bill

The Information Commissioner's Office (ICO) is pleased to respond to the consultation on the draft Justice Bill for Northern Ireland. The ICO is the UK's independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on concerns, providing information to individuals and organisations and taking appropriate action where the law is broken. The ICO enforces and oversees the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004, the Data Protection Act 1998 (the DPA) and the Privacy and Electronic Communication Regulations 2003.

The main focus of interest for the ICO in the draft Bill is compliance with the DPA and our response will concentrate on the aspects and areas we feel are relevant in relation to this area. We have previously responded to certain amendments which are proposed under the Justice Bill, which we outlined in the Department of Justice's Consultation 'Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime: A Five Year Strategy'. In addition we have also responded to a consultation on the proposal from the Attorney General for Northern Ireland for a potential amendment to the Coroner's Act (Northern Ireland) 1959, specifically to allow him to obtain papers relevant to exercising his existing power to direct an inquest where he considers it advisable to do so.

We have some overall points to make with regard to the further amendments proposed for inclusion in the Bill, particularly with regard to sharing of witness and victim information and in relation to criminal records. Sharing information in the aspects highlighted in the draft Bill is likely to involve the 'processing' of both personal data and sensitive personal data. The sharing of personal data must meet certain conditions, which are stricter in relation to sensitive personal data. If we consider the circumstances here, the proposals provided in this draft Bill would mean that these conditions would be met. If consent can be obtained, or in the case of sensitive personal data, explicit consent, then the conditions may exist for sharing or disclosing of information. This could apply to the sharing of witness and victim statements and criminal convictions for example, therefore ensuring the conditions would exist within the draft Bill to allow this to take place in limited circumstances.

In our previous correspondence with the Department with regard to the 'Making a Difference: Improving Access to Justice for Victims and Witnesses of Crime: A Five Year Strategy', we highlighted the importance of obtaining further information with regard to the proposed Victim and Witness Care Unit. We are pleased to note in the draft Victim Charter, additional information with regard to this Unit and in section 67, p.27 the requirement for *consent* in relation to any referral of a victim or a witness to other appropriate support services. Section 28 of the draft Bill, relating to victims and witnesses makes a clear basis for allowing a statutory provision to be put in place for a Victim Charter.

The ICO welcomes this overall proposal and are pleased that one of the overall principles in this Charter relates to providing victims with relevant information, clearly setting out what they can expect as they move through the criminal justice system. We strongly feel that this principle with regard to providing information at the development aspect of this Charter should follow a 'privacy by design' approach from the outset, particularly with regard to the processing and sharing of personal data as well as requiring appropriate safeguards to be in place with regards to the security of the information.

In addition with relation to this Charter, we believe there is an opportunity through this statutory provision to clarify information with regard to privacy, what 'consent' is, how it can or needs to be given and under which circumstances, under the DPA, why consent may not be required in relation to the disclosure or sharing of sensitive personal data. We feel that this information is of crucial importance to ensure the protection of privacy for the victim or witness, as well as providing clarity as to what may or may not happen with this information. Through this proposed statutory function, and building on what

exists currently, it is important for victims and witnesses to understand what they may be consenting to, how their privacy will be respected and under what circumstances, aspects such as the common law duty of confidentiality may fall under the requirements of the DPA. We also note that the consultation on the draft Victim Charter is also currently live and we will highlight these aspects in our response to this consultation in this regard also.

Therefore we strongly feel that victim and witness statements should only be shared where it is absolutely necessary to do so. Any agency or organisation within the criminal justice sector who 'needs' such information must be able to justify that need. This extends to all stages of the criminal justice process. Such justification is required in order to minimise the risk of information being shared or held excessively which may lead to a breach of the third data protection principle with regard to ensuring that personal data must be adequate, relevant and not excessive. We would consider the condition most likely to be appropriate in order to facilitate the sharing of any victim personal statement (beyond the purpose they are used at present) will be explicit consent. As highlighted above, inherent in this condition will be the need for the individual to understand what is happening to their information, agree to the sharing and they should signify that agreement, to qualify their 'explicit' consent.

We would further like to take the opportunity with regard to personal and sensitive personal data to highlight the importance of security aspects relating to records management of this type of information. The requirements of the DPA, in relation to security are clear. Appropriate safeguards must be put in place with adequate processes for how and under what circumstances lawful and fair sharing can and should take place. Given the sensitive nature of the type of sensitive personal data that may be contained in a victim personal statement this will require careful consideration. We note in section 35 (20) the provision for the Department to make a copy of any victim statement, and would advise that due regard is given in light of this and other relevant activity. We would welcome further clarification on this, particularly with regard to how long the statement will be kept, the security considerations about the information and the need for appropriate retention and disposal schedules to be in place.

The amendments include a proposal likely to lead to the insertion of a single new clause into the Bill, setting out that certain information will be shared between specific organisations for the purpose of informing victims and witnesses about available services. We note at present, an 'opt in' is required in order for this to be effective and the statistics on the take up of this current provision. We would remind the Department in this regard the importance of ensuring that fair notice

is given in relation to this activity, which again needs to meet the requirements of the DPA in relation to how and why the conditions can and will be present for this provision to take effect. We would also highlight the issues we have addressed with regard to the sharing of sensitive personal data, such as in the case of a victim personal statement.

We note the amendments to the draft Bill with regard to (Part 4), the 'Exchange of Information between Access NI and Disclosure and Barring Service for barring purposes' (Part 5) and the 'Review of criminal records certificates where convictions or disposals have not been filtered' (Part 5). As highlighted in our earlier comments the issues relating to conditions for processing as well as the requirements to ensure that personal and sensitive personal data must be kept secure are all issues for consideration with regard to these parts of the Bill. As a general point, we support the proposal to publish a statutory Code of Practice with relation to Criminal Records. In addition, we welcome the proposal with regard to ensuring there is a statutory basis to allow Access NI to share information with the Disclosure and Barring Service. Whereas we note the intention of the statutory basis in this regard we would stress the importance of compliance of the DPA principles in these circumstances, particularly with regard to the fair and lawful processing of the sensitive personal data, in this case and also in light of the security measures that must be in place.

With regard to the review of criminal record certificates where convictions or disposals have not been filtered we would stress again the importance of the DPA compliance required in these circumstances with regard to the fair and lawful processing of personal data. The DPA requires that personal data must not be kept for longer than is necessary, we therefore welcome the introduction of filtering with regard to criminal records in this light. It is important that this takes into consideration retention and disposal schemes of organisations to ensure this sensitive personal data is processed fairly and lawfully. We note that following the introduction of the filtering scheme in April of this year, the provision on behalf of the Attorney General and the Minister with regard to the introduction of a review process to determine the provision for potential discretion on behalf of individuals. We would welcome further information on this in due course. In addition further information on the new guidance proposed with regard to accuracy of criminal record certificates will also be welcome. We would highlight principle 4 of the DPA in this light which includes the requirement that personal data must be kept accurate and point out the potential issues with regard to again fair and lawful processing of sensitive personal data in these situations. We look forward to responding and reviewing further information in future consultations as highlighted in these matters.

In conclusion we hope that the issues we have raised are useful and we look forward to engaging with the Department in the future on many of the matters we have highlighted in our response

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ken Macdonald', with a long horizontal stroke extending to the right.

Dr Ken Macdonald
Assistant Commissioner for Scotland & Northern Ireland