

ICO response to
the discussion
paper on the
Rehabilitation of
Offenders Act 1974

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ico.

Information Commissioner's Office

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About the ICO

The ICO's mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

The ICO is the UK's independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on complaints providing information to individuals and organisations and taking appropriate action where the law is broken.

The ICO enforces and oversees the Data Protection Act 1998 and the Privacy and Electronic Communication Regulations 2003, as well as the UK Freedom of Information Act 2000 and the UK Environmental Information Regulations 2003, both of which apply to reserved matters in Scotland.

Introduction

The Information Commissioner's Officer ("the ICO") welcomes the opportunity to respond to the Scottish Government's discussion paper on the Rehabilitation of Offenders Act 1974 ("the 1974 Act").

The Data Protection Act 1998 ("the 1998 Act") regulates the processing by organisations of data relating to identifiable, living individuals. The Act defines personal data which is more sensitive to include "data consisting of information as to...the commission or alleged commission by him of any offence". As such, we are keen to ensure that any reform of the 1974 Act is consistent with the principles of the 1998 Act.

As the regulator of the 1998 Act, our response will be limited to commenting on the proper processing of a person's criminal record rather than the particular issues raised in the discussion document.

Response

Criminal records and the Data Protection Principles

The 1998 Act sets out eight principles with which the processing of personal data by any organisation or legal person must comply. Legislation that facilitates the necessary, appropriate and proportionate processing of personal data, such as the 1974 Act and the Police Act 1997, must be drafted in line with these principles.

The first Data Protection Principle requires personal data to be processed fairly and lawfully and on the basis of the conditions specified in Schedule 2 of the 1998 Act. It should be clear to people what information is recorded, how long it will be recorded for, and the purposes for which it will be used. People must also be made aware at the relevant time that their criminal information may be disclosed in the future, subject to the type of disclosure requested.

The third Data Protection Principle says that personal information must be adequate, relevant and not excessive. The fifth Principle says that personal information must not be kept for longer than is necessary. Unless there is a clear need for a person's criminal history, or any particular conviction, to be known for the rest of their life, then entries on their record should be deleted when it is deemed to be no longer relevant as prescribed by legislation. There must also be arrangements in place that limit the amount of a person's criminal record that can be disclosed by defining some convictions as relevant for a particular purpose, such as employment with vulnerable groups, but not relevant for other purposes.

Due to these factors, the ICO believes there is a continuing need for legislation on this subject to ensure compliance with the 1998 Act. We would welcome the opportunity to work with the Scottish Government in order to ensure that any amendment to, or reform of, the 1974 Act is drafted in accordance with the Data Protection Principles and the rest of the 1998 Act.

Further issues

Privacy Impact Assessment

The ICO advocates the use of Privacy Impact Assessments (PIA) at an early stage of policy development. A PIA is a process which helps assess the privacy risks to individuals in the collection, use and disclosure of information. It also helps to identify privacy risks, foresee problems and bring forward solutions. While there is currently no statutory requirement to undertake a PIA, the Scottish Government has endorsed the process within its Identity Management and Privacy Principles published in 2010.¹ For example, Principle 2.1(a) requires that a PIA or proportionate equivalent is conducted and published prior to the implementation of a project which involves the collection of personal information whilst Principle 2.9 states that wherever proposed legislation has a privacy dimension, a summary of the impacts identified in the PIA should be submitted for consideration by the lead committee in the Scottish Parliament.

We would expect to see a PIA undertaken when developing a specific proposal for reform of the 1974 Act. We have been consulting on reviewing our PIA handbook and are currently considering the responses we have received. Further information can be found on our website at www.ico.org.uk/about_us/consultations/our_consultations. We would be willing to assist the Scottish Government in preparing the PIA if it considered it appropriate.

Enforced Subject Access Requests

Section 56 of the 1998 Act prohibits any person from requiring another person to obtain a record of their criminal convictions for reasons of employment or the contracting of goods or services. However, the commencement of Section 56 is contingent upon sections 112, 113 and 115 of the Police Act 1997 being enforced.

While the then Scottish Executive implemented and commenced the relevant sections of the Police Act 1997 in 2002, it requires a UK Minister to commence Section 56 for Scotland. We would welcome the Scottish Government making representations to the UK Government to commence Section 56 at least for Scotland as part of any reform of the 1974 Act and the disclosure system.

¹ Version 1.1 was published in May 2011.

Discussion paper on the Rehabilitation of Offenders Act 1974

For further information on this submission, please contact Dr Ken Macdonald,
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