

# ICO response to the inquiry into the procedures for considering legislation

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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

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The ICO welcomes the opportunity to respond to the Standards, Procedures and Public Appointment Committee's inquiry into the process for considering legislation.

As the Committee will be aware, there two Information Commissioners with regulatory power in Scotland: the (UK) Information Commissioner, Christopher Graham and the Scottish Information Commissioner, Rosemary Agnew. The (UK) Information Commissioner, who is based in Wilmslow, Cheshire, but has an office in Edinburgh, primarily regulates the Data Protection Act 1998 (the DPA) which legislates for the processing of personal data, that is, data relating to identifiable, living individuals and the Freedom of Information Act 2000 which gives individuals rights of access to information held by public authorities in England, Northern Ireland and Wales as well as by public authorities in Scotland which have responsibility for reserved matters. The Scottish Information Commissioner is based in St Andrews and primarily regulates the Freedom of Information (Scotland) Act 2002 which gives rights of access to information held by devolved public authorities. Given the limited number of public authorities headquartered in Scotland but dealing in reserved matters, the focus of the UK Commissioner's work in Scotland is on data protection.

The ICO's mission is to uphold information rights in the public interest. We give guidance to citizens and organisations, rule on eligible complaints and take appropriate action when the law is broken. The role of the office in Scotland is to engage with stakeholders in providing advice and guidance, as well as having a positive input into the policy arena. In this regard, we regularly monitor the work of both the Scottish Government and the Scottish Parliament, provide submissions to consultations and sit on various policy and project steering groups to ensure a privacy dimension to deliberations and development.

In 2008 the ICO published a series of documents around the concept of Privacy by Design,<sup>1</sup> which is an approach whereby privacy and data protection compliance is designed into systems holding information right from the start, rather than being bolted on afterwards or even ignored, as has too often been the case. One of the most effective ways of 'designing' compliance at the outset is through the use of Privacy Impact Assessment, a tool which we believe could sit easily within the current impact assessment process of the Scottish Parliament.

The following submission does not address each of the consultation questions but focusses on those deemed relevant to our experience of the legislative process, as well as making the case for the inclusion of privacy within these current assessment requirements.

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<sup>1</sup> [Privacy by Design - Data Protection Topic Guide - ICO](#)

# Specific questions

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## Question 1: Public Bill process – overview

The ICO has found the current three stage process to be adequate to allow it to have an input from an external scrutiny perspective. However, the timing between stages, particularly for larger, more controversial Bills, can be tight and make engagement difficult (see comments below).

## Question 2: Accompanying documents

The ICO recommends that a Privacy Impact Assessment (PIA) be required to accompany any bill, public or otherwise, that involves the processing of personal information when it is introduced to the Scottish Parliament.

The collection, use, sharing or disposal of information about living, identifiable individuals is governed by the DPA. As one of the conditions for processing is 'functions conferred by enactment', it is important to ensure that the enactment itself is robust in terms of compliance with the DPA.

The ICO advocates the use of PIAs at an early stage of policy or legislative development. The process enables organisations to assess the privacy risks to individuals from the collection, use and disclosure of their personal information. It can also help to foresee problems and bring forward solutions. We published a new [PIA Code of Practice](#) in February 2014 which is designed to integrate a PIA with other project and risk management tools.

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](#) originally published in 2010.<sup>2</sup> 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.

Despite the Scottish Government's commitment, we are aware that this does not always happen in practice. Specifically, we are aware that the Scottish Government had prepared a PIA on the Children and Young People Bill but we are not aware that it was ever provided to the Education and Culture Committee (we suggested in our written evidence to the Committee that they ask to see the PIA to help their deliberations in relation to the information sharing provisions of the Bill).

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<sup>2</sup> Version 1.1 was published in May 2011.

Data protection issues would likely be better considered during the legislative drafting stage if PIAs were required as an accompanying document for new legislation involving the processing of personal information. It would also ensure that Parliament and its Committees are aware of issues the Scottish Government (or the author in the case of non-public Bills) has already considered prior to tabling the legislation.

The Committee should also be aware that the European Union is currently considering a new Data Protection Regulation that would supersede the existing Directive and the DPA. One measure contained in the draft Regulation is a requirement for organisations engaged in certain types of intrusive work to conduct a Data Protection Impact Assessment. It is our view that voluntarily conducting PIAs at the moment will help organisations to comply with this requirement if it is ratified into law. The current timetable for the new Regulation would see it coming into force in early 2017.

## **Question 5: Amendment stages**

As intimated above, the amendment stages can be challenging for external agencies to have meaningful input. It is acknowledged that a balance must be struck between allowing enough time for the submission of proposed amendments and the administration required to compile the Marshalled List. However, for an external agency with limited resources it can be difficult to give adequate consideration to the Marshalled List if time is tight between its publication and the scheduling of the relevant stage. Moreover, this is compounded when there are numerous amendments and/or the legislation is controversial. Allowing an increase in the timing between the publication of the Marshalled List and the relevant stage would provide more of an opportunity for fuller consideration of the effect of the amendments and to provide more meaningful input into the scrutiny process.

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# Further issues

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## Engagement with the Scottish Government

Members of the Committee may be interested to know that we are currently working with the Scottish Government to update its PIA toolkit in line with our new Code of Practice. We are also working with the Scottish Government's Bill Teams to raise awareness of PIAs and their value in the legislative process, as well as raising awareness of data protection in general. It is our intention to extend this work by engaging with the Scottish Parliament's Non-Government Bill Unit.

# Summary of Recommendations

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The ICO recommends the requirement that a PIA is included within the current Bill impact assessment process and, therefore, forms part of the accompanying documents/information in the introduction of Bills to the Scottish Parliament.

The ICO recommends that the current timing in respect of the publication of the Marshalled List of amendments and the relevant stage consideration is increased to allow external agencies sufficient time to provide meaningful input to the scrutiny process.

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## **Inquiry into the procedures for considering legislation**

For further information on this submission, please contact Dr Ken Macdonald, Assistant Commissioner (Scotland & Northern Ireland) on 0131 244 9001 or email [scotland@ico.org.uk](mailto:scotland@ico.org.uk).

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