

19th March 2019 V1.0 FINAL

## **ICO Response to Welsh Government Consultation on Draft Additional Learning Needs Code**

The Information Commissioner (the Commissioner) is pleased to respond to the Draft Additional Learning Needs (ALN) Code.

The Commissioner has responsibility for promoting and enforcing the EU General Data Protection Regulation (GDPR), the UK Data Protection Act 2018 (DPA 2018) and other information rights legislation.

The Commissioner is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

### **Comment relating to all parts of your consultation**

The Commissioner notes that she is responding to a general public consultation and would remind the Welsh Government that under Article 36(4) of GDPR, Member States are required to 'consult the supervisory authority during preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing'. The matters covered within this public consultation appear to fall within scope of that statutory requirement for Welsh Government to consult the ICO. [Guidance on the application of Article 36\(4\)](#) has been published by DCMS. Paragraph 2.10 of the guidance states "Article 36(4) applies directly to the UK, and therefore the requirements of this provision also apply to legislative and statutory measures adopted by the devolved legislatures". Notwithstanding comments contained in this response, the Welsh Government should ensure that it complies with Article 36(4) by consulting directly with the ICO as laid out in that Guidance.

### **Comments on Part 1 of your consultation**

The Draft ALN Code clearly requires a considerable amount of processing of personal and special category data about children and their families. Special category data includes information revealing racial or ethnic origin, religious or philosophical beliefs, health or sexual orientation, among other issues less likely

to be relevant to this consultation. In addition Article 10 of GDPR provides for additional protections for the processing of any data relating to criminal offences.

The Commissioner would emphasise that a significant proportion of the data required by these proposals relates to children, who are an inherently vulnerable group and whose data is given additional protections under GDPR and DPA 2018. Given the centrality of such data to the draft Code, the Commissioner would expect to see due consideration given to the data protection implications of the proposals.

Therefore, a Data Protection Impact Assessment (DPIA) should be undertaken on the proposals to ensure that the desired aim of the policy is being achieved with the minimum necessary impact on individuals' information rights. Our guidance on undertaking a DPIA can be found [here](#).

The various responsibilities set out in the Code for the assessment of needs and development and maintenance of interventions fall to local authorities, schools, further education institutes (FEIs), the NHS and a range of others who may be involved in providing support or professional advice in relation to the child. It therefore seems inadequate given the complexity of the proposals for the only reference to data protection in the draft code to be aimed at reminding the professionals involved to act in compliance the law (ALN Code para 7.65).

The Commissioner believes that whilst Local Authorities, Health Boards and many FEIs have in house professional data protection support, capacity for data protection compliance in schools is often very low. The GDPR requires certain organisations, including maintained schools in Wales, to appoint a Data Protection Officer, part of whose role is to provide data protection advice to the organisation. The Code should remind schools and other public bodies on whom duties fall that they have relevant data protection responsibilities and should work with their Data Protection Officer to ensure the actions necessitated by the Code are taken forward in a compliant way.

The Code could also usefully prompt organisations to think about the data protection rights of the child and those with parental responsibility – perhaps in Chapter 2 where there is considerable focus on taking a 'Rights Based Approach'. The information rights set out in the GDPR and DPA 2018 give structure in the UK to the human right of privacy and respect for correspondence.

Throughout the Code all organisations will need to bear in mind their responsibility to manage the personal information in compliance with data protection laws, and their responsibility to ensure the individual's information

rights are respected. Individuals' rights of particular relevance to this Code include:

1. The right to be informed about how their data is being used by each organisation, and what their rights are with regard to that information. The GDPR 'right to be informed' includes a list of issues that must be included in what are called 'privacy notices'. This includes providing child friendly versions of the notices wherever children's data is used. Our guidance can be accessed [here](#).
2. Individuals also have rights to have incorrect / inadequate data rectified, and – unless an exemption applies – a right to access the data held about them.
3. Depending on the circumstances, the individual may have a right to object to the use of their data for the particular purpose, and in some circumstances may even have a right to have it erased.

Guidance on these and other individual rights under GDPR can be found [here](#).

All organisations undertaking functions under the Code will need to identify an appropriate lawful base under GDPR to legitimise the processing of the personal information. Under GDPR, for any use of personal information to be lawful it must comply with at least one of the 'lawful bases' set out in Article 6. If special category data is to be used, then in addition to an Article 6 basis a second basis from Article 9 will also be required, many of which are interpreted for the UK in DPA 2018. Where the personal information to be used relates to criminal issues then in addition to a lawful base in Article 6, the processing must also comply with Article 10 of the GDPR and relevant parts of DPA 2018.

Given the complexity of the data exchanges proposed, it would be advisable for Welsh Government to undertake a data mapping exercise at this stage. One aim of this exercise should be to ensure that appropriate lawful bases for processing from GDPR Article 6 and where appropriate Articles 9 or 10 are available for use by the organisations being asked to undertake the functions. Schools and other smaller organisations involved in the assessment of need and development and maintenance of interventions will welcome guidance from Welsh Government on the lawful bases that they are likely to be able to rely on to deliver the tasks allotted to them under this Code. This need for guidance may be strongest for organisations and individual specialists who may be asked to provide information in response to requests made by those organisations taking forward their public tasks under this Code.

Clarity will also need to be established on where 'data controllership' sits for the processes set out in the Code. This may fall to one organisation, or to a number

working in partnership. Under GDPR the 'data controller' is "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data" (Article 4(7)). Some organisations addressed by this Code are under a statutory obligation to process personal data for the purposes set out in the Code. Section 6(2) of the DPA 2018 states that anyone who is under such an obligation and only processes the data to comply with it will be a controller. Clarity on data controllership will help ensure that the information rights of the individual can be properly coordinated and communicated.

Another function of the proposed data mapping exercise would be to ascertain the extent to which the data sharing required by the Code is likely to involve either joint data controllership, or partnership working between separate data controllers. The [Wales Accord on Sharing Personal Information](#) (WASPI) toolkit may be a useful resource in these scenarios, and depending on what data sharing is identified through the data mapping, it may be that Welsh Government could bring together a group of relevant stakeholders to develop WASPI ALN template data sharing / data disclosure agreements that could be used by relevant organisations across Wales to support delivery of the functions set out in this Code.

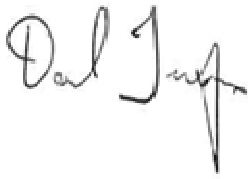
### **Comments on Part 4(c) of your consultation**

Paragraph 480 states 'Authorities will need to satisfy themselves that they are complying with the Data Protection Act when sharing information'. The Commissioner recommends that this is updated to refer to The GDPR and DPA 2018. It should also be amended to remind authorities to comply with these laws at all times when implementing the Code – the need to comply with data protection is not limited solely to data sharing circumstances.

### **Comments on Part 5 of your consultation**

The Commissioner notes that an integrated impact assessment has been undertaken on the draft ALN Code, the ALN Coordinator Regulations and the draft Educational Tribunal for Wales Regulations. She notes that none of these impact assessments include any reference to data protection matters, or indicate that a separate DPIA has been undertaken. Whilst a DPIA by Welsh Government during the development of legislation and Regulations is not a statutory requirement, it would be good practice in identifying possible data protection problems in the policy proposals, and ensuring that mitigations are built in at an early stage. In addition, GDPR Article 35(10) allows that where a DPIA has been carried out in the development of law that regulates a specific set of processing

operations, the requirement on each data controller to undertake a DPIA before starting the relevant processing will not usually apply. Taking a 'once for Wales' approach to DPIAs in relation to Welsh Government legislation and Regulations would significantly reduce the duplication of work required by each affected data controller involved in implementing the policy. Such DPIAs could be developed through consultation with intended data controllers to ensure that their front line experience is reflected.



**David Teague**  
**Regional Manager (Wales)**  
**Information Commissioner's Office**

Cc: Helen Morris, Data Protection Officer, Welsh Government