

By email only: racerelationsorderreview@executiveoffice-ni.gov.uk

16 June 2023

FAO: The Racial Equality Legislation Team, The Executive Office

Dear Sir/Madam,

Re: The Executive Office (TEO), Review of the Race Relations (NI) Order (RRO) 1997

The ICO welcomes the opportunity to respond to the above consultation. This Office has responsibility for promoting and enforcing the UK General Data Protection Regulation (UK GDPR), the UK Data Protection Act 2018 (DPA 2018) and additional information rights legislation.

We note that this consultation centres on proposals which aim to ensure that racial equality legislation is reflective and responsive to the needs of minority ethnic communities and offers them the best protections from racism and discrimination. The consultation states that this will be achieved by reviewing and making proposed changes to the RRO in response to changes in equality legislation in Great Britain (GB) and Ireland, and by engaging with various stakeholders.

Please note that many of the themes/questions included in the consultation fall outside of the scope of the Information Commissioner's regulatory role. For this reason, the following comments are focused solely on the information rights elements of the document.

Article 36(4) – Statutory Consultation on Legislative Measures

The consultation states that TEO intend to include a section to enact mandatory Ethnic Equality Monitoring through secondary legislation.

In addition to this, there are also proposals to protect children/young people against victimisation regarding complaints (Article 4), restrict the disclosure of information on investigations conducted by ECNI (Article 50(3)), shift the burden of proof in industrial tribunals (Article 52A) and increase the powers of the ECNI to carry out formal investigations by removing procedural barriers (Articles 46 and 47).

We would therefore like to draw your attention to your obligations under Article 36(4) of the UK GDPR given the reference to legislative measures as proposed in your consultation.

Article 36(4) imposes a requirement on Government Departments and relevant public sector bodies to consult with the ICO when developing policy proposals relating to the processing of personal data. Article 36(4) states that: *"The relevant authority must consult the Commissioner during the preparation of a proposal for a legislative measure to be adopted by Parliament, the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly, or of a regulatory measure based on such a legislative measure, which relates to processing."*

Consultation with the ICO under Article 36(4) is a separate process to any wider public consultation such as this one. Such prior consultation is deemed necessary in order to ensure compliance with the UK GDPR and in particular to mitigate the risk involved for the data subjects affected by the proposals.

The [Enquiry Form](#) (set out at [Annex A of the guidance](#)) needs to be completed by TEO's policy lead in consultation with its Data Protection Officer. The form is designed to capture the initial information the ICO requires to assess whether or not policy proposals require formal consultation under Article 36(4). Therefore, your policy lead in this area must fill out this form.

Whilst we await submission of your Article 36(4) Enquiry Form, we have set out below some data protection considerations arising from the current consultation that we would like to draw to your attention. It is also likely that the areas below can be explored further with TEO as part of the Article 36(4) consultation and engagement process.

Data Protection by Design and Default

A fundamental concept of data protection law is that data protection should be built into any project or proposals using personal data from the earliest stages of planning. As such, we would like to remind TEO of their obligations under [data protection by design and default](#). It is important to note that a key aspect of these obligations involves considering whether there is a need to carry out a [Data Protection Impact Assessment \(DPIA\)](#) and seeking expert from your [Data Protection Officer \(DPO\)](#).

Necessity and Proportionality

As the proposal to introduce Ethnic Equality Monitoring includes the processing of [special category data](#), data controllers will have to satisfy a lawful basis under [Article 6 of the UK GDPR](#) as well as a condition for processing under [Article 9 of the UK GDPR](#).

As this information is afforded additional protections under UK GDPR, TEO must articulate and justify why mandating the collection of such sensitive data is necessary and proportionate. The consultation document has indicated that this has been proposed *"to provide evidence for better policy making in relation to the needs of those from minority ethnic communities"*. However, it is not clear why mandating the collection of such information is necessary to achieve this purpose.

Consideration must therefore be given to whether such processing is proportionate and adequately targeted to meet the objectives set out in the consultation document, and whether there is any less intrusive alternative to achieve the same outcome. The DPIA will be an important tool for TEO to set out what alternatives have been considered and why this route has been chosen as the most appropriate from a data protection perspective.

Personal Data

We note that under Article 4 of the RRO, TEO intends to change the legislation to ensure any child or young person connected with a complaint is protected against victimisation. This is to prevent parents being discouraged from raising an allegation of discrimination with a school or educational establishment due to fears of retaliation.

Regarding this, it should be highlighted that complaints, including those raised anonymously, may include information which could lead to the identification of the complainant and others. Consequently, when making changes to the legislation, TEO should give take account of [personal data](#) in its broadest sense and how to mitigate inappropriate disclosures of personal data.

Consideration should therefore be given to ['direct'](#) and ['indirect'](#) identifiers, and also ['mosaic'](#) or ['jigsaw'](#) identification. This form of identification is owing to non-identifying information from a single source being combined with information from another recipient and/or system and in the context of complaints, may be of particular concern when a concern pertains to a specific incident.

As part of this, it will also be important to bear in mind the implications of Recital 38 of the UK GDPR which states that children merit *"specific protection"* as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.

For these reasons, TEO should consider whether guidance needs to be issued to organisations around privacy enhancing practices to protect individuals from being unnecessarily identified.

Restriction on the Disclosure of Information

In relation to any restrictions on the disclosure of information (Article 50(3)), this must be compliant with the UK GDPR. TEO should therefore be aware that any complete or partial refusal of a request for personal information needs to have a corresponding [exemption or exemptions](#) to restrict the right of access. Consideration may also need to be given to how such restrictions will impact how any data controllers who are also public authorities deal with requests for information under the Freedom of Information Act (FOIA) 2000.

Assistance in Obtaining Information

Article 63 of the RRO refers to a questionnaire to help those unfamiliar with the law to obtain evidence for their case. We note that there are proposals to repeal this Article from the Order. Whilst TEO have stated their rationale for this proposal, it is important that any changes to legislation do not impact on the ability of aggrieved individuals to obtain information that they are legally entitled to.

In relation to this, TEO should be aware that individuals will still have the right to obtain a copy of their own personal information through [Article 15 of the UK GDPR](#) and information held by public authorities through FOIA.

In addition to this, in the case of obtaining information from public authorities, it is important that in the absence of such a questionnaire that public authorities are still compliant with their duties under [Section 16 of FOIA](#). TEO should ensure that any changes to the legislation do not negatively impact on public authorities' obligations in this regard.

Burden of Proof: Industrial Tribunals

As mentioned, under Article 52A, we note that there are proposals to shift the burden of proof in industrial tribunals to the respondent/defendant as opposed to the complainant/prosecution. This is to align with cases to which the Equal Treatment Directive applies.

It is welcomed that the burden of proof will be the same for all claims made under the Order. This will help ensure that there is consistency and

greater fairness when it comes to the evidential requirements for those involved in cases relating to the RRO.

Codes of Practice

It is noted that TEO intend to increase the powers of the ECNI under Article 45 to issue Codes of Practice with regard to racial equality in a wider range of areas than is allowed currently.

As the proposals create new processing powers and obligations for organisations, we would welcome the inclusion of guidance around data protection obligations in any new codes of practice or resulting guidance.

Power to Conduct Formal Investigations

As stated, TEO wish to amend Articles 46 and 47 of the RRO to increase the powers of the ECNI to carry out formal investigations by removing procedural barriers. In practice this would mean providing the ECNI powers to investigate without the need to conduct a test of whether or not there is a 'belief' of unlawful acts.

In relation to this, TEO should consider the risk of malicious or unsubstantiated claims. Consideration should be given to the impact that such investigations may have on individuals, in particular the level of intrusion into individuals' private lives that may occur during investigations, and any potential [resultant harms](#).

Conclusion

We hope you find the above comments helpful. We look forward to receiving your Article 36(4) Enquiry Form and to engaging further on these proposals. Should you have any queries in relation to the advice above or the submission of your Article 36(4) Enquiry Form, please do not hesitate to contact our office.