

FACULTY OF ADVOCATES

**Response from the Faculty of Advocates**

**to**

**The Consultation on**

**Data: A New Direction**

**Introduction**

The Faculty of Advocates is grateful for the opportunity to respond to the consultation entitled “Data: A New Direction”.

The proposed package of reforms aims to “create an ambitious, pro-growth and innovation-friendly data protection regime that underpins the trustworthy use of data”. In this regard the package of proposed reforms specifically seeks to: (i) reduce barriers to innovation; (ii) reduce burdens on businesses and deliver better outcomes for people; (iii) boosting trade and reducing barriers to data flows; (iv) delivering better public services; and (v) reform the Information Commissioner’s Office.

The Faculty of Advocates is of the view that the proposed reforms, although laudable in their intention, proceed on the assumption that law reform in itself can achieve the five policy objectives listed above.

While the case has been made for some nuanced and incremental reforms, which elaborate and improve upon the provisions of the Data Protection Act 2018 and the philosophy therein flowing from the GDPR, it is premature to suggest in the current post-Brexit social, economic, and political landscape that a radical overhaul of the United Kingdom’s Data Protection regime is necessary or desirable to achieve the aforementioned policy objectives.

It is the position of the Faculty of Advocates that any reforms should be nuanced and incremental, improving and elaborating upon the existing Data Protection regime under the Data Protection Act 2018 and GDPR, while focussing on strengthening, sustaining, and safeguarding public confidence in the provision, processing, and protection of personal data to achieve the aforementioned policy objectives.

**The Data Protection Regime under the Data Protection Act 2018 and GDPR**

Prior to the departure of the United Kingdom from the European Union, the GDPR was intended as a means of harmonising Data Protection Law, while serving as a catalyst for greater clarity, consistency, and confidence in Data Protection regimes among Member States, with the ultimate result of furthering the Digital Single Market.

In achieving this objective, the architecture of this law was ultimately guided by principle, with the Data Protection Principles being enshrined in Article 5 of the GDPR and subsequently Sections 35 to 40 of the Data Protection Act 2018.

From principle it was intended that there would emerge practice. From practice would emerge predictability. Through predictability, public confidence would be increased in data processing, in turn enabling the socio-economic benefits of data processing to be realised.

The Faculty of Advocates maintains the view that with its being less than four years since the enforcement of the GDPR in the European Union, and the Data Protection Act 2018 within the United Kingdom, it is difficult to advance any empirical or logical basis as to why this regime is no longer fit for purpose.

It is suggested that greater engagement with the public, private, and third sectors over an extended time-period to identify any perceived strengths, weaknesses, and areas for improvement in the existing Data Protection regime would be prudent, after which time the question of wholesale reform may be revisited. Until such a basis is clearly identified, it is the position of the Faculty of Advocates that any reform should be limited to nuanced and incremental changes for the purposes of improving the existing Data Protection regime, as opposed to wholesale changes.

**Reducing Barriers to Innovation**

The Faculty of Advocates maintains the position that any reforms should be nuanced and incremental in aiming to reduce barriers to innovation.

The relationship between law and technology is that the former has historically always been a step behind the latter. Legislative approaches to combat this situation broadly fall into two categories.

Firstly, the law can be drafted in highly specific terms in the interests of legal certainty. This however has the potential to straitjacket its application to new technologies and scenarios and potentially inhibit fundamental freedoms, rights, or socio-economic benefits which might otherwise result. Separately, this approach may lead to the law becoming obsolete, or requiring a supplementary patchwork of further legislation, or judicial interpretation, to allow for its continued effective and proportionate operation.

Secondly, the law can be drafted in broader terms in the interests of flexibility. This however results in a lack of legal certainty, with an increased emphasis on the role of the Judiciary in the interpretation and development thereof, as well as a greater reliance on principle as a guide to practice.

The Faculty of Advocates considers that the latter approach in the context of our current principles-based regime of Data Protection Law is more conducive to ensuring: (i) the adaptability of the law to new technologies and scenarios; (ii) heightened vigilance on the part of data controllers and processors that the use of personal data continues to be responsible and in accordance with principle and practice; and (iii) that fundamental rights or freedoms are not imperilled, nor legitimate socio-economic benefits from the use of personal data denied.

Accordingly, for the purposes of the various reforms proposed in Chapter 1 of the Consultation Document, the Faculty of Advocates would advise against the implementation of rigid, technologically specific, and exhaustive provisions, instead retaining the emphasis, in the GDPR and Data Protection Act 2018, on adherence to a principle-based approach to data use.

However, the Faculty of Advocates is of the view that there is merit in a nuanced and incremental reform of the legislation. Such might include, *inter alia*, the incorporation of the recitals to the GDPR into substantive legislation: thus better serving as an interpretative guide to data controllers and processors as they seek to undertake their legal responsibilities and discharge their legal duties.

In terms of specific emerging technologies, such as artificial intelligence, and the use of innovative data sharing solutions (including intermediaries), it is the position of the Faculty of Advocates that public confidence in the use of personal data in such contexts is the key to unlocking the socio-economic benefits thereof. We submit that the regulatory functions of the ICO paired with the heightened vigilance of the principle-based approach inherent in the GDPR and Data Protection Act 2018 are, in the long-term, conducive to ensuring the responsible use of data in such contexts, whilst striking a fair balance between data protection and realising socio-economic benefits from the use of data. Upsetting this balance through reforms which encourage maximisation of the ease of data processing and potentially erode the heightened vigilance of data controllers and processors inherent in the current principle-based system may risk compromising fundamental rights in the interests of the objectives expressed in the Consultation Document.

The Faculty of Advocates would at this stage re-emphasise the philosophy behind the GDPR, of principle underlining practice, practice creating predictability and, thereby, public confidence and the realisation of socio-economic benefits of data use.

**Reducing Burdens on Businesses and Delivering Better Outcomes for People**

The Faculty of Advocates questions the rationale behind the application of the phrase “build back better” to a series of compliance protocols and practices which are in their adolescence following the recent enactment of the GDPR and Data Protection Act 2018.

The principles which drive the GDPR, and Data Protection Act 2018 exist for the purpose of promoting best practice insofar as the use of personal data is concerned. It is the broad principle-based nature thereof paired with the sanctions in the event of non-compliance which provides an incentive to establish robust, and considered, approaches that ensure the responsible use of data.

The Faculty of Advocates has concerns that a shift in focus towards privacy management programmes tailored to specific businesses will result in a *laissez-faire* attitude towards compliance, and potentially undermine the principle-based nature of the GDPR and Data Protection Act 2018.

The Faculty of Advocates accepts that there is no “one size fits all” approach to how businesses plan, implement, and enforce compliance regimes. Consideration will always require to be given by specific businesses to how such regimes should be implemented, given their own unique circumstances, business-models, and the socio-economic landscapes within which they operate. However, with under four years having passed since the enactment of the GDPR and Data Protection Act 2018, it is the position of the Faculty of Advocates that it is premature to cast doubt on the proposition that the current approach (*i.e.* theprinciple-based approach found in the current Data Protection Legislation, with specific reference to Article 24 of the UK GDPR) contains the flexibility needed to allow businesses to make responsible, proportionate, and balanced decisions in this regard.

While the Faculty of Advocates accepts that there may be a lack of certainty for specific business-models where data processing is either *de minimis* or unconventional in nature, specifically with reference to Article 24 of the UK GDPR, any such gaps should be addressed through nuanced and incremental legislative reform or sector-specific guidance as opposed to wholesale legislative changes. Although such changes may seek to promote or mandate the use of privacy management programmes to some degree, or indeed proportionately vary the specific compliance protocols mandated by law for certain categories of business enterprise, care should be taken not to erode the principle-based approach underpinning the existing Data Protection regime (which has a particular emphasis on avoiding the unintended consequence of divergent practices emerging among similar businesses). It is submitted that the philosophy behind the GDPR already quoted is again relevant.

Insofar as the rights of data-subjects are concerned, specifically subject access requests, the Faculty of Advocates acknowledges that a balance requires to be struck between enforceability of such rights, and the logistical considerations therein. No opposition is taken to the proposition that a fee-based system could allay some of the logistical concerns. It is submitted that through a return to something akin to section 7 (2) of the now repealed Data Protection Act 1998 (whereby except in prescribed circumstances a fee might be charged), one might move towards a system that allows for qualifications to be introduced into the current regime for subject access requests in limited situations. The specifics of such a qualification in terms of the extent and nature of its operation would require to be the subject of wider consultation with the public, private, and third sectors. The Faculty of Advocates identifies no reason in principle as to why a regime similar to that of Section 7 (2) of the Data Protection Act 1998 could not be introduced in a limited category of cases, so long as it is informed by consultation, and does not fetter the operation of, or disproportionately interfere with, the principles in the GDPR and Data Protection Act 2018.

Overall, insofar as Chapter 2 of the Consultation Paper is concerned, the Faculty of Advocates maintains the view that the case for wholesale reform at this time has not been made. While the provisions of Article 24 of the UK GDPR may be expanded upon in the interests of clarity and certainty in a nuanced and incremental manner, care must be taken not to dilute the overriding nature of the data protection principles, and inadvertently establish a *laissez-faire* attitude towards compliance. Furthermore, while the Faculty of Advocates does not oppose the proposals regarding qualifications to subject access requests in limited categories of case, it maintains the view that wider public consultation, impact assessments, and considerations of how such measures could be adopted in a manner compliant with and proportionate to the overriding data protection principles, ought to be exhausted prior to codification into law.

**Boosting Trade and Reducing Barriers to Data Flows**

The Faculty of Advocates expresses concern at proposed reforms in Chapter 3 of the Consultation Document.

The significance of “adequacy” in the context of cross-border dataflows, and the socio-political salience thereof is arguably at its highest following Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Schrems II).

While the Faculty of Advocates accepts that a direct equivalence of laws is not necessarily required for the purposes of achieving adequacy in the terms envisioned in the GDPR, there is a concern that the risk-based approach to assessing adequacy as expressed in the proposed reforms imperils international relations, specifically the adequacy status of the United Kingdom with the European Union.

Such risk-based approaches not only involve uncertainty, unpredictability, and divergent practices but, in the absence of a robust regulatory regime, also risk the emergence of a *laissez-faire* attitude towards compliance, where financial gain and economic convenience is placed before consideration of fundamental rights. Instead, it is submitted that the heightened vigilance which flows from the principles-based approach underpinning the GDPR and Data Protection Act 2018 is more conducive to striking an appropriate balance between protecting fundamental rights and unlocking the socio-economic benefits of data use.

Accordingly, insofar as Chapter 3 of the Consultation Document is concerned, while the Faculty of Advocates acknowledges that there may be scope for nuanced and incremental reform to increase clarity and certainty regarding what constitutes responsible data use in the context of international dataflows, it is opposed to a radical overhaul of the current regime in the GDPR, and Data Protection Act 2018, given the readily apparent risks, and the relatively vague information available as to the projected socio-economic advantages thereof.

In this regard, given the adolescent status of the GDPR and the limited time within which the current provisions regarding international dataflows have been in force, the Faculty of Advocates is of the view that consultation on a sector-specific basis over an extended period is required to ensure any such changes are fully informed.

**Delivering Better Public Services**

The Faculty of Advocates agrees that countless benefits of data use have been identified in the context of the COVID-19 pandemic. The primary concern of the Faculty of Advocates is again however that over-prescriptive legislation in certain contexts will dilute the heightened vigilance incumbent upon data controllers and processors inherent in the GDPR and Data Protection Act 2018.

In this regard the proposal that an organisation, asked to process data on behalf of a public body, could rely on that body’s lawful ground of processing is troublesome absent specific safeguards in the wording of such legislation.

While the Faculty of Advocates does not oppose such a provision in principle, great care would require to be taken in defining the precise parameters of its operation to avoid logistical concerns, as well as attaching appropriate weight to fundamental rights.

There is also a concern that the proposal that public and private bodies may rely on a ground of processing of personal data relating to health premised on “substantial public interest” could develop into an unrestricted ground of processing, if not appropriately restrained by the wording of any such legislative provision. That in turn would pose issues both of fundamental rights and logistical concerns for data controllers and processors.

Again, while the Faculty of Advocates does not oppose such a provision in principle, great care would require to be taken in defining the precise parameters of its operation to address such logistical concerns, as well as attaching appropriate weight to fundamental rights.

The Consultation Document furthermore outlines the twin challenges of: (i) balancing fundamental rights while allowing the socio-economic benefits of data use to be realised; and (ii) ensuring that appropriate safeguards, limitations, and transparency are present in the Data Protection regime. The proposal to extend the list of Specific Situations in Schedule 1 to the Data Protection Act 2018 and that of including a statutory definition of “substantial public interest” are identified as assisting in this regard.

For the purposes of Chapter 4 of the Consultation Document, the Faculty of Advocates maintains its view that the principle-based approach of the GDPR and Data Protection Act 2018 ought to remain the guiding factor in any form of decision making by data controllers and processors, and indeed any nuanced or incremental reforms to the current Data Protection regime.

The broadening of the existing provisions is acknowledged in the Consultation Document to risk data processing which could not reasonably have been expected, while the drafting of further provisions or definitions in narrow terms could both straitjacket the application of the law to new circumstances and result in further lack of certainty. While the Faculty of Advocates is not opposed to nuanced and incremental reform in the interests of clarity and certainty so long as it is informed by meaningful consultation, it is submitted that due to the adolescence of the GDPR and the absence of any long-term studies or impact assessments in relation to the effectiveness thereof in the context of the COVID-19 pandemic, the case has not been made for wholesale change.

**Reform of the Information Commissioner’s Office**

The Faculty of Advocates holds the view that in the absence of any compelling evidence that the Information Commissioner’s Office is unfit for purpose in terms of its form and function, the question of its reform is premature.

The proposals insofar as they concern the powers of the government to appoint the CEO of the ICO, and approve its guidance, immediately give rise to concerns that the ability of the ICO to act as an independent regulator will be compromised. It is the position of the Faculty of Advocates that public trust and confidence in the ICO, as well as the Data Protection regime generally, would be best served through maintaining the independence of the ICO as a regulator. As such, while structural reforms within the ICO may improve its effective and efficient functioning as a regulator, care must be taken not to compromise the ICO’s independence.

The Faculty of Advocates cautions against a wholesale expansion of the enforcement powers of the ICO. The enforcement powers of the ICO are already expansive, being both investigative and punitive in nature. The proposed powers, specifically (i) commissioning technical reports; and (ii) compelling witnesses to give answers at interview, if introduced without appropriate procedural safeguards, risk the ICO taking on an inquisitorial function which is potentially at cross-purposes with the objective of strengthening, sustaining, and safeguarding public confidence in the Data Protection regime. As such, while the powers of the ICO may be increased in the interests of improving its effectiveness as a regulator, this should not be at the expense of confidence in the ICO; following a change in public and private perception to the effect that the ICO is an inquisitorial body regulating through fear of non-compliance.

The Faculty of Advocates is however supportive of the proposed reforms in Chapter 5 of the Consultation Document insofar as they aim to promote greater accountability of the ICO to Parliament and the public. It is also recognised that there may be some structural and resource-based utility in expanding the remit of the ICO into other areas including Biometrics and Surveillance.

However, such reforms should proceed following careful consultation with the ICO, public, private, and third sectors, as well as other regulators, to ensure a fair and effective allocation of resources to enable effective functioning as an independent regulator. In this regard the Faculty of Advocates submits that reducing any practical or administrative burdens on the ICO should not come at the expense of introducing high risk approaches to data use and compromising fundamental rights of data subjects.

**Conclusions**

The Faculty of Advocates would emphasise its position in support of the policy principle that from principle emerges practice; from practice emerges predictability; from predictability emerges public confidence; and thus the socio-economic benefits of data use may be realised. While it is accepted that the case has been made for nuanced and incremental reform, it is premature and misconceived to suggest that wholesale reform of the GDPR and Data Protection Act 2018 is required to achieve the policy objectives outlined in the Consultation Document.