

# **GDPR and LED Implementing Regulations (Amendment) Regulations 2018**

## **Summary of responses and analysis November 2018**

The consultation ran from 10 October to 7 November 2018 inviting views on the proposed changes to the Data Protection (Application of GDPR) Order 2018, and GLIR, addressed in particular to private, public and third sector organisations which process, or are likely to process personal data.

The Cabinet Office received 15 responses to the consultation; 14 organisations and 1 individual responded.

- 3 gave permission to publish their response in full
- 11 gave permission to publish anonymously
- 1 did not give consent to publish on the consultation hub.

Clear themes emerging from the consultation responses include:

- Concerns about additional costs that could be incurred
- Request for Information Notice timescales to include some flexibility
- Ensuring that Data transfers to the UK post 'Brexit' can continue

There were also specific comments aimed at clarifying specific wording and definitions in the regulations.

Thank you to everyone who took the time to submit their views and responses to this consultation.

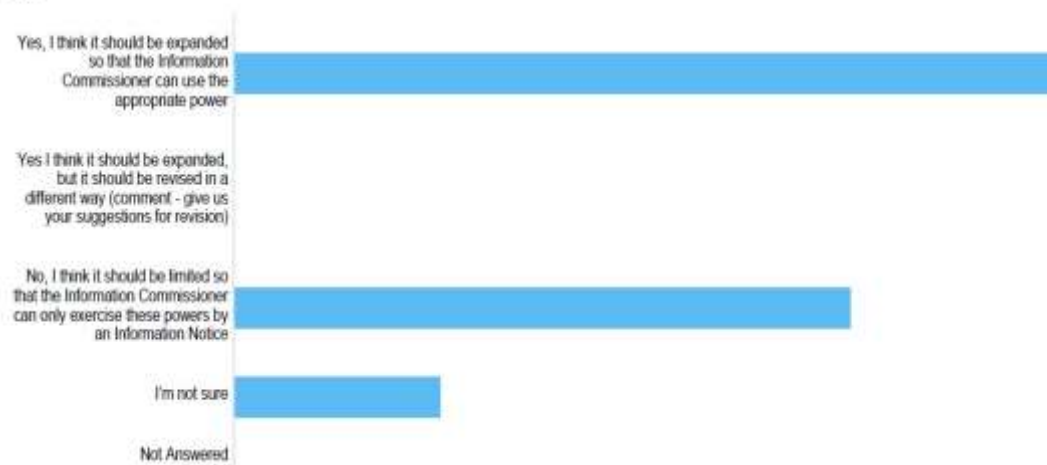
# 1. Enforcement Provisions – Part 3 of the Implementing Regulations.

## 1.a General Enforcement

The consultation asked whether in relation to general functions of the Information Commissioner under Regulation 77, that the powers should exclusively be used with an Information Notice, or that it should be expanded as proposed to include powers which may be exercised under the appropriate enforcement provisions?

Question : Q.1a General Enforcement

Q1a



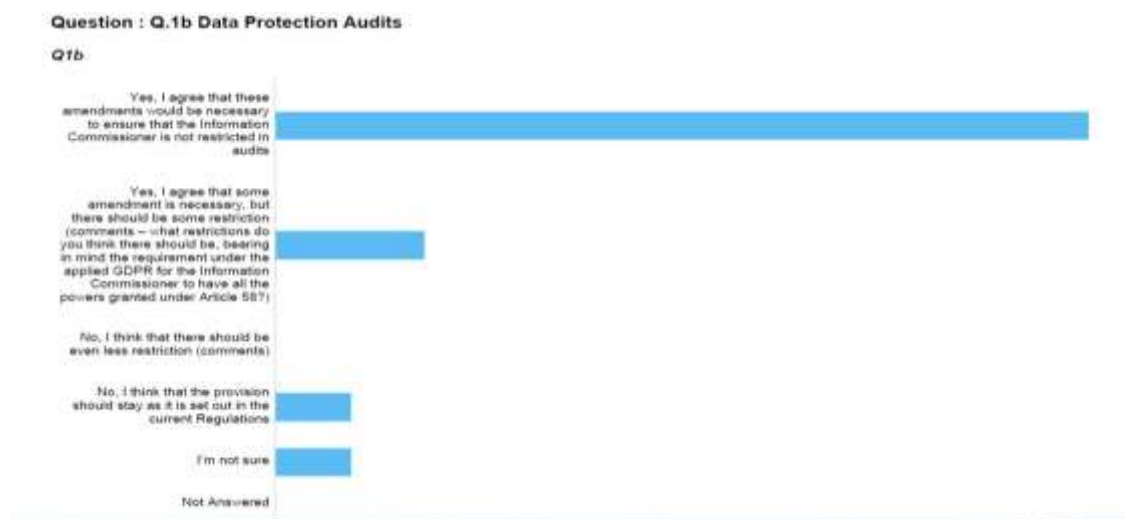
Respondents to this question were divided, with nine agreeing that the powers of the Information Commissioner should be expanded as proposed and five disagreeing. One respondent was not sure.

Those who did not support the expansion of the enforcement powers said they did so because they were concerned about the confusion that this may cause and additional costs for Controllers.

'It may be that further enforcement provisions would lead to confusion and, perhaps, unnecessary legal costs for Controllers'.

## 1.b Data Protection Audits

GDPR and LED Implementing Regulation 78 applies where circumstances make it reasonably impracticable for the Information Commissioners staff to conduct an audit in accordance with Article 58(1)(b) of the applied GDPR and regulation 77(6) of these regulations. The proposal is to amend Regulation 78 so that the Information Commissioner may approve (but not direct) the appointment of an appropriate external auditor.



Eleven respondents agreed the amendment was necessary, one respondent thought that Regulation 78 should stay as it is set out in the current Regulations, two thought that some amendment was necessary but that there should be some restrictions, one respondent was not sure.

Those who thought that there should be some restrictions said:

'If the ICO can instruct a controller or processor to appoint an auditor (possibly from an approved list), will the cost lie with the controller/processor? If the ICO wishes an audit to be done, his office should cover the cost'.

The Information Commissioner should prepare and provide an 'audit template' for any third party auditors to use. Additionally, all audits should be signed off by the Information Commissioner

The Information Commissioner should set a minimum standard or at least a tiered cost structure, so as to not allow third-party auditors to charge over and above for their services.

Whilst those who were in favour of the amendments said:

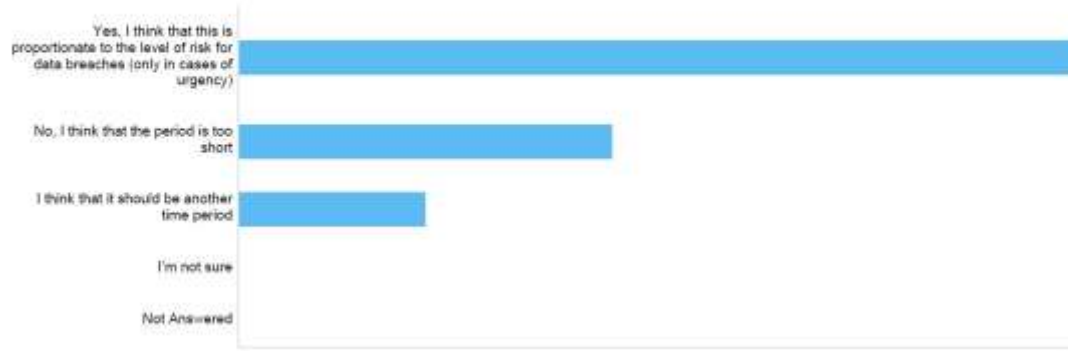
The amendment clarifies the role of the controllers and processors in selecting auditors and agreeing the terms of audits, and gives more definition to the process, both of which are welcome additions to the regulations.

## 1. c Information Notices

It is proposed to amend Regulation 101 in respect of Information Notices to align with the equivalent UK provisions. The amendment would require that if it is urgent information is provided to the Information Commissioner within 24 hours, rather than the existing 7 days.

### Question : Q.1c Information Notices

Q1c



Nine respondents agreed with the proposed adaptations and four disagreed; two thought that another time period would be appropriate.

Reasons given for disagreeing include:

'72 hours would be appropriate.'

'Changing to 24 hours leaves open the risk of 'being in default' when all reasonable steps have been taken to comply. Would seem more reasonable to amend either 72 or 48 hours'

'I agree that this is an important measure but 24 hours is a very short turnaround time. I would hope that this would only be used in very extreme circumstances. and that some flexibility would be permitted (at the discretion of the Information Commissioner, taking into account the level of cooperation from the data controller)'

'24 hours may be impractical due to absences, resource limitation etc. "Within 24 hours if possible, but in any event no more than 72 hours" would be fairer'

I believe the Information Commission should determine a time frame, up to a period of 7 days based on the severity of the case. The notice period should be outlined on the information notice to the Controller/Processor e.g. if the Information Commissioner deems the case to be 'high risk' they can reduce the notice period to 24 hours and for a lesser case allow 7 days.

Those who agreed said:

'Urgency' needs a clear definition.

## 1. d Failure to comply with Assessment Notices

It is proposed that Regulation 103 is amended so that the provision for the offence and corresponding defence for the failure to comply with an information notice is excluded. Both Regulation 112 and Regulation could and should include these with other forms of notice.

Question : Q.1d Failure to comply with Assessment Notices

Q1d



Fifteen respondents supported this approach with no objections or comments made in relation to this amendment.

## 1.e Assessment Notices

Regulation 104 sets out how the Information Commissioner can carry out an assessment of whether the Controller or Processor has complied or is complying with data protection legislation. It is proposed to make some amendments to assessment notice provisions to ensure that the provisions are workable balanced against the need to ensure safeguards for controllers and processors subject to assessment proceedings.

Question : Q.1e Assessment Notices

Q1e



13 respondents agreed that the amendment makes Regulation 104 more workable for the Information Commissioner, 2 respondents thought that there should be an amendment but more safeguards should be introduced. No comments were provided.

## Question 2 Questions on changes to exemptions and conditions

### Q2.a Insurance Conditions

Schedule 9, paragraph 4, of the existing Regulations details the restrictions and exemptions that apply to Insurance. It is proposed to amend the insurance conditions to correct some technical issues, but also to include an exemption for disclosure of information to beneficiaries of insurance contracts (in a similar manner to trust beneficiaries in the equivalent exemption).

#### Question : Q.2a Insurance Conditions

##### Q2a



Thirteen respondents agreed with the conditions as drafted; two agreed but thought there should be more changes, and one respondent was not sure.

Yes but I think there should be more changes, said:

'With regard to sub-paragraph (2) of Paragraph 14, Schedule 2, please could you clarify whether the word "and" at the end of item (b) should actually read "or"? As currently drafted, it appears that insurers would have to meet all three criteria in order to take advantage of the exemption. This would be extremely difficult, if not impossible, and therefore would potentially render the proposed change unworkable. Clarification on the wording/intention would be appreciated.'

## Question 2.b Occupational Pension Schemes.

It was proposed that Schedule 2, paragraph 16, of the Regulations relating to Occupational Pension is updated to include references to data concerning the health of the parent, grandparent, great grandparent, sibling or member of the occupational pension scheme when determining eligibility for membership, or the payment of benefits for an occupational pension scheme.

### Question : Q.2b Occupational Pension Schemes

#### Q2b



13 respondents agreed with the inclusion of the scheme members and their relatives, one respondent stated that the provision should remain as drafted, one respondent was not sure.

## Q2.c Anti-Doping in Sport

Schedule 2, paragraph 21, of the Regulations refers specifically to Anti-Doping in Sport. It is proposed to update this provision and amend it so that it is re-named standards of behaviour in sport. This would allow the provision to align with its UK equivalent, to enable processing of special category data to prevent doping in sporting environments, and to be expanded to include standards of behaviour in sport.

### Question : Q.2c Anti-Doping in Sport

#### Q2c



14 respondents agreed with the proposed amendment, one respondent was not sure.

## Q2.d Publication of legal judgments

It is proposed that Schedule 2, paragraph 28, of the Regulations is amended to include a new condition relating to the publication of legal judgements. This would be equivalent to a similar condition contained in Schedule 1, part 2 of the Data Protection Act 2018 (UK).

Question : Q.2d Publication of legal judgments

Q2d

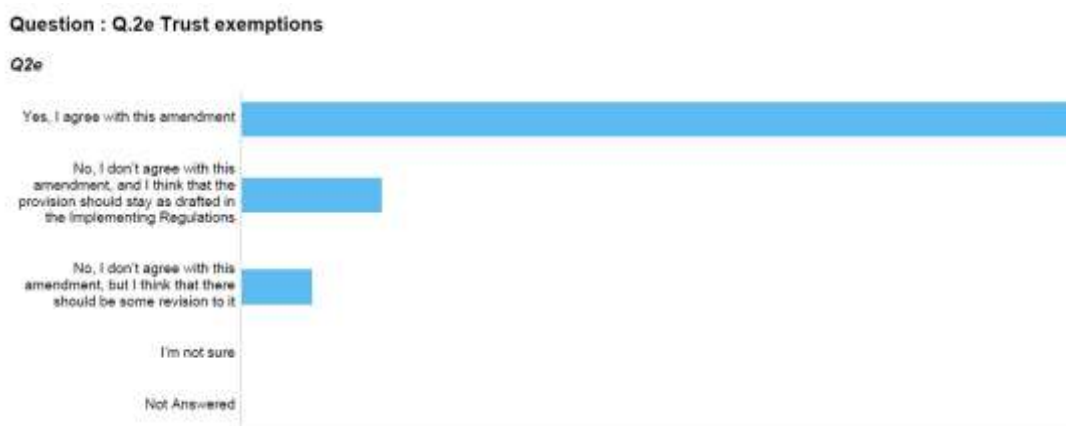


14 respondents agreed with the proposed amendment and inclusion of the new condition, one respondent disagreed and thought that the provision should be included but revised.



## Q2.e Trust Exemptions

The existing exemption contained in schedule 9, paragraph 21, was intended to address concerns about the knowledge of beneficiaries of the existence of a trust and their beneficial status, and the impacts upon the discretion of a Trustee. It is proposed to amend the existing exemption to streamline it so that it relates only to personal data processed in connection with a trust where it is likely to prejudice the trustee's discretion.



The majority of respondents (twelve were in favour of the proposed amendment. Two thought that the provision should stay as drafted in the Implementing Regulations. One did not agree and thought that there should be some further revision to the Regulation.

Those who agreed said:

'This amendment gives trust providers the clarification they required on trust exemptions, and is a welcome amendment.

Those who disagreed said:

' The issue with the drafting is the difference between what will actually impact on the exercise of discretions.

Situation 1 - Settlor sets up trust and lists his children as the people who may benefit if the Trustee (exercising a discretion) decides they should. The children have no vested interest, may receive nothing at any time, and may not know about the trust. The Trustee will probably only have their names and addresses as provided by the Settlor. Telling the children that the Trustee holds their data will not affect the exercise of a discretion, but it may make the Settlor think twice about an IOM trustee if this was required.

Situation 2 - as above but the Trustee decides to, or the trust deed requires, that the children must receive funds. In this case the Trustee will probably have copy passports etc. and will have contact with the children. Again the exercise of the discretion is unaffected and it is not problematic to tell the children their data is held.

Perhaps the exemption should reflect the insurance exemption - just being named on a trust deed/application form is exempt, but a beneficiary obtaining a vested interest/payment would trigger a need to notify the data subject.

### 3. Further comments on the proposed amendment to the Regulations

A number of themes were identified in the additional comments in response to the consultation as follows:

**Complexity of proposed amendments** - one comment highlighted the difficulty of reviewing the options, and the need to compare the existing Regulations and the draft of the suggested amendments in order to be able to respond. It was suggested that this may have reduced the number of responses.

**Highlight the need for further changes** – One response confirmed that they were supportive of the proposed changes, but would like to see a timetable for more wide ranging changes, and were especially interested in the proposal of a new body to manage and regulate this area.

**Inclusion of Member State Law** – One response advised that in respect of the proposed amendment to Article 6, paragraph 3(b) of the Applied GDPR that they had the following comments:

The inclusion of “Member State law” is welcomed; however, the amendment needs to make provisions for transfers of data required under UK law post Brexit.

Finally, general comments highlighted some typographical errors, missing words or cross referencing. Thank you for highlighting these, giving the opportunity for the re-drafted final form amending Regulations to be made both consistent and accurate.

### Conclusion

The response to the consultation suggested broad support for the policy proposed within the specific questions set out, as follows:-

Expanding Regulation 77 so that the Information Commissioner may exercise their powers under the appropriate enforcement provision and not just an Information Notice.

Amend Regulation 78 so that the Information Commissioner may approve (but not direct) the appointment of an appropriate external auditor.

Amend Regulation 101 to reduce the timescale for providing urgent information to the Information Commissioner from 7 days. Based on consultation feedback this was changed from within 24 hours to 72 hours.

Amending Regulation 103 as proposed.

Amending Regulation 104 as proposed.

Amend Schedule 2, paragraph 16, to include scheme members and relatives.

Amend Schedule 2, paragraph 21, as proposed

Amend Schedule 2, paragraph 28, as proposed.

Amend Schedule 9, paragraph 4, to include an exemption for disclosure of information to beneficiaries of insurance contracts.

Amending Schedule 9, paragraph 21, produced a number of comments from representatives from the Trust Industry. In light of these comments it was decided

not to introduce the suggested amendment, but to consult further with the Trust Industry to decide on an appropriate way forward.

The consultation showed that there remains some uncertainty as to the GLIR works in practice, which the Cabinet Office will continue to address via its website and media releases, in collaboration with the Information Commissioner's Office, to ensure that the Regulations are understood.

### **The Future of Data Protection Legislation**

The legislative programme includes the drafting of a new Information Commissioner Bill in the 2018/2019 schedule which will permit the Island to make this short term responsive and flexible legislative arrangement into primary legislation once we have had a full opportunity to review the impact of the withdrawal of the UK from the EU (Brexit), and the impact of GDPR and the LED both on the Island and in other jurisdictions.

## **Responses received from organisations**

Celton Manx Limited

Clearwater Fiduciary Services Limited

Crossroads Care

Equiom Group

Hansard International Limited

Financial Intelligence Unit (FIU)

IQE Limited

Isle of Man Constabulary Isle

of Man Digital Agency Manx

ICT Association (MICTA) Manx

Telecom Trading Limited Old

Mutual International Santander

International

SMP Partners Limited