

LAW SOCIETY SUBMISSION



DATA PROTECTION BILL 2018

DEPARTMENT OF JUSTICE & EQUALITY

APRIL 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1. The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland (the "Law Society").
- 1.2. We are pleased to make this submission on the draft Data Protection Bill 2018 (as passed by Seanad Éireann) and in doing so to raise issues which we believe ought to be considered further by the legislature and which may require amendments to the Data Protection Bill 2018 in its current form.

2. Background

- 2.1. The General Data Protection Regulation (the "GDPR") regulates the processing by an individual, a company or an organisation of personal data relating to individuals in the EU. It does not apply to data processed by an individual for purely personal reasons or for activities carried out in a person's home with no connection to a professional or commercial activity.
- 2.2. The key purposes of the Data Protection Bill 2018 are as follows:
 - 2.2.1 to give further effect to the GDPR in the areas in which Member States have a discretion on the means of its implementation;
 - 2.2.2 to transpose Directive (EU) 2016/680 on law enforcement (the "Directive") into national law;
 - 2.2.3 to establish the Data Protection Commission as the State's data protection authority with the means to supervise and enforce the GDPR and Directive; and
 - 2.2.4 to enact consequential amendments to various Acts that contain references to the Data Protection Acts 1988 and 2003.
- 2.3. The principal focus of this submission is as regards Part 6 or sections 103 to 154 of the Data Protection Bill 2018 which contains provisions dealing with enforcement of the obligations and rights set out in the GDPR and the Directive. In addition we make a number of recommendations on a range of issues that if not attended to, will impact on private and commercial affairs.

3. Supervision and Enforcement Mechanisms

Courts

- 3.1. The Law Society is keen to ensure that the provisions concerning the supervision and enforcement mechanisms are as effective as possible so as to give effect to the principle aim of the GDPR. That is, to regulate the processing by an individual, a company or an organisation of personal data relating to individuals in the EU and to do so by enhancing the safeguards surrounding that processing. In that regard we make the observations set out below.
- 3.2. The right to an effective judicial remedy is set out in Articles 78 and Article 79 of the GDPR and is reflected in section 115 (entitled "*Judicial remedy for infringement of relevant enactment*") of the Data Protection Bill 2018. The jurisdiction to hear disputes arising under section 115 will rest with the Circuit Court and the High Court in furtherance of section 115(3). The disputes arising under section 112 are referred to as data protection actions and will be considered actions in tort.
- 3.3. The Law Society queries, whether from an access to justice perspective, it might be appropriate for the District Court to also have jurisdiction to hear data protection actions where the relief sought is compensation whether for material or non-material damage. Firstly, the costs of such a civil action could be anticipated to be less costly than those of a Circuit Court action, secondly the time involved in hearing and disposing of such actions would also be less in the District Court and thirdly it must be anticipated that the value of many data protection actions would deem them to fall more appropriately within the jurisdiction of the District Court. Given, by way of example, the number of international corporations processing personal data on a large scale which have their main place of establishment in Ireland it can be anticipated that a significant amount of data protection actions may be taken in Ireland.
- 3.4. In this regard we note that there is an assigned Judge within the Dublin Metropolitan Area to hear regulatory enforcement actions which has helped build expertise in the area. The Law Society would welcome a similar arrangement being made for the District and Circuit Court so that an assigned Judge would hear all relevant disputes thus facilitating consistency of judgments and the development of judicial expertise.
- 3.5. On a separate but related point, we raise the current position of ICANN, whereby it is considering (in furtherance of its requirements pursuant to GDPR) of restricting access to the currently publicly available WHOIS service. Under that service, the name of domain name registrants is publicly available. ICANN is considering ceasing that service post the implementation of GDPR. It is to be envisaged that if that happens it may become necessary for Court applications to obtain the names of a domain name registrant where the ownership of a domain name comes into dispute. It is desirable from a costs perspective that applications of this nature (third party requests for identification details) be facilitated through the lower costs and ideally by means of an application before the District Court.

- 3.6. The Law Society would be concerned if ICANN's approach is taken by other entities that publish information registers that provide a function beneficial to society. This is an issue that may perhaps be more fully explored in future regulations to amend the rules of court for data protection actions as envisaged in section 157 (entitled "*Rules of court for data protection actions*").

Compensation

- 3.7. It is noted that Article 82 of the GDPR provides for the right to compensation from a controller or processor for "*any person*" who suffers material or non-material damage as a result of infringement of GDPR. It is not limited to a data subject. Section 115 is therefore too narrowly drafted, as is, because it only refers to a "*data subject*" and not to "*any person*" who could, by way of example, be an employer, spouse or child of a data subject. Section 115 therefore needs to be amended to enshrine the right provided to "*any person*" in Article 82 of the GDPR. This point applies by analogy to section 126 ((entitled '*Judicial remedy for infringement of relevant provision*').
- 3.8. The Law Society notes that there has been much debate on the advantages and disadvantages of providing NGO's with the right to seek compensation under section 115 (8) and by analogy section 126(7). The purpose of the GDPR is to provide increased safeguards for the personal data of citizens and how their rights can be vindicated effectively. There is therefore merit in the Law Society's view in considering this issue further. Such further consideration would require an assessment of (1) whether and (2) what rights are best vindicated by means of class action suits, to include data protection rights, in addition to what amendments to the rules of procedure of the Courts are required to facilitate such actions e.g. to address how such issues as appeals and awards for both costs and compensation could be addressed fairly and comprehensively. If class action suits are to be permitted then it is an issue that should be addressed comprehensively.

4. Miscellaneous

Consolidate Data Protection legislation for ease of use

- 4.1. The Law Society believes it would be preferable if there was a single piece of legislation post the implementation of GDPR which addressed the key issues concerning data protection law in Ireland. In that regard it is noted that the Data Protection Acts 1988 and 2003 will not be repealed in full and that the implementation of GDPR may warrant further regulations additional to the Data Protection Bill 2018. Given that the individual's right to data protection is a fundamental right, the Law Society is of the view the every effort should be made at the earliest opportunity to seek to consolidate the legislation in this area into a single piece of legislation so that

it is as accessible as possible particularly for ordinary members of the public seeking to vindicate their rights.

Material and territorial scope should be clarified

- 4.2. Whilst Article 2 and 3 of the GDPR do respectively set out the material and territorial scope of the GDPR, it is noted that some EU Member States (such as Germany) have set this out explicitly in their domestic law implementing GDPR. The Law Society sees the merit in such an approach for both individuals and controllers/processors as it will serve to remove ambiguity with regard to the remit and applicability of the Data Protection Bill 2018. Clarity as to what entities the Data Protection Bill 2018 applies to is desirable given the number of signification corporations processing personal data on a large scale in Ireland and the likely queries that might otherwise arise and require judicial clarification.

Guidance required from Commissioner on rejection/dismissal of complaints

- 4.3. The Law Society notes the new legislative framework being proposed for complaint handling as set out in section 107. Currently section 10 (1)(b)(i) of the Data Protection Acts 1988 and 2003 stipulates the rejection by the Office of the Data Protection Commissioner only of complaints that are opined to fall within the strict legal definition of "*frivolous and vexatious*" as recently considered by the Courts. Whilst there are strongly held views in favour of both legislative frameworks, on balance the Law Society considers it desirable that the Office of the Data Protection Commissioner post-GDPR have the suite of options available to it, as is being proposed in section 107(5) of the Data Protection Bill 2018. The new proposed framework is more accessible than the current regime in that it identifies the options available to the Office of the Data Protection Commissioner. In this way the process has more transparency.
- 4.4. Concerns have been expressed that the new complaint handling mechanism is deficient insofar that a written decision will no longer be required to dispose of all complaints. Accordingly, the Society recommends that the Office of the Data Protection Commissioner be required to provide public guidance as to the factors that office will take into account in summarily rejecting or dismissing a complaint under section 107(5) without further action, in the interests of transparency.

Derogation recommended in relation data held by occupational pension scheme trustees

- 4.5. The Law Society wishes to raise a concern in relation to the impact of the GDPR on the practice of trustees of occupational pension schemes holding "death benefit" or "expression of wishes" forms relating to pension scheme members. It is not uncommon for these forms to be held by the trustees in sealed envelopes until the relevant members die. This means that the scheme would hold personal data (which may include special categories of personal data) relating to an unknown data subjects without any clear legal basis to do so.

- 4.6. To deal with this issue, we would suggest that a derogation should be included to permit the processing of special categories of personal data without consent where the processing is necessary for the purposes of making a determination in connection with eligibility for or benefits payable under an occupational pension scheme, the processing is not carried out for the purposes of measures or decisions with respect to the data subject and the processing can reasonably be carried out without the consent of the data subject.”

Retaining Section 11(6) of Data Protection Acts 1988 and 2003 viz. transfer of data

- 4.7. Currently, Section 11(6) of the Data Protection Acts 1988 and 2003 provides an exception to the general doctrine of privity of contract (only parties to a contract may enforce the contract) where a data transfer is done by means of a contract embodying the contractual clauses referred to in paragraph 2 or 4 of Article 26 of the Directive 95/46/EC (the “Directive”), by providing that the data subject has the same rights to enforce a clause conferring rights on him or her relating to such rights, and to compensation or damages for breach of such clauses, as the data subject would have had if he / she had been a party to the contract. In terms of both the ongoing use of standard model clauses and the use of Binding Corporate Rules (in connection with which external enforceability of Binding Corporate Rules by data subjects needs to be demonstrated) by Irish based entities and groups in respect of which the Irish Data Protection Commission will be the lead supervisory authority. Unless a provision equivalent to Section 11(6) of the Data Protection Acts 1988 and 2003 is included in the Data Protection Act 2018, it may not be possible for entities to use these mechanisms.
- 4.8. It will also be difficult to seek approval of Binding Corporate Rules by the Irish Data Protection Commission and under Irish law to ensure the necessary external enforceability due to the doctrine of privity of contract under Irish law.
- 4.9. We submit that the Data Protection Bill 2018 be updated to include a section equivalent to Section 11(6) of the Data Protection Acts 1988 and 2003, as it is important that the standard model clauses and Binding Corporate Rules mechanisms be available to Irish entities, particularly those that are part of broader international groups of companies.
- 4.10. We thank you for considering this submission.

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