# Chapter Five – Reform of the ICO

Date – 17.12.21

## 5.1 Introduction

No questions

## 5.2 Strategy, objectives and duties

### Q5.2.1. To what extent do you agree that the ICO would benefit from a new statutory framework for its objectives and duties?

Somewhat Agree

#### Q5.2.1a. Please explain your answer and provide supporting evidence where possible.

The ICO already undertake work to uphold individuals' information rights, as evidenced by their complaints process and the enforcement action they undertake under DPA and PECR. However, by outlining their strategic objectives in a specific instruction would provide a framework for ensuring these activities are prioritised and provide a basis for oversight and scrutiny of their activity.

If a new statutory framework provided for more regular enforcement and action taken to regulate all of the DP regime then this would be more effective. [The Spanish regulator for example acts against companies for breaches of the entirety of the GDPR](https://www.dataguidance.com/news/spain-aepd-fines-company-1500-failing-provide). Including inadequate transparency notices to data subjects. If the statutory framework allowed for the ICO to regulate more than just breaches of security this would drive standards of compliance up but in this instance increase public trust.

This would support the regulation of use of personal data in AI. The University of Manchester have been undertaking research through a network called SPRITE+ looking at [digital trust and security](http://www.digitalfutures.manchester.ac.uk/what-we-do/cross-cutting-capabilities/digital-trust-security/).

[The University of Manchester is conducting research into privacy and trust](https://www.socialsciences.manchester.ac.uk/dts/research/clusters/privacy-and-trust/) particularly at anonymisation and provenance. There could be more thought about how research shapes the regulatory framework of the ICO.

There were some concerns that resources at the ICO need to be mirrored for the other legislation, they regulate, particularly the Freedom of Information Act, to ensure that priorities are aligned, and one regime does not fall behind another. Especially as they are in places interdependent. The housing sector also identified the need for resources to support the new “Access to Information Scheme” for housing providers as [another linked example of regulatory activity likely to sit with the ICO](https://www.gov.uk/government/publications/the-charter-for-social-housing-residents-social-housing-white-paper/the-charter-for-social-housing-residents-social-housing-white-paper)**.**

### Q5.2.2. To what extent do you agree with the proposal to introduce an overarching objective for the ICO with two components that relate to upholding data rights and encouraging trustworthy and responsible date use respectively?

Somewhat Agree

#### Q5.2.2a. Please explain your answer and provide supporting evidence where possible.

We do not believe the two strands are incompatible, and in fact upholding data rights would encourage trustworthy and responsible data use (and vice versa), since data rights are at the centre of the legislation the ICO regulate. This is evidenced in the title of the legislation itself, being “data protection” - protecting the personal data rights of individuals. However, because of this we would have some concerns if the strands were kept separate as they are inextricably linked.

### Q5.2.3. Are there any alternative elements that you propose are included in the ICO’s overarching objective?

Yes

#### Q5.2.3a. Please explain your answer and provide supporting evidence where possible.

Taking a risk-based approach in relation to the rights of individuals based on a clear threshold relating to impact on both the service and the individual. This could be supported by additional information for individuals relating to their rights such as detail of how the thresholds will be applied, and how to work with the organisation to identify a proportionate approach. However, as society changes and with the digital age pushing this at a fast rate there needs to be a dynamic review period around what those thresholds are.

### Q5.2.4. To what extent do you agree with the proposal to introduce a new duty for the ICO to have regard to economic growth and innovation when discharging its functions?

Somewhat Disagree

#### Q5.2.4a. Please explain your answer and provide supporting evidence where possible.

The two overarching objectives referred to in section 5.2.1 (upholding individuals rights and encouraging trustworthy and responsible data use) should be the ICO’s focus. There is no reason this approach would negatively impact on growth and innovation, the two are not mutually exclusive. Any impact on growth and innovation is from a failure of Data Controllers to understand what the existing legislation enables.

We feel that clear and effective guidance from the ICO with practical examples of application, could assist organisations in their interpretation. In addition, the horizon scanning referenced in the consultation proposal could lead to prioritisation of emerging and high-risk themes in a timelier manner.

Privacy programmes could enable this if there were obligations about what is minimally expected in the makeup of those programmes and how they applied to the wider business. Regulation of quality of these programmes would support responsible growth and innovation.

There is also a difference between the purpose of the ICO and other regulators such as Ofgem and Ofqual. The latter two are economic regulators trying to create markets whereas the ICO’s role is to ensure individuals information rights are upheld. There would need to be clear and transparent framework set out that stipulated how the ICO would balance the rights and freedoms of individuals with the public interest of economic growth and innovation. We have seen this play out in the pandemic where use of data for innovation and scientific research was clearly in the wider overriding public interest. However, to balance that on a day-to-day basis would be difficult as it takes time to consider all the factors to mitigate unintended harms which are more reasonably accepted in a global emergency.

In addition, there is a concern about introducing contradictory objectives, and concerns that the ICO would change into a different kind of regulator who is less likely to uphold individual rights and responsible data, if the ICO are not given additional resources to meet this remit.

### Q5.2.5. To what extent do you agree with the proposal to introduce a duty for the ICO to have regard to competition when discharging its functions?

Somewhat Disagree

Q5.2.5a. Please explain your answer and provide supporting evidence where possible**.**

As evidenced in para 332-334 of the proposal, the ICO already works closely with the CMA. If the ICO were to be asked to take competition into consideration when discharging their functions this would require the ICO to overlap with the functions of the CMA. This would cause confusion and place an unnecessary burden on the ICO.

This kind of duty conflicts with the responsibilities of other organisations such as local and combined authorities, and business networks, whilst the ICO needs to do the job of regulating information rights.

### Q5.2.6. To what extent do you agree with the proposal to introduce a new duty for the ICO to cooperate and consult with other regulators, particularly those in the Digital Regulation Cooperation Forum (CMA, Ofcom and FCA)?

Somewhat Agree

#### Q5.2.6a. Please explain your answer and provide supporting evidence where possible.

As the ICO already cooperates and consults with other regulators this would be a sensible step, although we would not limit this to those in the Digital Regulation Cooperation Forum since the ICO do work outside of the digital arena as well.

### Q5.2.7. Are there any additional or alternative regulators to those in the Digital Regulation Cooperation Forum (CMA, Ofcom and FCA) that the duty on the ICO to cooperate and consult should apply to?

Yes

#### Q5.2.7a. Please explain your answer and provide supporting evidence where possible.

The duty should include all regulators processing personal data and/or complaints e.g., Local Government and Social Care Ombudsman. For example, Greater Manchester Combined Authority currently has fewer powers around the use of data but is working closely with partners in the region to create a mature information governance system across the city region. There is also too much focus on the technology, since the lawfulness and ethics of data use needs to be addressed first, before building a technical ecosystem, and GMCA have been working on just this approach in our work on building an Information Strategy, and we have worked closely with the Centre for Data Ethics and Innovation on the ethical approach to use of data. Our experiences would be useful for the ICO to be aware of in a more proactive manner.

### Q5.2.8. To what extent do you agree with the establishment of a new information sharing gateway between relevant digital regulators, particularly those in the DRCF?

Somewhat Agree

#### Q5.2.8a. Please explain your answer and provide supporting evidence where possible.

It would make sense to create and information sharing gateway for the sharing of information between regulators, to ensure that joint working can take place between the relative organisations with ease. This type of working is in place within the public sector already, such as in the digital care records being rolled out by the NHS across health and social care nationally.

### Q5.2.9. Are there any additional or alternative regulators to those in the DRCF (ICO, CMA, Ofcom and FCA) that the information sharing gateway should include?

Yes

#### Q5.2.9a. Please explain your answer and provide supporting evidence where possible.

The gateway should include all regulators processing personal data and/or complaints e.g., Local Government and Social Care Ombudsman. This would allow the inclusion of sector specific regulators.

### Q5.2.10. To what extent do you agree with the Government’s proposal to introduce specific language recognising the need for the ICO to have due regard to public safety when discharging its functions?

Neither Agree nor Disagree

#### Q5.2.10a. Please explain your answer and provide supporting evidence where possible.

We believe the ICO already take public safety into consideration when discharging its functions, since there is always a balancing test to be made where data processing is in the public interest. Evidence of this will be present in the files of the ICO where investigations do not result in enforcement action being taken (which the public do not have access to). Human Rights legislation is at the heart of data protection legislation, and public safety would fall under this banner.

During discussions with partners across Greater Manchester, it was noted that the ICO have never appeared to act in a way that compromises public safety, and in our experience, they have always worked with organisations to enable data processing for policing, security and public safety. For example, during the early stages of the Covid-19 pandemic, the ICO were happy to help GMCA and local authority partners in public health navigate the complexities of local and national contact tracing activity in a way that enabled us to put public safety first in a way that also enabled compliance with UK GDPR and DPA18.

However, if what is intended here is that a clear steer is given to the ICO that they should not regulate law enforcement processing or processing for intelligence services, then this would concern us. This is an ethical issue, and we would need more information to provide a more detailed response.

### Q5.2.11. To what extent do you agree with the proposal for the Secretary of State for DCMS to periodically prepare a statement of strategic priorities which the ICO must have regard to when discharging its functions?

Neither Agree nor Disagree

#### Q5.2.11a. Please explain your answer and provide supporting evidence where possible.

Strategic priorities given to the ICO by government should be made by parliament as a whole. The involvement of the Secretary of State without parliament’s agreement would constitute interference and remove the independence of the ICO. By allowing parliamentary approval this provides checks and balances against this interference.

However, provision of information on strategic priorities for the government is useful information for any regulatory body and could strengthen joined up working across central and local government and the wider public sector (including health) by providing the Commissioner with information on the changing landscape in government. However, an ever increasing/changing list of priorities the ICO needed to ‘have regard to’ including economic growth, innovation and competition would be self-defeating. Additional information should be provided on what ‘have regard to’ actually means, how it would interface with the fundamental role of the ICO and how it would be measured. We would like to be reassurance by way of confirmation that the statement in para 346 will be upheld: that this will not conflict with statutory objectives and duties.

### Q5.2.12. To what extent do you agree with the proposal to require the ICO to deliver a more transparent and structured international strategy?

Somewhat Agree

#### Q5.2.12a. Please explain your answer and provide supporting evidence where possible.

As evidenced by the ICOs response to this consultation, the international strategy does need more transparency, and formalising this requirement would be beneficial.

### Q5.2.13. To what extent do you agree with the proposal to include a new statutory objective for the ICO to consider the Government's wider international priorities when conducting its international activities?

Neither Agree nor Disagree

#### Q5.2.13a. Please explain your answer and provide supporting evidence where possible.

The ICO should maintain its independence as regulator and not take instruction or influence from the government. However, it would be acceptable to take account of parliament’s views on international activities, albeit the ICO should prioritise upholding the data rights of individuals and transparent and responsible data use when considering international work and collaboration.

## 5.3 Governance model and leadership

### Q5.3.1. To what extent do you agree that the ICO would benefit from a new governance and leadership model, as set out above?

Strongly Agree

#### Q5.3.1a. Please explain your answer and provide supporting evidence where possible.

The formalisation of the structure would provide clearer governance of the ICO and provide resilience and diversity. In particular the addition of a Board with an independent Chair from the Commissioner would mean less reliance on one individual. The diversity of the Board is important, since ensuring the board is representative of society's diversity make up, this would go a long way to creating trust with the public. Having a Board would also ensure more scrutiny of the work of the Commissioner.

### Q5.3.2. To what extent do you agree with the use of the Public Appointment process for the new chair of the ICO?

Strongly Agree

#### Q5.3.2a. Please explain your answer and provide supporting evidence where possible.

The proposal is an existing established process and providing this is undertaken with full parliamentary oversight and involvement this would continue to work.

### Q5.3.3. To what extent do you agree with the use of the Public Appointment process for the non-executive members of the ICO's board?

Somewhat Disagree

#### Q5.3.3a. Please explain your answer and provide supporting evidence where possible.

If the role of the non-Exec members is to provide oversight and scrutiny of the work of the commissioner, it is vital that this is not undertaken by parliament. By removing the involvement of parliament then the public are likely to have more trust in the work of the non-exec members, since the process of appointment is less likely to be seen as “political”.

### Q5.3.4. To what extent do you agree with the use of the Public Appointment process for the new CEO of the ICO?

Somewhat Disagree

Q5.3.4a. Please explain your answer and provide supporting evidence where possible**.**

As above, the CEO should not be appointed in any way which could be interpreted as having political interference. This is so that the work of the ICO is not entirely driven by parliamentary appointments.

### Q5.3.5. To what extent do you agree that the salary for the Information Commissioner (i.e. the proposed chair of the ICO in the future governance model) should not require Parliamentary approval?

Somewhat Disagree

#### Q5.3.5a. Please explain your answer and provide supporting evidence where possible.

Parliamentary oversight of the pay of the commissioner is likely to put more trust in the appointment than if the Secretary of State is to determine the level of pay. This can be demonstrated by the concerns raised during the Covid19 pandemic about the granting of contracts to companies with links to MPs.

## 5.4 Accountability and Transparency

### Q5.4.1. To what extent do you agree with the proposal to strengthen accountability mechanisms and improve transparency to aid external scrutiny of the ICO's performance?

Strongly Agree

#### Q5.4.1a. Please explain your answer and provide supporting evidence where possible.

As with any organisation in any sector, greater transparency and scrutiny of the ICO’s performance is crucial to ensuring public trust in the regulator.

### Q5.4.2. To what extent do you agree with the proposal to introduce a requirement for the ICO to develop and publish comprehensive and meaningful key performance indicators (KPIs) to underpin its annual report?

Somewhat Agree

#### Q5.4.2a. Please explain your answer and provide supporting evidence where possible.

The ICO has faced criticism for being an ineffective regulator compared with its EU peers. Some performance monitoring is necessary to assess its effectiveness as a regulator.

Whilst it is always good to see how well a publicly funded body is performing, we would be concerned that the work of the commissioner would become focussed on meeting those KPIs rather than focussing on its key objectives of upholding data rights and encouraging trustworthy and responsible data use. There would be a danger of their compliance work becoming a tick box exercise to serve a particular number of enforcement notices in a year for example, rather than taking action as appropriate. As such, any KPIs should service a specific purpose and not be reporting for reporting’s sake. For example, any KPIs relating to the issuing of monetary penalties would be destructive and seen as a government initiative to increase income.

### Q5.4.3. To what extent do you agree with the proposal to require the ICO to publish the key strategies and processes that guide its work?

Strongly Agree

#### Q5.4.3a. Please explain your answer and provide supporting evidence where possible.

Transparency is one of the key information rights the ICO upholds in both its work within data protection and access to information. It would therefore be appropriate that the ICO are themselves required to meet specific transparency obligations.

However, we note that the ICO already seem to have something in place to meet this requirement with a number of documents published. It would therefore be useful to be provided with greater detail of the proposals intended.

### Q5.4.4. What, if any, further legislative or other measures with respect to reporting by the ICO would aid transparency and scrutiny of its performance?

Don’t Know

#### Q5.4.4a. Please explain your answer and provide supporting evidence where possible.

As above, the ICO already publish a lot of information that would be covered by a proposal to increase transparency and scrutiny. Therefore, we feel more detail is needed on this proposal in order to form a view.

#### Q5.4.5. Please share your views on any particular evidence or information the ICO ought to publish to form a strong basis for evaluating how it is discharging its functions, including with respect to its new duties outlined in section 5.4.

In terms of producing guidance and policy, it would be useful for the ICO to be required to provide a timeline of forthcoming documentation. It would also be useful for them to be required to provide a date of application to all guidance issued, including that provided in website form (as opposed to formal documents accessed via the website).

### Q5.4.6. To what extent do you agree with the proposal to empower the DCMS Secretary of State to initiate an independent review of the ICO’s activities and performance?

Somewhat Disagree

Q5.4.6a. Please explain your answer and provide supporting evidence where possible**.**

All organisations should expect to have some level of scrutiny over their activities. However, this may impact independence if a review moves from performance and activities to more fundamental elements relating to priorities, or the type/content of advice and guidance issued by the Commissioner. We feel strongly that the Secretary of State should not be given powers to take action towards an independent regulator. Any independent review should be undertaken with the agreement of parliament to ensure there is no political bias or interference towards the regulator.

### Q5.4.7. Please share your views on what, if any, criteria ought to be used to establish a threshold for the ICO's performance below which the Government may initiate an independent review.

We have no views on this question.

## 5.5 Codes of Practice and Guidance

### Q5.5.1. To what extent do you agree with the proposal to oblige the ICO to undertake and publish impact assessments when developing codes of practice, and complex or novel guidance?

Neither Agree nor Disagree

#### Q5.5.1a. Please explain your answer and provide supporting evidence where possible.

The publication of impact assessments for codes of practice and complex or novel guidance would assist data controllers to better understand the considerations made behind the decision, as well as highlight the importance of the particular legislative area and the guidance etc. That the impact assessment relates to.

However, upholding data rights and encouraging trustworthy and responsible use of data should be required no matter what the impact on organisations processing personal data. Protection of the individual's personal data and rights should be at the centre of the development of codes or practice and complex and novel guidance. The ICO should predominantly take account of how the law should be implemented.

### Q5.5.2. To what extent do you agree with the proposal to give the Secretary of State the power to require the ICO to set up a panel of persons with expertise when developing codes of practice and complex or novel guidance?

Neither Agree nor Disagree

#### Q5.5.2a. Please explain your answer and provide supporting evidence where possible.

The ICO already seeks to do this in the case of sector specific or technical guidance in which it lacks expertise. They also undertake wide consultation on new guidance etc. which it expects those with expertise to contribute to. Formalising the inclusion of topic or sector specific experts would support understanding and development of guidance particularly across novel or technical areas.

The ICO would need to select appropriate experts to ensure independence rather than having experts imposed on them, to ensure they maintain their independence as a regulator.

### Q5.5.3. To what extent do you agree with the proposal to give the Secretary of State a parallel provision to that afforded to Houses of Parliament in Section 125(3) of the Data Protection Act 2018 in the approval of codes of practice, and complex and novel guidance?

Strongly Disagree

#### Q5.5.3a. Please explain your answer and provide supporting evidence where possible.

This could be a conflict of interests and reduce the independence of the regulator and therefore confidence of data controllers in the guidance. Data controllers are legally responsible for compliance with legislation and need confidence that guidance is objective and not slanted to achieve a particular governmental purpose. In meeting the requirements advised, organisations can be confident that they are acting lawfully. There are already publication delays built in to the DPA2018 but introducing any unnecessary delays could result in data controllers needing to review decisions taken to re-align their approaches. As the consultation refers to the ICO being agile, additional bureaucracy would not be beneficial. As with our earlier views on the involvement of government and/or the Secretary of State, we feel that powers to control approval of codes of practice, complex and novel guidance should sit with parliament, to ensure that independence of the ICO is maintained.

### Q5.5.4. The proposals under section 5.5. would apply to the ICO's codes of practice, and complex or novel guidance only. To what extent do you think these proposals should apply to a broader set of the ICO's regulatory products?

Strongly Disagree

#### Q5.5.4a. Please explain your answer and provide supporting evidence where possible.

This could be a conflict of interests and reduce the independence and therefore confidence of data controllers in regulatory products. The proposed requirement to engage experts at Q5.5.2 would negate this requirement.

### Q5.5.5. Should the ICO be required to undertake and publish an impact assessment on each and every guidance product?

No

#### Q5.5.5a. Please explain your answer and provide supporting evidence where possible.

Increasing the level of documentation required during the development of guidance would negate the ability of the ICO to operate in a more agile way. Protection of the individual's personal data and rights should be at the centre of the development of all guidance. The ICO should predominantly take account of how the law should be implemented. However, an impact statement on how the codes of practice or complex or novel guidance uphold data rights and encourage trustworthy and responsible use of data would be welcomed to highlight the importance of the guidance.

## 5.6 Complaints

### Q5.6.1. To what extent do you agree that the ICO would benefit from a more proportionate regulatory approach to data protection complaints?

Neither Agree nor Disagree

#### Q5.6.1a. Please explain your answer and provide supporting evidence where possible.

Taking a risk-based approach to data protection complaints - A number of Data Controllers already have processes in place to investigate and review data protection complaints. The ICO then undertakes a 3rd investigation. This is often generated by other unrelated matters e.g., the data subject's dissatisfaction with outcome of a matter or complaint which may have been considered internally or by another regulatory body. The ICO online form asks what more the data subject thinks the controller can do to resolve the complaint but does not currently ask what outcome the data subject is looking for. It is also difficult to understand the number of complaints taken up by the ICO in relation to those received. This information would provide some assurance that consideration is given at the first point of contact.

The increase in complaints to the ICO referenced in the consultation document and the ICO website themselves (18,300 complaints received in 2016/17, rising to 30,000 in 2020), is likely to be explained in part by the public’s increased awareness of their rights thanks to the media coverage of GDPR. It is difficult to suggest a way in which the ICO could handle complaints in a more proportionate way and still uphold the individuals’ rights to make a complaint to the regulator.

There were concerns expressed during discussions on this specific proposal that by weakening the ICO’s requirement to data protection complaints that this would force individuals down the litigation route, and that this would drive inequalities based on the affordability of this approach.

### Q5.6.2. To what extent do you agree with the proposal to introduce a requirement for the complainant to attempt to resolve their complaint directly with the relevant data controller prior to lodging a complaint with the ICO (with guidance and exemptions)?

Somewhat Agree

#### Q5.6.2a. Please explain your answer and provide supporting evidence where possible.

Data controllers benefit from managing complaints as it highlights areas of good or poor practice in relation to the issue raised. This can be used proactively by the organisation and is a useful tool to feed into procedural updates and better transparency/explanation of what is a complex area of law. Improved guidance on complaints across a range of areas would be beneficial to support this approach. It needs to be recognised that a number of complaints by data subjects are not vexatious at the point of the initial investigation but may become so where data subjects are, for example, not satisfied with the outcome and approach the ICO.

However, the ICO already requires the individual to make a complaint with the data controller before accepting the complaint themselves. This is evidenced in the [complaints form on the ICO website](https://ico.org.uk/make-a-complaint/your-personal-information-concerns/personal-information-concerns/personal-information-concerns-report/), which specifically asks if the complainant has raised their issue with the data controller. If you answer “no” to this question, the form closes, and the complainant is asked to raise their concern with the data controller first. Formalising this process will help organisations and the ICO to be able to resolve complaints in a more timely manner, since there is likely to be a lot of publicity around such a legislative change, such as there was when GDPR came into force.

### Q5.6.3. To what extent do you agree with the proposal to require data controllers to have a simple and transparent complaints-handling process to deal with data subjects' complaints?

Somewhat Agree

#### Q5.6.3a. Please explain your answer and provide supporting evidence where possible.

#### Please also indicate what categories of data controllers, if any, you would expect to be exempt from such a requirement.

We believe that all complaints to organisations should be made using the same process where possible. In public bodies, the complaints policy for the organisation is usually the one used corporately as well and ensures that complaints are handled appropriately. We would not exempt any controllers from such a requirement, as a complaints policy will be easier for smaller organisations with fewer departments or layers of management to implement as they have fewer business processes to consider when drafting a policy.

### Q5.6.4. To what extent do you agree with the proposal to set out in legislation the criteria that the ICO can use to determine whether to pursue a complaint in order to provide clarity and enable the ICO to take a more risk-based and proportionate approach to complaints?

Strongly Agree

#### Q5.6.4a. Please explain your answer and provide supporting evidence where possible.

Outlining criteria for handling complaints would be useful, firstly as this can be used to inform individuals ahead of making their complaint and thereby set reasonable expectations. Secondly, this would provide useful clarity for data controllers as it is sometimes difficult to determine how decisions are taken in relation to complaints. Responses from ICO staff saying the organisation has more work to do (as is the case now) are not useful.

## 5.7 Enforcement powers

### Q5.7.1. To what extent do you agree that current enforcement provisions are broadly fit for purpose and that the ICO has the appropriate tools to both promote compliance and to impose robust, proportionate and dissuasive sanctions where necessary?

Neither Agree nor Disagree

#### Q5.7.1a. Please explain your answer and provide supporting evidence where possible.

The current provisions under UK GDPR provide a proportionate set of sanctions which can be escalated as appropriate. These escalations provide evidence for the ICO in terms of why the next step in the sanctions has taken place and makes it more difficult for organisations to argue that the sanctions were unfairly given. However, the ICO have only issued 6 monetary penalties under GDPR, compared to over 300 issued by the Spanish regulator so there is an argument perhaps to say that they need to use their powers more widely. It is also apparent that other regulators, again including the Spanish regulator as well as others across the EU will [issue monetary penalties](https://www.enforcementtracker.com/) for more “minor” breaches such as a failure to issue a privacy notice or failing to dispose of data within retention guidelines.

Where enforcement action is taken as a result of complaints, the proposal to be “more proportionate” in approach to complaints (section 5.6) will directly impact on the ICO being aware of failings in organisations. Lower-level breaches of the legislation happening repeatedly are likely to be an indicator of something bigger going on within that organisation, or a warning of a more serious breach likely to follow. It would be better to continue to investigate lower-level concerns in order to prevent the need for enforcement action in the first place.

### Q5.7.2. To what extent do you agree with the proposal to introduce a new power to allow the ICO to commission technical reports to inform investigations?

Strongly Agree

#### Q5.7.2a. Please explain your answer, and provide supporting evidence where possible, including:

#### Whether there are any other risks or benefits you can see in this proposal

#### If you foresee any risks, what safeguards should be put in place

Although costly, technical reports would enable to ICO to uncover any potential criminal wrongdoing, or any attempted “cover up” during an investigation. In addition, in cases where an investigation is complex or deal with innovative processing, part of the assurance process should include an independent assessment which is not influenced by the organisations involved. This would allow the ICO to obtain an independent, specialist view and support organisations to improve compliance as a result of the outcome of the assessment.

### Q5.7.3. Who should bear the cost of the technical reports: the organisation (provided due regard is made to their financial circumstances) or the ICO?

If the legislation allowed subsequent cost recovery as part of the ICO enforcement powers this would enable proportionate allocation of costs dependent upon the outcome of the investigation.

### Q5.7.4. If the organisation is to pay, what would an appropriate threshold be for exempting them from paying this cost?

We are unfamiliar with the cost of such technical reports so am unable to comment.

### Q5.7.5. To what extent do you agree with what the government is considering in relation to introducing a power which explicitly allows the ICO to be able to compel witnesses to answer questions at interview in the course of an investigation?

Somewhat Agree

#### Q5.7.5a. Please explain your answer and provide supporting evidence where possible. In particular, please give your views on any benefits or risks you envisage and what measures could mitigate these risks.

This may enable the ICO to speed up investigations where witnesses do not respond to requests for information. However, this would need sanctions of its own to be effective. [In a recent enforcement action taken against First Choice Selection Services Limited](https://ico.org.uk/media/action-weve-taken/enforcement-notices/4017978/first-choice-selection-services-limited-en.pdf), a complaint made on 7 May 2020 was resolved on 31 March 2021 when the ICO served the enforcement notice. The length of time taken was as a direct result in delays from First Choice in responding to correspondence from the ICO. If the ICO had had power to compel provision of information with meaningful sanctions, this enforcement action may not have resulted in the issuing of an enforcement notice.

However, dependent upon the type of investigation, witnesses may be dis-incentivised to answer question without adequate legal representation due to concerns relating to any subsequent litigation or criminal charges. This could impact where the data controller did not agree to provide such support to a staff member or for smaller controllers.

### Q5.7.6. To what extent do you agree with extending the proposed power to compel a witness to attend an interview to explicitly allow the ICO to be able to compel witnesses to answer questions in the course of an investigation?

Somewhat Agree

#### Q5.7.6a. Please explain your answer and provide supporting evidence where possible. In particular, please give your views on:

#### Any benefits or risks you envisage

#### What, if any, additional safeguards should be considered

As above, if an interview is deemed necessary by the ICO, power to compel this may prove useful in expediating investigations.

### Q5.7.7. To what extent do you agree with the proposal to amend the statutory deadline for the ICO to issue a penalty following a Notice of Intent in order to remove unnecessary deadlines on the investigations process?

Strongly Agree

#### Q5.7.7a. Please explain your answer and provide supporting evidence where possible.

Following issuing the Notice of Intent the ICO is likely to receive mitigation arguments from the affected organisations which in turn will take time to investigate. In particularly complex or large cases, such as the action against Marriott and BA during 2019/2020, the six-month time frame has been demonstrated to be difficult if not impossible to meet. Extending this timeframe would alleviate this and ensure investigations can be as thorough as necessary.

This would be appropriate in complex cases but would need some parameters in place to ensure that the reason for the extension was not based on capacity issues at the ICO. Data Controllers need to finalise and manage the impact of enforcement action in a timely way.

### Q5.7.8. To what extent do you agree with the proposal to include a ‘stop-the-clock’ mechanism if the requested information is not provided on time?

Strongly Agree

#### Q5.7.8a. Please explain your answer and provide supporting evidence where possible.

The ICO should not be required to include the time an organisation takes to respond in its statutory timescales. This would mirror the ability for organisations to “stop the clock” when requesting further information from individuals when handling information rights requests. It would also mean that organisations could not “run down the clock” by being unduly slow to respond.

### Q5.7.9. To what extent do you agree with the proposal to require the ICO to set out to the relevant data controller(s) at the beginning of an investigation the anticipated timelines for phases of its investigation?

Somewhat Agree

#### Q5.7.9a. Please explain your answer and provide supporting evidence where possible.

This provides clarity for data controllers and would be useful in complex cases so that they can appropriately resource the investigation and any backfill required for day-to-day business operations. However, this should not prevent the ICO from investigating as thoroughly as required.

## 5.8 Biometrics commissioner and surveillance camera commissioner

### Q5.8.1. To what extent do you agree that the oversight framework for the police's use of biometrics and overt surveillance, which currently includes the Biometrics Commissioner, the Surveillance Camera Commissioner and the ICO, could be simplified?

Somewhat Agree

#### Q5.8.1a. Please explain your answer and provide supporting evidence where possible.

On the proviso that the ICO receives appropriate resourcing for this we are in support of this proposal. Having multiple codes of practice with slightly differing approaches makes it difficult for organisations of all kinds to understand, follow and comply with. At the very least where the work overlaps the commissioners should be required to produce joint guidance and policy to make compliance easier for organisations, and for their respective responsibilities to be easier to understand by the public.

### Q5.8.2. To what extent do you agree that the functions of the Biometrics Commissioner and the Surveillance Camera Commissioner should be absorbed under a single oversight function exercised by the ICO?

Strongly Agree

#### Q5.8.2a. Please explain your answer and provide supporting evidence where possible.

The current position of having more than 1 regulator with oversight of a single areas is unnecessarily complicated. It is difficult for data controllers to assess and comply with different sets of guidance and compliance regimes. An example of this would be CCTV with both the Surveillance Camera Commissioner and ICO active in this space. It would also be beneficial for organisations if the tools to show adequate compliance were simplified and less burdensome. This would lead to a higher level of engagement and compliance by organisations. However, care should be taken to ensure the functions are resourced appropriately.

## 5.9 Further questions

### Q5.9.1. In your view, which, if any, of the proposals in ’Reform of the Information Commissioner’s Office’ would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

All the proposals would impact on people who identify with protected characteristics under the Equality Act 2020, since these are broadly in line with the categories of special category data within the UKGDPR and DPA18 which require additional care and safeguards, and as a result are likely to attract the attentions of the ICO. Where the characteristics are not special category data (such as marriage and civil partnership or maternity), this information is still likely to be considered more sensitive to individuals than other less sensitive information such as demographics and are therefore also more likely to require attention from the ICO.

As we have outlined in response to question 5.6.1 there would also be a threat to equality if smaller complaints would no longer be dealt with by the ICO since the only other avenue open to individuals would be litigation which would be challenging for those on low incomes. In addition, the proposal for data controllers to have control of complaints will reduce transparency by removing the oversight of the ICO.

### Q5.9.2. In addition to any of the reforms already proposed in ’Reform of the Information Commissioner’s Office’ (or elsewhere in the consultation), what other reforms do you think would be helpful to improve the effectiveness of the ICO?

The ICO does a good job with regards to guidance provided to local authorities and those organisations with a higher level of data protection compliance maturity. However, many organisations are still not confident dealing with issues related to data, highlighted during our cross-sector discussions as being particularly relevant to small charities. We would like to see a proper focus on this in terms of providing support to organisations who lack confidence so that they can appropriately uphold data rights.

We also felt that the ICO lacks sufficient bite in the technical area due to their history as being primarily an organisation providing advice on the legislation. As a result, their interface with technology is underdeveloped and needs better resourcing. This can be demonstrated by the call for evidence issued by [the ICO in October 2021 regarding use of age assurance technology](https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/call-for-evidence-on-the-use-of-age-assurance/). Whilst it is important that the ICO seek advice from sector experts, in order to fully deliver on regulating technology they need to be appropriately resourced to develop their own capacity in these technical areas of application.

**End of chapter Q. Do you have any general comments about this chapter not yet captured by your responses to the questions above?**

The consultation appears to favour a reduction in autonomy and independence for the ICO. This is a significant element for data controllers particularly those operating in the public sector. A quasi-independent commissioner would not have the same level of trust if organisations felt that there was an unnecessary level of political influence. A change to a model of this type would be disruptive and subject to a level of change which would destabilise the UK approach to data protection. It would also impede the Commissioners worldwide influence as other jurisdictions would not have the same level of confidence in the post holder's objectivity.

The proposal seems to be about making it easier to support economic growth and sharing of data. UK GDPR and DPA18 currently balance movement of data with protecting rights, whereas this proposal as a whole seems to be changing things about transparency and fairness. When you read chapter five alongside chapter one it seems that the ICO may become a different regulator, with a different function and focus and changing legislation about people’s rights, in particular transparency, fairness.

In places the proposal seems to make comparisons to the approaches taken by other regulators such as Ofcom, and also seeks to increase the remit of the ICO. If this were to be the approach decided upon, then we feel it is important to highlight the disparity in resourcing the work of regulators. For example, the ICO operating expenditure in 2020/2021 was £56 million, whilst the Health and Safety Executive (comparable as an organisation focussed on compliance with legislation) had an operating expenditure in 2020/2021 of £223 million. In order to deliver on the proposals as well as the ICOs current remit whilst the processing of data becomes more important to society, we feel the ICO needs to receive more funding resources.

This under resourcing may in part explain the perceived lack of enforcement action taken by the ICO (see section 5.7.1 above), which in turn leads to the public having a lack of trust in the regulator.

There is also a need for the ICO to provide more support to smaller organisations in the form of training. A colleague within Greater Manchester who supports the VCSE sector with regards to data protection reflected that she was unaware of any organisations they support having any data breaches. This seemed unlikely given the number of low-level breaches reported within Local Authorities and Health organisations (anecdotal through our networks) and is believed to be down to a lack of resources within the VCSE sector to provide training to staff. It would be useful for the ICO or government to provide some free or low-cost e-learning packages aimed at this sector.

Group discussions within our region also revealed concerns about the sharing of data for “emergency” reasons and the need to appropriately define this term in line with the legislation, and to ensure that bodies dealing with “emergency” data sharing powers collaborate with the ICO to enforce these powers. Examples of “emergency” data sharing include the sharing of “shielded patient” data for the purposes of providing support to those shielding during the pandemic, sharing of data for covid-19 contact tracing purposes, sharing of information for intelligence purposes for example in the immediate aftermath of the Manchester Arena bombing, sharing data for policing purposes where time is of the essence (e.g. a suspect in custody for a short period of time where CCTV may be useful in order to charge or release the suspect), or sharing of data in order to deal with the climate “emergency”. All of these purposes may be valid, but attract a different level of urgency, and will require handling in different ways to comply with different pieces of legislation, not all of which fall under the ICO’s remit.