Market Research Society Response
DCMS consultation *Data: a new direction*

19 November 2021

Contents

About the Market Research Society (MRS)

1. The Market Research Society (MRS) is the UK professional body for market, opinion and social research, insight and analytics. MRS is the world's largest and oldest research association, representing 5,000 individual members and over 600 accredited Company Partners in over 50 countries and has a diverse membership of individual researchers within agencies, independent consultancies, client-side organisations, the public sector and the academic community.
2. MRS' expertise as the lead authority on market, opinion and social research is recognised around the globe. MRS provides the policy and standards expertise for the UK plus a number of global associations including EFAMRO the European Research Federation and EPHMRA the international healthcare research association. MRS also has close business ties with other research associations around the world via its participation in the Global Research Business Network (GRBN) plus formal agreements with associations in the US, Australia and Japan.
3. MRS promotes, develops, supports and regulates standards and innovation across market, opinion and social research and data analytics. MRS regulates research ethics and standards via its Code of Conduct. All individual MRS members and Company Partners agree to regulatory compliance of all their professional activities via the MRS Code of Conduct and its associated disciplinary and complaint mechanisms.
4. More information about MRS can be found on the MRS website: https://www.mrs.org.uk/
5. **MRS is joined in this consultation response by BHBIA[1], the British Healthcare Business Intelligence Association**, an industry association representing companies involved in healthcare market research and data analytics. Its members' work supports the measurement and understanding of disease, physician and patient needs, and informs drug development.

FOREWORD

1. The Market Research Society (MRS) and its members welcome the opportunity to respond to this consultation and that the UK Government is taking an evidence-based approach to develop these proposals.
2. We agree that there is a lot of untapped value in the data being held in the private and public sectors and if unlocked could have a transformative impact on the UK's economy.
3. **Whilst we recognise that there are potential benefits in evolving the UK's data protection regime it is important to note that the EU remains a key market for market, opinion and social research and businesses have invested heavily in becoming GDPR-compliant. We fully understand that EU data adequacy does not**

[1] www.bhbia.org.uk

require verbatim the same laws, but it does require equivalent outcomes. Hence, we think it is worth emphasising the significant trade off risks should the UK opt to diverge significantly from the EU's data protection regime.

- Changes to the current regime could mean that businesses operating in the UK and EU would have to significantly increase compliance costs and efforts.
- It could risk the UK's data adequacy status.
- Significant changes to the regulatory regime generate uncertainty among UK business, which can have a negative impact on innovation and growth.

4. Looking further afield, we very much support the UK Government's aim of championing international dataflows, and we agree with the principle that unnecessary barriers to the international free flow of data should be removed. However, we would like to make the following comments:
   - Given that the UK is a much smaller market compared to the US, EU & China we wonder what consideration has been given in terms of protecting the UK's domestic data assets which lack the same scale advantages that other countries or trade blocs may have. If there is no reciprocal access, will the UK government continue to champion open international data flows?
   - We think it is important that the government's own data adequacy assessment remains apolitical and a purely technical decision. This will ensure that the public and business have trust in the process, and it is not simply "traded-off" in order to secure any future trade agreements. We recommend that the UK Government publishes details of data adequacy assessments to increase transparency on how the government arrives at these decisions.
5. This response answers the questions which are most relevant to our professional and sector. We have not answered all of the questions posed.

About Market, Opinion and Social Research

6. Market, opinion and social research means the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making. The profession operates within the framework of international and national Codes, ISO and BS Standards, national standards and scientific journals.
7. Market, opinion and social research uses rigorous scientific methods and furthers public interest.
8. Market, opinion and social research plays a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences and measure key performance indicators.

Research in of itself does not seek to change or influence opinions or behaviour. Unlike marketing, advertising, or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers to test their products or messages, it is not a commercial communication.

About the UK Market, Opinion and Social Research Sector

9. There are circa 3,100 active registered businesses in the UK listing market research and opinion polling as their primary activity, and a further 1,700 listing market research and opinion polling as a subsidiary activity.
10. **The UK research sector is a great UK success story.** The UK is a £7bn[2] market for research and is the second largest research market in the world, second only to the US.
11. The UK research sector is recognised as leading the way in the development of creative and innovative research approaches including maximising the opportunities afforded by the development of new digital technologies. The methodological issues are explored and debated in the academic journal, the International Journal of Market Research (IJMR)[3].

MRS is available and would welcome further engagement and discussion on any aspects of this response.

For additional information or further discussion please contact Debrah Harding, Managing Director Debrah.harding@mrs.org.uk

[2] See Industry size and growth rates: https://www.mrs.org.uk/resources/industry-size

[3] For more information about IJMR: https://journals.sagepub.com/home/mre

Chapter 1- Reducing barriers to responsible innovation

Research Purposes

Q1.2.1. To what extent do you agree that consolidating and bringing together research-specific provisions will allow researchers to navigate the relevant law more easily?

Somewhat agree

12. We agree that research-specific provisions – spread across the UK GDPR and the DPA 2018 – should be consolidated and brought together. We strongly suggest for this process to be carried out in close cooperation with the ICO.

Q1.2.2. To what extent do you agree that creating a statutory definition of 'scientific research' would result in greater certainty for researchers?

Somewhat agree

13. We agree that creating a statutory definition of scientific research could provide greater certainty. We strongly suggest for this process to be carried out in close cooperation with key stakeholders such as MRS plus the data protection regulator, the ICO.
14. Any statutory definition of scientific research must be broad in its scope and application. For example, market, opinion and social research is currently included within the application of Article 89(1) and this should continue.
15. In so doing, the Government should strongly consider if any proposed legislative changes would make participation in cross-border research more difficult. As noted in the consultation, it's crucial that that legislative reform enables international interoperability.

Q1.2.3. Is the definition of scientific research currently provided by Recital 159 of the UK GDPR ('technological development and demonstration, fundamental research, applied research and privately funded research') a suitable basis for a statutory definition?

Yes

16. Recital 159 is a suitable basis for a statutory definition.
17. It is crucial that any formulation is sufficiently flexible to capture any changes in the nature of and approach to research in the future and not framed in fixed boundaries.
18. Scientific research cannot be limited to the common understanding of medical and academic research but needs to be considered alongside other forms of research such as healthcare, arts, humanities, social, opinion and market research. For example, health science is not only medical research and clinical trials.
19. The span of scientific research should not be a simple dichotomy of "private research versus public research" when determining if it falls within scientific research.
20. The dentification of scientific research cannot be limited to juxtaposition of academic versus commercial, private versus public as much as it cannot be of limited consideration.

21. The source of funding or commissioning of research should not determine whether it meets the definition of scientific research. The activity being undertaken, how and why it is being undertaken should determine its definition.
22. The source of funding for research is not a determining factor in whether research is scientific; nor does it determine whether an activity results in public benefit or public good.
23. The concept of "scientific research" should be focused on all kinds of empirical scientific research where personal data of the research subjects (i.e., the participants) are processed which could also, for example, be the case in market, opinion and social research.
24. Additional essential elements to be taken in consideration are objectivity, generalizability, validity and reliability of research results and in particular:
    a. Research "definition" should include the attempt to derive generalisable or transferable new knowledge
    b. Using scientific research methods including those from the social sciences
    c. Including market healthcare and social research
    d. And including projects that generate hypotheses, methodological research and descriptive research.

A case in point: the opinion, market, social and opinion research sector.

A. Market, social and opinion research is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making.
B. Market, social and opinion research plays a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences and measure key performance indicators.
C. Research in itself does not seek to change or influence opinions or behaviour. Unlike marketing, advertising or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers to test their products or messages, it is not a commercial communication.
D. It is important to understand that market, social and opinion research is defined by the objective(s) and the approach, not by the title of the work or those involved in it. The profession operates within the framework of international and national Codes, ISO and BS Standards[4], national standards and scientific journals. In particular, The International Journal of Market Research (IJMR)[5] is SSCI-ranked peer review journal which is rated by the Association of Business Schools as a 2* journal. Its aim is to be

[4] See BS ISO 20252; 2019 – Market, opinion and social research including insights and data analytics – vocabulary and service requirements: https://shop.bsigroup.com/products/market-opinion-and-social-research-including-insights-and-data-analytics-vocabulary-and-service-requirements

[5] For more information about IJMR: https://journals.sagepub.com/home/mre

the leading primary authoritative source of information about excellent practice and new thinking in research, insight and data analysis worldwide. The IJMR provides a bridge between practitioners and academics to share, discuss and debate all aspects of research, insight and data: applications, methodologies, new technologies, technology and methodology adoption and adaption from related areas, solutions, strategic and management issues.

E. The same considerations expressed above apply to the sphere of health research. Health research is a very broad realm and includes:

    - Biomedical research including clinical trials and non-interventional studies
    - Epidemiological studies
    - Health services research
    - Public health research
    - Studies of behavioural, social, and economic factors that affect health
    - Evaluation of health care interventions and services
    - Drug safety surveillance.

F. Not all health research is medical research or clinical trials – healthcare research and in particular healthcare market research, whatever it is called and whatever approach is used, is defined by the following key characteristics:
    - The systematic gathering and interpretation of information about individuals, organisations or marketplaces
    - Using the information gathering and analytical methods and techniques of the applied social, behavioural and data sciences
    - The purpose is to gain insight or support decision making
    - Projects are undertaken on the basis of providing participants with anonymity and confidentiality, which are fundamental tenets of market, opinion and social research
    - No direct action (e.g., a sales approach) to be taken in relation to individuals or organisations as a result of healthcare market research (except following up adverse events, when permitted, which is a legal requirement for healthcare protection)

G. However, there is a risk to introducing a statutory definition of 'scientific research': by defining the borders of scientific research there is a risk that all activities which fall within the scope are required to adhere to the same ethical frameworks and approaches, without due consideration of their need. For example, scientific research activities that until now have been carried out ethically and legally adhering to professional Codes of Conduct could be unnecessarily required to be further scrutinised by ethics committees/boards, bodies and institutions which is common in certain fields of academic and medical scientific research, but unnecessary for most types of market, social and opinion research. We strongly recommend that if a statutory definition is introduced the ethical and operational requirements for each field of scientific research are defined by the sectors and not by statute.

H. The aim would be to avoid situations such as those with the Irish Health Research Regulations 2018 on the processing of personal data for health research purposes,

which mandates "explicit consent" as one of the "suitable and specific measures" that must be undertaken when the processing of personal data (including health data) for the purposes of health research. Therefore, regardless of what legal basis is chosen to justify the processing of personal data for health research purposes, the explicit consent of the data subject is required unless the researcher has been granted a consent declaration by the Health Research Consent Declaration Committee.

I. It is important that not all healthcare market research is categorised as health research and subject to the same demands that are made of non-interventional studies or clinical research. This is not required for most market research projects and would restrict the use of healthcare market research as a valued tool in the gathering of information to support the research and development of medicines and medical devices.

Q1.2.4. To what extent do you agree that identifying a lawful ground for personal data processing for research processes creates barriers for researchers?

Somewhat agree

25. Any changes to the lawful grounds for research processes must make processing more effective and efficient for research. It is essential that it does not become more complicated to define and implement.
26. The Government should strongly consider if any proposed legislative changes would make participation in cross-border research more difficult. As noted in the consultation, it's crucial that legislative reform enables international interoperability.
27. Cross border research relies on consistent rules. Every day, researchers work on cross border research projects aimed at delivering comparative insights to decision-makers. Even before the proliferation of data, research has been increasingly conducted across borders involving multiple service providers connected in increasingly complex partnerships. These partnerships may be privately funded, or indeed publicly funded which further encouraged cross-border collaboration and cross-fertilisation. These partnerships depend on consistency across-borders to operate effectively, whilst respecting complex legal and operational conditions and safeguards expected of research professionals.
28. The concept and use of "scientific research" is already challenged by being at the crossroad of public task and public interest. In the UK, the Data Protection Act 2018 (DPA 2018) includes the concept that tasks can be carried out in the public interest or the exercise of official authority. Research that is in the public interest can be carried out by controllers which are public authorities, commercial organisations, other non-commercial researchers, such as those based in university research centres, think-tanks, charities, or not-for-profit organisations. Examples of projects that use the current public task and public interest requirements include:

    - Providing or improving evidence bases that support the formulation, development or evaluation of public policy or public service delivery; guiding decision-making with anticipated benefits for the economy, society or quality of life of people

- Significantly extending understanding of social or economic trends or events, either by improving knowledge or challenging accepted analyses
- Replicating, validating, challenging or reviewing existing research (including official statistics) in a way that leads to improvements in the quality, coverage or presentation of existing research

Q1.2.5. To what extent do you agree that clarifying that university research projects can rely on tasks in the public interest (Article 6(1)(e) of the UK GDPR) as a lawful ground would support researchers to select the best lawful ground for processing personal data?

Neither agree nor disagree

29. Universities are classed as public authorities for the purposes of data protection law. Current guidance issued by the ICO indicates that the 'public task' ground for processing is likely to apply to much of the processing of personal data carried out by universities.

Q1.2.6. To what extent do you agree that creating a new, separate lawful ground for research (subject to suitable safeguards) would support researchers to select the best lawful ground for processing personal data?

Somewhat agree

30. Any changes to the lawful grounds for research processes must make processing more effective and efficient for research. It is essential that it does not become more complicated to define and implement.
31. Researchers use a range of the existing lawful grounds when processing personal data, including informed consent and legitimate interest. Any changes to the lawful grounds, including the possible introduction of a separate lawful ground for research, should not preclude the use of other lawful grounds by researchers as and when appropriate.
32. The Government should strongly consider if any proposed legislative changes would make participation in cross-border research more difficult. As noted in the consultation, it's crucial that that legislative reform enables international interoperability.
33. Cross border research relies on consistent rules. Every day, researchers work on cross border research projects aimed at delivering comparative insights to decision-makers. Even before the proliferation of data, research has been increasingly conducted across borders involving multiple service providers connected in increasingly complex partnerships. These partnerships may be privately funded, or indeed publicly funded which further encouraged cross-border collaboration and cross-fertilisation. These partnerships depend on consistency across-borders to operate effectively, whilst respecting complex legal and operational conditions and safeguards expected of research professionals.

Q1.2.7. What safeguards should be built into a legal ground for research?

34. The "additional safeguards" framework must reflect the approach of the GDPR and needs to be technology neutral, relying heavily on both co-regulation and on a 'toolbox' of privately adopted measures that have the advantage of being fit for purpose within the sector in which they are implemented, and in doing so transcend theory and enable practice.
35. Market, opinion and social research rests on a tradition of nearly 70 years of self-regulation. Codes of Conduct and ISO and BS standards are successful examples of sector produced tools which can deliver the necessary safeguards.

    - *Codes of Conduct* set the ethical and professional principles. In the market, social and opinion research is robustly self-regulated by a family of national and international codes of conduct, ensuring that data collected for research is strictly limited to research only, preventing harm or adverse consequences to individuals. Compliance with both legal and ethical requirements for the treatment of personal data is vital for maintenance of participant trust. Ethical standards are set out in national and international Codes. These Codes are also supported by detailed guidance on specific aspects of research methodologies and underpinned by disciplinary processes. The UK MRS Code of Conduct, operative since 1954 supports all those engaged in research, insight and data analytics in maintaining professional standards. The MRS Code is also intended to reassure the general public and other interested parties that activities undertaken by MRS members and MRS Company Partners are carried out in a professional and ethical manner. The MRS Code safeguards standards, promote confidence and champion professionalism.

    - *International and British Standard BS ISO 20252:2019, Market, opinion and social research, including insights and data analytics – Vocabulary and service requirements*, sets out guidance and requirements relating to the way in which market, opinion and social research studies are planned, carried out, supervised, and reported to clients commissioning such projects. It ensures consistency and transparency in the way research is undertaken and provides confidence in research results and research providers. It covers all the stages of a research study: from the initial contact between clients and service providers, to the presentation of results to clients.

36. These self-regulatory frameworks are very stringent on the requirements of informed consent, anonymization storage limitation and purpose limitation and codify them in a way appropriate for the sector.

Q1.2.8. To what extent do you agree that it would benefit researchers to clarify that data subjects should be allowed to give their consent to broader areas of scientific research when it is not possible to fully identify the purpose of personal data processing at the time of data collection?

Somewhat agree

37. Consent is not, and cannot be consider, a one-fits-all solution. Consent is a pillar of data protection but is one, not the only gateway to legal and ethical data sharing for research purposes. The downside of relying exclusively on consent can be summarised as follows:
    - The burden and distraction of the data subject: Notwithstanding the extensive educational efforts carried out to empower the general public to own and protect their data, there remains limited appreciation of the meaning of consent. Data subjects still share information extensively with organisations and one another e.g., on social media – despite not always fully appreciating what can and cannot subsequently be done with their personal data – this does not mean however that the data subject should be taking the burden of ensuring their own privacy.
    - The burden on the researcher: researchers may not know, and in many cases do not know, the specific identities of data subjects, participants, in research studies in the first place. As a result, if it can be practically very difficult to re-contact participants to obtain consent for further processing.

38. Ethics: When secondary data research, i.e. research which re-uses personal data collected for other purposes, is underpinned with an ethical approach to undertaking the further processing – such as a Code of Conduct - the difficulties around re-use of data can be readily resolved. Ethical research, that is, research that is designed to do no harm, to be beneficial, and to be fair and transparent, leads to increased trust by participants and data subjects, and over time enhances participation, reputation and builds impact.

Q1.2.9. To what extent do you agree that researchers would benefit from clarity that further processing for research purposes is both (i) compatible with the original purpose and (ii) lawful under Article 6(1) of the UK GDPR?

Somewhat agree

39. Any changes to the further processing for research processes must make such processing more effective and efficient for research. It is essential that it does not become more complicated to define and implement.
40. Researchers use a range of the existing lawful grounds when processing personal data, including informed consent and legitimate interest. Any changes to the further processing for research purposes should not preclude the use of other lawful grounds by researchers as and when appropriate.

41. The further processing provisions are currently complex to navigate, we strongly suggest exploring with the research sector and other stakeholders whether these proposals would bring benefits and for this process to be carried out in close cooperation with the ICO.
42. The market, opinion and social research sector position on further processing for research is clearly defined within the MRS Code of Conduct and we would recommend that any clarity should align with the current approach which is: when using secondary data that includes personal data researchers must ensure that:

    - The intended use is compatible with the purpose for which the data was originally collected.

    - Use of the data will not result in harm to data subjects and there are measures in place to guard against such harm. Harm, in this context, has a very broad meaning that includes financial loss, invasion of privacy, physical injury, denial of opportunity and damage to reputation. One useful tool for understanding the potential harm to data subjects is a privacy impact assessment.

Q1.2.10. To what extent do you agree with the proposals to disapply the current requirement for controllers who collected personal data directly from the data subject to provide further information to the data subject prior to any further processing, but only where that further processing is for a research purpose and it where it would require a disproportionate effort to do so?

Neither agree nor disagree

43. It is too soon at this stage to agree with the proposal as it firstly requires framing the definition of scientific research
44. There is a need for much greater clarity about the definition of controllers and processors. Due to the nature and scope of activities undertaken in any given research project, and the number of individuals and organisations involved throughout the research supply chain, researchers can be controllers, joint controllers or processors. For some projects it is possible for researchers to fulfil different roles for different aspects of a single project. Without clear guidance, particularly about what constitutes a controller, it is difficult to determine how this could apply, not least as to which parties could benefit from the disapplication of the current requirement to provide further information to the data subject prior to further processing.
45. It is very important for continuing public trust and confidence in research that there remain some safeguards to prevent the potential misuse or abuse of the disapplication of the current requirement beyond what people would reasonably expect. It is essential that only those involved in genuine research, regulated by Codes of Conduct and other ethical research frameworks be able to use and benefit from the proposed removal of the current requirement to provide further information to the data subject prior to further processing.

Further Processing

Q1.3.1. To what extent do you agree that the provisions in Article 6(4) of the UK GDPR on further processing can cause confusion when determining what is lawful, including on the application of the elements in the compatibility test?

Q1.3.2. To what extent do you agree that the government should seek to clarify in the legislative text itself that further processing may be lawful when it is a) compatible or b) incompatible but based on a law that safeguards an important public interest?

Q1.3.3. To what extent do you agree that the government should seek to clarify when further processing can be undertaken by a controller different from the original controller?

Q1.3.4 To what extent do you agree that the government should seek to clarify when further processing may occur, when the original lawful ground was consent?

Q1.3.1 to 1.3.4 –

46. Additional information on the proposal is necessary at this stage.
47. Greater clarity is always welcome but acting at legislative level might be counterproductive both in terms of maintaining public confidence by protecting fundamental rights and unlocking growth and innovation.
48. There is a need for much greater clarity about the definition of controllers in the research context to understand how the proposal might apply. Due to the nature and scope of activities undertaken in any given research project, and the number of individuals and organisations involved throughout the research supply chain, researchers can be controllers, joint controllers or processors. For some projects it is possible for researchers to fulfil different roles for different aspects of a single project. Without clear guidance, particularly about what constitutes a controller, it is difficult to determine how these proposed changes could apply.
49. The market, opinion and social research sector position on further processing for research is clearly defined within the MRS Code of Conduct and we would recommend that any clarity should align with the current approach which is:
    - when using secondary data that includes personal data researchers must ensure that: The intended use is compatible with the purpose for which the data was originally collected.
    - Use of the data will not result in harm to data subjects and there are measures in place to guard against such harm. Harm, in this context, has a very broad meaning that includes financial loss, invasion of privacy, physical injury, denial of opportunity and damage to reputation. One useful tool for understanding the potential harm to data subjects is a privacy impact assessment.

Legitimate Interests

Q1.4.1. To what extent do you agree with the proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test?

Q1.4.2. To what extent do you agree with the suggested list of activities where the legitimate interests balancing test would not be required?

Somewhat disagree

Q1.4.1 and Q1.4.2

50. The balancing test for legitimate interest is a UK concept, from the original Data Protection Act. The legitimate interest lawful ground is a flexible provision that allows organisations to collect and process data in ways that support responsible innovation while carrying out a necessary balancing test against the risk of infringing on the interests, rights and freedoms of people.
51. Creating a list would be counterproductive, potentially closing off legitimate interest to innovative and/or technological developments in the future. It is also potentially risky. As noted by the ICO, producing an exhaustive list of types of data processing where organisations would not be required to assess the balance does not remove the need to undertake an assessment. Rather, it moves the responsibility for doing the relevant thinking from business to Government.
52. Not only is this established in UK case law, but transparency and proportionality are a cornerstone feature not only of the UK's approach to data protection but of data protection frameworks globally. Ensuring the processing is both necessary and proportionate also guards against unjustified interference with peoples' fundamental rights.
53. Undertaking a legitimate interest test on a case-by-case basis is in line with the principle of risk-based organizational accountability.
54. The UK Government would need to be confident that the types of processing they include when drawing up such a list do not have a disproportionate impact on data subject's rights.

Q1.4.3. What, if any, additional safeguards do you think would need to be put in place?

55. We consider the exhaustive list of activities to be an inappropriate tool.
56. Additional guidance on the scope and application of legitimate interest enhancing the helpful ICO's current guidance would be welcome.
57. In the context of market, opinion and social research, insights and analytics we would like to highlight the example of passive data collection (for example the use of cookies on a user's computer to capture Internet browsing history for aggregate research purposes); clear guidance on the use and applicability of the legitimate interest lawful ground, would be beneficial for organizations which utilise approaches such as these.

Q1.4.4. To what extent do you agree that the legitimate interests balancing test should be maintained for children's data, irrespective of whether the data is being processed for one of the listed activities?

Strongly agree

It is essential that children and their personal data is protected to the highest level and with appropriate safeguards. Whatever changes are considered for legitimate interest, the protection of children should be paramount.

AI and Machine Learning

Q1.5.14. To what extent do you agree with what the government is considering in relation to clarifying the limits and scope of what constitutes 'a decision based solely on automated processing' and 'produc[ing] legal effects concerning [a person] or similarly significant effects?

Somewhat disagree

58. It is essential the UK maintains its adequacy recognition from the EU. The risk of clarifying the limits and scope of 'solely automated processing' or 'similarly significant effects' is a change, specifically a weakening, of a subject access right. The concern is that such an action could significantly increase the risk of the UK losing its adequacy recognition.

Q1.5.15. Are there any alternatives you would consider to address the problem?

Yes

59. The focus should be on the purposes for which AI systems using automated processing are being used for. If AI is being used for research purposes, for example, some of the concerns regarding automated processing could be addressed in the proposed amendments to the research and public interest provisions. Such an approach would align with the technologically neutral approach of data protection legislation rather than making a special case for AI.

Q1.5.16. To what extent do you agree with the following statement: 'In the expectation of more widespread adoption of automated decision-making, Article 22 is (i) sufficiently future-proofed, so as to be practical and proportionate, whilst (ii) retaining meaningful safeguards'?

Somewhat agree

60. Article 22 establishes the right of data subjects not to be subject to decisions solely based on automated processing if it produces legal effects that concerns or significantly affects them. With automated processing becoming more widespread, it is necessary and important that data subjects can challenge such decision making and require human review and/or intervention where necessary.
61. We strongly suggest that the application of Article 22 in the context of AI systems can be supported with the introducing of supporting guidance not amendments to the

legislation. Guidance can be changed over time as the technology and its application evolves. It is impractical to update legislation every time innovations arise.

Q1.5.17. To what extent do you agree with the Taskforce on Innovation, Growth and Regulatory Reform's recommendation that Article 22 of UK GDPR should be removed and solely automated decision making permitted where it meets a lawful ground in Article 6(1) (and Article 9-10 (as supplemented by Schedule 1 to the Data Protection Act 2018) where relevant) and subject to compliance with the rest of the data protection legislation?

Strongly disagree

62. We are strongly opposed to the proposal to remove Article 22. Given that algorithms or data can be subject to bias, there is a significant risk of harm to the data subject especially if such automated decision making can lead to legal effects but is not in any way contestable.
63. It is essential the UK maintains its adequacy recognition from the EU. The risk of clarifying the limits and scope of 'solely automated processing' or 'similarly significant effects' is a change, specifically a weakening, in data subject rights which could risk the UK's adequacy status.

Data Minimisation and Anonymisation

Q1.6.1. To what extent do you agree with the proposal to clarify the test for when data is anonymous by giving effect to the test in legislation?

Somewhat disagree

64. We welcome the Government's proposal to provide further clarity and certainty about the test organisations must apply when deciding whether information can be considered anonymous.
65. But we strongly suggest holding legislative initiatives until the ICO's publishes the updated Anonymisation guidance, which is already being drafted through series of effective consultations to which MRS and other business stakeholders are providing input.
66. Guidance and the test for anonymisation can be changed over time as the technology and its application evolves. It is impractical to update legislation every time anonymisation innovations arise and/or the test needs to be changed.

Q1.6.2. What should be the basis of formulating the text in legislation?

Recital 26 of the UK GDPR

67. Our preference is for the use of Recital 26 of the UK GDPR which would be a simple solution, and pragmatic given that this is linked to existing legislation and, in fact, has been constant guideline for more than twenty years. This same approach was included in the Directive that underpinned the DPA 1998, is addressed in existing caselaw and also adopted in the ICO's anonymisation code. It would therefore be already familiar to many organisations.

Q1.6.3 To what extent do you agree with the proposal to confirm that the reidentification test under the general anonymisation test is a relative one (as described in the proposal)?

Neither agree nor disagree

68. The proposal to confirm the reidentification test would not change the existing position that the test must apply differently over time, taking into account technical developments. A relative test involves assessing what is "reasonably likely" relative to the specific circumstances, rather than a purely hypothetical chance of identifiability.
69. Ongoing due diligence would still be expected.
70. Given that the CJEU made this ruling in 2016, prior to the IP completion date, it should in principle be regarded as retained EU case law. To codify this proposal into legislation would only make sense if that judgement can no longer be relied on in UK courts.

Q1.6.4. Please share your views on whether the government should be promoting privacy-enhancing technology, and if so, whether there is more it could do to promote its responsible use.

71. We agree that greater use of effective anonymisation could help to better protect individuals' personal information, reduce risks for organisations and provide the opportunity for broader economic and societal benefits.
72. Further promotion of PETs is highly welcome, but we suggest waiting for publication of the upcoming ICO's guidance.

Innovative Data Sharing Solutions

Q1.7.1. Do you think the government should have a role enabling the activity of responsible data intermediaries?

Yes

73. We welcome the Government's initiative to approach new, innovative, and appropriate forms of data sharing. In particular, where they enhance people's rights and have the potential to address power imbalances between those holding large scale data sets and those seeking to use them.
74. However, additional information and guidance about intermediaries and data trusts is required. A precise definition of what is a 'data intermediary' should be introduced.
75. More information is needed in order to ensure accountability: clarity about who is responsible for ensuring appropriate protections; how the principles of data limitation and minimisation have been applied; how data subjects are able to exercise their rights; and clarity about the nature of the controller and processor relationship.

Q.1.7.2. What lawful grounds other than consent might be applicable to data intermediary activities, as well as the conferring of data processing rights and responsibilities to those data intermediaries, whereby organisations share personal data without it being requested by the data subject?

76. At this stage, we don't have sufficient information to determine whether other lawful grounds other than consent might be applicable to data intermediary activities, but we do support the approved accreditation scheme to enhance transparency and ensure accountability.

Chapter 2 - Reducing burdens on businesses and delivering better outcomes for people

Accountability framework

Privacy management programmes

Q2.2.1. To what extent do you agree with the following statement: 'The accountability framework as set out in current legislation should i) feature fewer prescriptive requirements, ii) be more flexible, and iii) be more risk-based'?

Somewhat disagree

77. As the Government notes, accountability is a building block of effective data protection regulation and implementation. It is a fundamental principle.
78. Data subjects' trust in businesses being accountable for their actions when collecting and processing personal data is fundamental to unlock innovation, expand growth an achieve broader economic and societal benefits.
79. We are supportive of new approaches BUT the Government should keep the following points in the highest consideration:
    - The current framework sets the highest principle-based standards for the protection of data subjects and their fundamental rights. Any fewer prescriptive requirements need to be matched with measures that guarantee the same level of protection.
    - To ensure positive outcomes it is important that any approach is risk-based. This means that those organisations whose processing carries the highest risk to people should also have the more robust approaches to accountability.
    - Businesses which process EU citizen data would need to ensure that any EU GDPR requirements are being met. It is impractical and overly bureaucratic for businesses to have dual systems to meet different UK and EU accountability requirements.

Q2.2.2. To what extent do you agree with the following statement: 'Organisations will benefit from being required to develop and implement a risk-based privacy management programme'?

Somewhat disagree

80. Building effective accountability practices into organisations' culture is fundamental for sustaining high data protection standards in the longer term.
81. Some of the accountability requirements being proposed appear to be replacing similar obligations, it is therefore very unclear how much positive impact the proposals will have. A different regime does not necessarily mean a better regime.
82. Businesses have invested significant amounts of time and resources developing processes to meet the current accountability requirements. Any alternative approaches would require businesses to duplicate past effort without any clear guarantee that the changes will produce the desired effect of reducing bureaucracy and increasing business efficiency. There is a real risk that the opposite – more

administration, more bureaucracy and more wasted resources – will result from this proposal.

83. The ICO's accountability framework, which is easy to use and provides clear guidance on what businesses need to do to meet accountability requirements, has been an invaluable tool enabling businesses of all sizes, including small and medium sized enterprises, to meet the current accountability requirements. Any other privacy management programme must be able to guarantee the maintenance of the same standards.
84. It is crucial that any approach to accountability is enforceable. We agree with the ICO view that organisations should make available, on request, their privacy management programme and accompanying documentation to enable the ICO to continue to enforce the legislation effectively.
85. It is important to understand in more detail from the UK Government how the privacy management programme proposal would ensure a risk-based approach. This includes how it would ensure that those organisations with the highest volumes, greatest complexity or most privacy intrusive data have the most robust approaches to accountability and risk identification, mitigation and management.
86. We agree with the ICO's encouragement for the UK Government to explore whether these benefits could be achieved with more minor changes to the level of prescription in current accountability requirements, avoiding the potential disruption that could come with more substantial change.
87. We agree with the ICO's view that there is still more work for the UK Government to do to set out whether the additional benefits that a privacy management programme approach would bring which would outweigh the potential costs involved in making these changes. It is also essential that this proposal is implemented in a way that does not create greater burdens for organisations, including small and medium sized enterprises, than the current legislative framework, or undermine protections for data subjects.

Q2.2.3. To what extent do you agree with the following statement: 'Individuals (i.e., data subjects) will benefit from organisations being required to implement a risk-based privacy management programme'?

Somewhat disagree

88. The approach to accountability must include a focus on organisations being accountable for their practices and demonstrating their accountability in a proportionate way, even when detailed requirements are not set out in law. This is important for transparency and public trust and ensuring effective regulatory action can be taken where necessary.
89. There is no evidence that the proposed alternative privacy management programme, will provide any significant additional benefits to data subjects compared to the current accountability approach.
90. A different regime does not necessarily mean a better regime.

Data protection officer requirements

Q2.2.4. To what extent do you agree with the following statement: 'Under the current legislation, organisations are able to appoint a suitably independent data protection officer'?

Strongly agree

91. DPOs are the cornerstone for organizations in terms of GDPR compliance, they play a critical role especially in the organisations in which it is compulsory to have them in place.
92. DPOs are independent entities, not directed by the organisation for which they work, in recognition of the key role that the DPO plays in ensuring compliance with the regulation.
93. The DPO is the manifestation of the supervisory authority in an organization, they are particularly important in organisations with the highest levels of data use and consequently the highest potential risk to people. Having a dedicated role with responsibility for ensuring people's data is properly protected is an important safeguard.
94. The proposal to replace DPOs with a designated individual, or individuals, to be responsible for the privacy management programme seems very similar to the current arrangements without any clear indication of what the positive impact of the proposals will be. A different regime does not necessarily mean a better regime.

Q2.2.5. To what extent do you agree with the proposal to remove the existing requirement to designate a data protection officer?

Strongly disagree

95. It is crucial that the benefits listed in the previous answer are not lost as a result of any proposed changes.
96. The alternative to a DPO is a designated individual or a number of individuals, who have similar accountability responsibilities as a DPO except for the privacy management programme as opposed to the current accountability requirements. It is not clear what positive impact such a change would realistically have to either privacy management within business or to protecting data subjects when interacting with businesses.
97. As noted by the ICO, DPOs are now well-developed and skilled professionals, and the Government should consider the potential economic impact of removing the requirement for DPOs as part of its overall assessment of the costs and benefits.

Data protection impact assessments

Q2.2.7. To what extent do you agree with the following statement: 'Under the current legislation, data protection impact assessment requirements are helpful in the identification and minimisation of data protection risks to a project'?

Strongly agree

98. In our experience, DPIAs have a vital role to play in any GDPR compliance programme as they allow identification of potential privacy issues at an earlier and less costly stage. They also reduce the risks and increase of awareness of privacy and data protection with staff members throughout organisations.
99. Conducting a DPIA improves awareness in organisations of the data protection risks associated with projects, leading to the improvement of the design of projects and enhances communication about data privacy risks with relevant stakeholders.
100. DPIAs ensures and helps to demonstrate that organisations are compliant from the beginning of projects and avoid sanctions.
101. DPIAs inspire confidence in the public by improving communications about data protection issues.

Q.2.2.8. To what extent do you agree with the proposal to remove the requirement for organisations to undertake data protection impact assessments?

Strongly disagree

102. In our experience, DPIAs have a vital role to play in any GDPR compliance programme as they allow identification of potential privacy issues at an earlier and less costly stage. They also reduce the risks and increase of awareness of privacy and data protection with staff members throughout organisations.
103. Conducting a DPIA improves awareness in organisations of the data protection risks associated with projects, leading to the improvement of the design of projects and enhances communication about data privacy risks with relevant stakeholders.
104. DPIAs ensures and helps to demonstrate that organisations are compliant from the beginning of projects and avoid sanctions.
105. DPIAs inspire confidence in the public by improving communications about data protection issues.
106. Businesses have got used to using DPIAs as an essential part of business and privacy planning. Many apply the very useful and practical ICO approach to DPIAs. There are no clear benefits to removing the requirement to undertake DPIAs. Businesses and data subjects benefit from the current approach. There is no evidence that using a different approach to identify and minimise data protection risks will produce any additional benefits to either businesses or data subjects.

Prior consultation requirements

Q. 2.2.9 Please share your views on why few organisations approach the ICO for 'prior consultation' under Article 36 (1)-(3). As a reminder Article 36 (1)-(3) requires that, where an organisation has identified a high risk that cannot be mitigated, it must consult the ICO before starting the processing.

107. ICO engagement ensured appropriate protections or privacy-respecting approaches were put in place. This approach enables and supports innovation, helping organisations to mitigate risks. Removing this provision would remove an important opportunity for the ICO to offer proactive support to organisations carrying out the most potentially high-risk processing.
108. Businesses rely on the fundamental expertise of the ICO and its experience with DPIAs, which demonstrate the essential role they play. The ICO notes:
    - Removing the statutory framework for scrutiny of high-risk processing could undermine the high standards of protection for people we know the UK Government is committed to. It could also be seen by many stakeholders as a reduction in transparency
109. We strongly agree with the ICO's viewpoint.

Q.2.2.10. To what extent do you agree with the following statement: 'Organisations are likely to approach the ICO before commencing high risk processing activities on a voluntary basis if this is taken into account as a mitigating factor during any future investigation or enforcement action'?

Strongly agree

110. The potential for high fines if businesses get high risk processing wrong is sufficient incentive to approach the ICO.

Record keeping

Q.2.2.11. To what extent do you agree with the proposal to reduce the burden on organisations by removing the record keeping requirements under Article 30?

Somewhat disagree

111. Keeping good records is a key element of good privacy management and high standards of privacy. It also supports organisations to deal effectively and efficiently with subject access requests. Also, in some cases with requests made under the Freedom of Information Act.
112. As noticed by the Government, removing the records of processing requirements under Article 30 could hinder effective enforcement and offer less regulatory protection to data subjects.
113. There is no evidence provided which demonstrates that the alternative record keeping requirements for a privacy management programme will be any less burdensome than the current record keeping requirements.

Breach reporting requirements

Q.2.2.12. To what extent do you agree with the proposal to reduce burdens on organisations by adjusting the threshold for notifying personal data breaches to the ICO under Article 33?

Somewhat disagree

114. It is important that a comprehensive assessment of risk is used.
115. Any change to the threshold needs to take in the strictest consideration not only material damages, but also societal consequences.
116. Lowering the threshold will not necessarily result in organisations no longer over-reporting breaches to the ICO where there is likely to be no risk to individuals' rights and freedoms. The introduction of more guidance on when breaches should be reported should have the desired effect of reducing reporting without the need to diminish the protection afforded to data subjects.

Voluntary undertakings process

Q.2.2.13. To what extent do you agree with the proposal to introduce a voluntary undertakings process? As a reminder, in the event of an infringement, the proposed voluntary undertakings process would allow accountable organisations to provide the ICO with a remedial action plan and, provided that the plan meets certain criteria, the ICO could authorise the plan without taking any further action.

Somewhat agree

117. Engagement with the ICO should be a collaborative partnership and not a combative one. Businesses ought to feel confident to seek guidance where needed without the fear of potential enforcement action. It may be the case that a remedial action plan may be more effective in enacting systemic change as opposed to a straightforward punitive fine. Fines should remain in place as an enforcement power of last resort, especially for organisations that fail to execute the remedial action plan.
118. However, "accountable organisations" need to be clearly defined and it should not be assumed that all public sector institutions fall into this category especially if they have a track record of repeated data breaches.
119. If this proposal is to be effective, the ICO needs to retain discretion to choose whether to accept a remedial action plan as sufficient. The ICO also needs to retain inspection powers to ensure compliance has been achieved.

Record-keeping

Q2.2.16. To what extent do you agree that some elements of Article 30 are duplicative (for example, with Articles 13 and 14) or are disproportionately burdensome for organisations without clear benefits?

Somewhat disagree

120. Keeping good records is a key element of good privacy management and high standards of privacy. It supports organisations to deal effectively and efficiently with

subject access requests. Also, in some cases with requests made under the Freedom of Information Act.

121. As noticed by the Government, removing the records of processing requirements under Article 30 could hinder effective enforcement and offer less regulatory protection to data subjects.
122. There is no evidence provided which demonstrates that the alternative record keeping requirements for a privacy management programme will be any less burdensome than the current record keeping requirements.

Breach reporting requirements

Q.2.2.17. To what extent do you agree that the proposal to amend the breach reporting requirement could be implemented without the implementation of the privacy management programme?

Somewhat disagree

123. Unreported data breaches under a lower threshold could negatively impact individual rights and freedoms, and we have not seen evidence to suggest that this proposal is necessary and that the benefits outweigh the risks.

Data protection officers

Q.2.2.18. To what extent do you agree with the proposal to remove the requirement for all public authorities to appoint a data protection officer?

Strongly disagree

124. DPOs are the cornerstone in terms of GDPR compliance, they play a critical role more especially so for public authorities.
125. DPOs are independent entities, not directed by the entity they work, in recognition of the key role that the DPO plays in ensuring compliance with the regulation.
126. The DPO is the manifestation of the supervisory authority, they are particularly important in public authorities that have the highest levels of data use and consequently the highest potential risk to people. Having a dedicated role with responsibility for ensuring people's data is properly protected is an important safeguard.

Q.2.2.19. If you agree, please provide your view which of the two options presented at paragraph 184d(V) would best tackle the problem.

Strongly disagree

127. We do not agree with the proposal or the two options.

Subject Access Requests

Q2.3.1. Please share your views on the extent to which organisations find subject access requests time-consuming or costly to process.

128. Subject access requests (SARs) are an important mechanism for delivering the fundamental and longstanding right of access and a critical transparency mechanism.

129. Any reform must not undermine the right of access, given the role it plays in supporting people to understand what information is held about them and how this impacts decisions that affect them
130. SARs are time-consuming, or costly to process largely due to how much of the records are held in paper format and whether the organisation has made the necessary investment to simplify their data stores.
131. If data is stored across multiple servers or databases over a long period of time, then the data joins can become complex. However, most databases use unique record identifiers so in principle it would be straightforward to identify the correct records.
132. Extracting emails would be somewhat harder especially if there is no central repository to access them and requires access to individual mailboxes.
133. For smaller organisations that are reliant on legacy technology or are not able to invest in the right tools, SARs can be burdensome.
134. More ICO guidance on when SARs can be rejected, for example how to determine when SARs are vexations, would be welcomed.

Q2.3.2. To what extent do you agree with the following statement: 'The 'manifestly unfounded' threshold to refuse a subject access request is too high'?

Neither agree nor disagree

135. More ICO guidance on when SARs can be rejected, for example how to determine when SARs are vexations, would be welcomed.
136. If the manifestly unfounded threshold is lowered, what would be the appropriate level to ensure that those legitimately exercising their data rights are not prevented from doing so?

Q2.3.3. To what extent do you agree that introducing a cost limit and amending the threshold for response, akin to the Freedom of Information regime (detailed in the section on subject access requests), would help to alleviate potential costs (time and resource) in responding to these requests?

Strongly disagree

137. Data privacy is a fundamental right under the Human Rights Act 1998 and therefore a cost cannot be placed on it. Freedom of Information's right to know is not enshrined as a fundamental right.
138. A fee may act as a deterrent for timewasters, but this is at odds with the idea that a fundamental right should have a price attached to it. Determining what is an effective fee will be hard. How do we maintain fairness and equity? We do not want those data subjects who cannot afford to exercise their right to be priced out.

Q2.3.4. To what extent do you agree with the following statement: 'There is a case for re-introducing a small nominal fee for processing subject access requests (akin to the approach in the Data Protection Act 1998)'?

Somewhat disagree

139. This type of proposal would disproportionately impact individuals with less resources to pay the fee and reduces equity of outcomes.

Q2.3.5. Are there any alternative options you would consider to reduce the costs and time taken to respond to subject access requests?

140. We recommend the introduction of more detailed guidance from the ICO.

Privacy and electronic communications

Q2.4.1. What types of data collection or other processing activities by cookies and other similar technologies should fall under the definition of 'analytics'?

141. We believe that the definition of 'analytics' should include web audience measurement and other cookies used for research purposes.
142. Cookies and referred data are used for website statistics to obtain information including page impression, visit information that provides insights into the use of the website.
143. Cookies can be a legitimate and useful tool, for example, in assessing the effectiveness of a delivered information society service, for example of website design and advertising or by helping to measure web traffic to the numbers of end-users visiting a website, certain pages of websites or the number of end-users of applications, or the digital reach of broadcasting services. Cookies are thus placed by providers of the informational society service or independent audience measurement research providers (often commissioned by joint industry committees or similar bodies) to measure online, tv viewing or radio listening. This is essential, for example, to determine the total reach of broadcasting services that may subsequently determine the level of public subsidy for such services.
144. Any cookies which are used for research purposes are regulated by the sector Codes of Conduct, such as the MRS Code of Conduct.

Q2.4.2 To what extent do you agree with the proposal to remove the consent requirement for analytics cookies and other similar technologies covered by Regulation 6 of PECR?

Strongly agree

145. We support the proposal to enable organisations to measure the quality and effectiveness of their online services (analytics) without the need to obtain prior consent, subject to appropriate safeguards.
146. We support adopting CNIL's interpretation as described in paragraph 199.
147. We believe that this will help provide clarity for users as to what is important for their privacy, allowing them to focus their attention on privacy choices which pose a higher risk.

Q2.4.3. To what extent do you agree with what the government is considering in relation to removing consent requirements in a wider range of circumstances? Such circumstances

might include, for example, those in which the controller can demonstrate a legitimate interest for processing the data, such as for the purposes of detecting technical faults or enabling use of video or other enhanced functionality on websites.

Somewhat agree

148. Consent should not be necessary when the purpose of using the processing storage capabilities of terminal equipment is to fix security vulnerabilities and other security bugs, provided that such updates do not in any way change the functionality of the hardware or software or the privacy settings chosen by the end-user and the end-user has the possibility to postpone or turn off the automatic installation of such updates. Software updates that do not exclusively have a security purpose, for example those intended to add new features to an application or improve its performance, should not fall under this exception.
149. Consent should not be necessary either if the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment is necessary for the provision of the information society services, such as those used by IoT devices (for instance connected devices, such as connected thermostats), requested by the end-user.

Q2.4.4. To what extent do you agree that the requirement for prior consent should be removed for all types of cookies?

Strongly disagree

150. We agree with the ICO in recommending the Government to consider the pros and cons of legislating against the use of cookie walls, which require users to 'accept' tracking as the price of entrance. We are concerned about the Taskforce's proposal to remove the requirement for prior consent for all types of cookies. This is irrespective of whether people have set their preferences via web browser technologies or through trusted data fiduciaries. Our concern is due to the highly intensive ways in which this data is processed across multiple organisations. We believe the proposals to allow users to express their preferences and then have them respected across all sites they access would better manage the balance between delivering a friction-free online experience for people, while also enabling them to have control over their data.
151. If data processing uses IP address and metadata without consent and for purposes other than making the communications connection, then it would potentially be a breach of not only existing e-Privacy legislation but the Human Rights Act 1998 and the ECHR.
152. Removing consent requirements for all types of cookies goes against the principle of transparency and increasing trust with the data subject.
153. Irrespective of the UK Government's decision, UK websites or content accessed by EU citizens would still have to provide the cookie banner, as for example US websites are required to.

Q2.4.5. Could sectoral codes (see Article 40 of the UK GDPR) or regulatory guidance be helpful in setting out the circumstances in which information can be accessed on, or saved to a user's terminal equipment?

Yes.

154. Codes of Conduct set the ethical and professional principles. Market, social and opinion research is robustly self-regulated by a family of national and international codes of conduct, ensuring that data collected for research is strictly limited to research only, preventing harm or adverse consequences to individuals.
155. Compliance with both legal and ethical requirements for the treatment of personal data is vital for maintenance of consumer trust. Ethical standards are set out in national and international Codes. These Codes are also supported by detailed guidance on specific aspects of research methodologies and underpinned by disciplinary processes.
156. Our Codes drawn up by researchers for researchers, help to protect providers, buyers and participants. They safeguard standards, promote confidence and champion professionalism. the UK MRS Code of Conduct, operative since 1954 it supports all those engaged in research, insight and data analytics in maintaining professional standards. The MRS Code also reassures the general public and other interested parties that activities undertaken by MRS members and MRS Company Partners are carried out in a professional and ethical manner

Q2.4.10. What are the benefits and risks of updating the ICO's enforcement powers so that they can take action against organisations for the number of unsolicited direct marketing calls 'sent'?

157. We welcome proposals that look to update the ICO's enforcement powers to provide increased protection for consumers. Increasing powers to take action against 'bad actors' would also be in the interest of legitimate direct marketers who act responsibly and seek to reach customers with information about their products and services. However, we note that an increased scope to enforce new powers could be an increased strain on the ICO's resources.
158. Currently the ICO can only take action on calls which are 'received' and connected. The ICO sometimes receives intelligence of companies sending thousands of calls, but which are not all connected, but they cannot take account of the potential risk of harm when determining the most appropriate form of enforcement action.

Q2.4.11. What are the benefits and risks of introducing a 'duty to report' on communication service providers?

159. More information on potential cost implications for the telecoms sector of any new reporting requirements would be required before this question can be addressed.

Q2.4.12. What, if any, other measures would help to reduce the number of unsolicited direct marketing calls and text messages and fraudulent calls and text messages?

160. The Government should look to increase awareness of Telephone Preference Service (TPS) and the relevant rules for businesses, as well as encouraging members of the public to sign up when they don't want to receive unsolicited direct marketing communications. Figures show that 29% of small and medium sized enterprises which use telemarketing were not aware of the legal requirement to screen their databases against the list of people who have registered with the TPS[6].

Q2.4.13. Do you see a case for legislative measures to combat nuisance calls and text messages?

Don't know

161. Further legislative measures would not be effective without proper enforcement. Many nuisance calls are initiated overseas.
162. If the UK Government were to consider further legislative measures it is essential that the scope of nuisance calls – unsolicited direct marketing calls – remains the focus.
163. In order for research to have value for government, businesses and the public it must be representative of the views of all UK citizens. Conducting telephone research is one of the most efficient and cost-effective ways of ensuring a representative sample of the UK population, and as a result is widely used in government research. Telephone research is also one of the best methods for researching otherwise hard to reach segments of the UK population, another key target for many public sector research projects. Telephone research depends on the ability of researchers to use TPS numbers and random digit dialled samples to achieve representative random probability samples of the UK population.
164. All telephone research by MRS members and MRS Company Partners is conducted on an ethical basis in accordance with the MRS Code of Conduct. The MRS Code is underpinned by a robust disciplinary and compliance framework to ensure that when telephone research is conducted it is done so in an ethical manner.

[6] https://www.campaignlive.co.uk/article/tps-targets-smes-awareness-drive/182078

Use of personal data for the purposes of democratic engagement

Q2.5.1. To what extent do you think that communications sent for political campaigning purposes by registered parties should be covered by PECR's rules on direct marketing, given the importance of democratic engagement to a healthy democracy?

Strongly agree

165. Political parties should continue to follow PECR when sending out communications for political campaigning. Some political parties have been poor in the way they have communicated with the electorate which has resulted in complaints.
166. Political parties' communication must be done in ways that foster public trust in how their data is being used – PECR ensures this. Any approach that undermines that trust could have unintended negative consequences for wider public attitudes towards the democratic processes.

Q2.5.2. If you think political campaigning purposes should be covered by direct marketing rules, to what extent do you agree with the proposal to extend the soft opt-in to communications from political parties?

Strongly disagree

167. The ICO guidance on political campaigning significantly clarifies the implications of dealing with personal data in the course of political activities with regard to GDPR implications, but also usefully highlights how to achieve compliance with the Data Protection Act 2018 (DPA) and how to manage its exceptions and specifications.
168. The guidance correctly identifies the boundaries of political campaigning versus direct marketing and in so doing it helps campaigners and citizens in understanding the difference between the two activities.
169. The UK Government needs to recognise the fundamental difference between political campaigning and opinion polling. MRS undertook extensive engagement with the ICO in the drafting of their guidance. Our position has been accepted and is as follows:
    - Market research, which includes social and opinion research, is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making. Research itself does not seek to change or influence opinions or behaviour however it is acknowledged as an important vehicle that gives people a voice. Social and opinion research is widely used by central and local government and public bodies, apart from opinion polling, to understand citizens' preferences and behaviours, gauge responses to proposals, measure impact and assist in developing appropriate policies used, for example, in improving educational, healthcare and police services. Political opinion polling i.e., surveys of political public opinion may be conducted for public media publication or for private use. Political opinion polling is one of the more visible faces of the research sector albeit that it accounts for less than 1% of all research undertaken in the UK.

- Direct Marketing includes data collection intended directly to create sales or to influence the opinions of citizens and/or as a means of information gathering for use on future sales, or influence including political activities.

Q2.5.3. To what extent do you agree that the soft opt-in should be extended to other political entities, such as candidates and third-party campaign groups registered with the Electoral Commission? See paragraph 208 for description of the soft opt-in

Strongly disagree

See answers to 2.5.1 and 2.5.2.

Q2.5.4. To what extent do you think the lawful grounds under Article 6 of the UK GDPR impede the use of personal data for the purposes of democratic engagement?

Strongly disagree

170. There is already flexibility for political parties and campaigners in this area.
171. Section 8 of the DPA 2018 sets out that democratic engagement is a public task. To support the use of the public task lawful ground for processing of personal data, there needs to also be a corresponding obligation laid down by law linked to this processing. For the processing of personal data sourced from the electoral register, most campaigners are able to rely upon electoral law. For processing other data under public task, other laws would need to be relied on, which we understand is challenging.

Q2.5.5 To what extent do you think the provisions in paragraphs 22 and 23 of Schedule 1 to the DPA 2018 impede the use of sensitive data by political parties or elected representatives where necessary for the purposes of democratic engagement?

Strongly disagree

172. The rules in this area are important because data about citizen's political views and activity is sensitive. There can therefore be negative consequences for data subjects if this is used or shared inappropriately. This is part of a wider set of data which is known as special category data. These are set out in Article 9 of the UK GDPR, along with a set of rules around how this data can be used to protect people.
173. We would be concerned if there was any proposal for an expansion of the kinds of special category data political parties are able to process without consent. For example, if it was to include ethnicity or other data, either factual or inferred. Furthermore, currently only registered political parties can rely on these conditions. It is important to understand if the UK Government may also consider extending these further to allow candidates and third-party campaigners to do so. If any such expansions are considered, it is important that the rationale for why this is required is clearly set out and that there is a wide public debate on the risks and benefits.

Chapter 3 - Boosting trade and reducing barriers to data flows

Adequacy

Q3.2.1. To what extent do you agree that the UK's future approach to adequacy decisions should be risk-based and focused on outcomes?

Neither agree nor disagree

174. It is the responsibility of the UK Government to assess whether the data protection laws of other countries and jurisdictions provide adequate protection for UK citizens. However, the ICO also has a role.
175. These proposals are still in development and more detail is needed to fully understand how a risk-based approach would work in practice. It would also be helpful to understand more detail about the proposals for future adequacy decisions to "take into account the different legal and cultural traditions which inform how other countries achieve high standards of data protection". We look forward to seeing more detail about how these changes would work in practice.

Q3.2.2. To what extent do you agree that the government should consider making adequacy regulations for groups of countries, regions and multilateral frameworks?

Neither agree nor disagree

176. We look forward to seeing more details or examples of how these proposals would work in practice. Clearly there could be efficiencies to be gained from assessing the laws of a group of countries. For example, where a number of countries are all subject to the same multinational jurisdiction. However, it would be helpful to have more detail about how the Government proposes to deploy this approach to fully understand the risks and benefits involved.

Q3.2.3. To what extent do you agree with the proposal to strengthen ongoing monitoring of adequacy regulations and relax the requirement to review adequacy regulations every four years?

Somewhat disagree

177. This proposal could allow UK Government to focus its resources on those areas where there is an increase in risk or significant change in circumstances, potentially making the process more flexible and efficient. However, we would be concerned if the proposed approach resulted in a lowering of the UK Government's ability to detect and act on changes that might pose increased risks to data subjects.
178. We would also like to see the reasoning behind the UK Government's change in its approach, as outlined in the Mission Statement published in August, which committed to monitoring and reviewing adequacy agreements at intervals no more than four years.

Q3.2.4. To what extent do you agree that redress requirements for international data transfers may be satisfied by either administrative or judicial redress mechanisms, provided such mechanisms are effective?

Neither agree nor disagree

179. We welcome greater clarity and agree that it is important to ensure that any remedies are effective and legally binding, as appropriate. It is important that the UK Government provides more detail on how they would assess whether redress mechanisms are effective.

Q3.3.1. To what extent do you agree with the proposal to reinforce the importance of proportionality when assessing risks for alternative transfer mechanisms?

Neither agree nor disagree

180. As the consultation notes, achieving proportionate protection is complex. There is a high compliance burden for businesses attached to the understanding and implementation of alternative transfer mechanisms. The principle of proportionality will be important for organisations to determine the most appropriate safeguards when using alternative transfer mechanisms to transfer data overseas.

Q3.3.2. What support or guidance would help organisations assess and mitigate the risks in relation to international transfers of personal data under alternative transfer mechanisms, and how might that support be most appropriately provided?

181. We agree that organisations would benefit from more support and guidance in this area, and that being able to efficiently and effectively transfer data is important for the UK economy.
182. We agree with the ICO's position: it is important to consider where the responsibility for different aspects of the risk assessment should lie. The ICO can provide guidance on how to approach and conduct these assessments, and the kinds of safeguards that would be appropriate for different scenarios. The UK Government will need to play a leading role in assessing the risks posed by the data protection regimes of specific countries, particularly for third party access to data. Given that accountability is a core principle of the data protection regime, it is also important that, while drawing on the increased guidance and support offered, data controllers remain accountable for their approach in practice. They must satisfy themselves that they are compliant with their responsibilities under data protection law and that the people whose data they are transferring are protected.
183. The UK Government should look to support the ICO on this where possible.

Q3.3.3. To what extent do you agree that the proposal to exempt 'reverse transfers' from the scope of the UK international transfer regime would reduce unnecessary burdens on organisations, without undermining data protection standards?

Somewhat disagree

184. While appreciating the perceived reduction of burdens on organisations, it is very difficult to identify a case in which organizations are not working in cross-countries data sharing scenario. Which means that they are already bound by the GDPR and have already adopted the mechanisms and tools prescribed.
185. This proposal would complex fragmentation of territorial scope of the data protection rules that would unfairly penalize small and medium sized enterprises given their limited resources and tools, creating additional and unnecessary burdens.
186. The UK Government should consult the ICO and UK businesses on the practical difficulties of this proposal.

Q3.3.4. To what extent do you agree that empowering organisations to create or identify their own alternative transfer mechanisms that provide appropriate safeguards will address unnecessary limitations of the current set of alternative transfer mechanisms?

Neither agree nor disagree

187. Empowering organisations to tailor their own alternative transfer mechanisms to their business needs, whilst providing the necessary protections for data subjects, could allow them to comply with the law more easily whilst maintaining business flexibility.
188. However, this could cause an inconsistent level of data protection for data subjects. The UK Government must ensure that any new alternative transfer mechanisms does not undermine individual data subject rights.
189. There is also a concrete risk of inconsistent levels of protection.
190. The ICO should oversee identifying, implementing and producing guidance on transfer mechanisms.

Q3.3.5 What guidance or other support should be made available in order to secure sufficient confidence in organisations' decisions about whether an alternative transfer mechanism, or other legal protections not explicitly provided for in UK legislation, provide appropriate safeguards?

191. It will be important for the ICO to have sufficient oversight of the development of alternative transfer mechanisms intended for high-risk processing. It should provide guidance for businesses on how to develop and deploy their alternative transfer mechanisms, as well as the opportunity for businesses to consult the ICO on their highest risk processing.

Q3.3.6. Should organisations be permitted to make international transfers that rely on protections provided for in another country's legislation, subject to an assessment that such protections offer appropriate safeguards?

Don't know

192. Whilst transfers relying on protections provided for in another country's legislation would be subject to an assessment to consider the appropriate safeguards, we are concerned of a potential increased risk to UK citizens' individual rights, from real-

world risks and cultural norms that are typically unaccounted for in data protection legislation.

Q3.3.7. To what extent do you agree that the proposal to create a new power for the Secretary of State to formally recognise new alternative transfer mechanisms would increase the flexibility of the UK's regime?

Somewhat disagree

193. This proposal would create complex fragmentation of territorial scope of the data protection rules that would unfairly penalize small and medium sized enterprises given their limited resources and tools, creating additional and unnecessary burdens.
194. We strongly recommend that if any proposal of this kind were to be pursued it was done so with the ICO and that the Secretary of State was prescribed a duty to consult with the ICO.

Q3.3.8. Are there any mechanisms that could be supported that would benefit UK organisations if they were recognised by the Secretary of State?

Yes

195. Codes of conduct would be an extremely useful mechanism, as already foreseen in legislation. Codes of Conduct set the ethical and professional principles. Market, social and opinion research is robustly self-regulated by a family of national and international codes of conduct, ensuring that data collected for research is strictly limited to research only, preventing harm or adverse consequences to individuals. Compliance with both legal and ethical requirements for the treatment of personal data is vital for maintenance of consumer trust.
196. Ethical standards are set out in national and international Codes. These Codes are also supported by detailed guidance on specific aspects of research methodologies and underpinned by disciplinary processes. Our Codes drawn up by researchers for researchers, help to protect providers, buyers and participants. They safeguard standards, promote confidence and champion professionalism. the UK MRS Code of Conduct, operative since 1954 supports all those engaged in research, insight and data analytics in maintaining professional standards. The MRS Code reassures the general public and other interested parties that activities undertaken by MRS members and MRS Company Partners are carried out in a professional and ethical manner.

Q3.4.1. To what extent do you agree with the approach the government is considering to allow certifications to be provided by different approaches to accountability, including privacy management programmes?

Strongly agree

197. Certification schemes, along with Codes of Conduct, are an important accountability tool and a good way for sectors to deliver sector solutions to manage and implement GDPR successfully.

198. Any new or additional types of schemes however should not have a negative impact on the existing market, which is increasing in importance. There will also need to be clarity about the different types of certification available, and what these deliver. This is to prevent confusion among people and businesses about what is subject to certification. It is also important that the UK Government ensures that the audit and assurance processes for these new types of certification are practical, accessible and effective whilst sufficiently rigorous to deliver high standards of data protection for data subjects.
199. Sector bodies, such as MRS, which has nearly 70 years' experience delivering a self-regulatory Code and compliance framework, would be happy to work with the ICO to put such schemes in place and to help sectors with practical and tailored guidance to incentivise companies to follow best practice.

Q3.4.2. To what extent do you agree that allowing accreditation for non-UK bodies will provide advantages to UK-based organisations?

Neither agree nor disagree

200. This could potentially expand the available approaches available for firms to develop certification schemes to enable international transfers. We are supportive of exploring mechanisms that may make the adoption of certification schemes as international transfer mechanisms function successfully overseas.

Q3.5.1. To what extent do you agree that the proposal described in paragraph 270 represents a proportionate increase in flexibility that will benefit UK organisations without unduly undermining data protection standards?

Strongly disagree

Please explain your answer, and provide supporting evidence where possible

201. Derogations should be used in exceptional circumstances. The repetitive use of derogations is currently restricted by the UK and EU GDPR. Recital 111 states that 'Provisions should be made for the possibility for transfers in certain circumstances where…the transfer is occasional'. Therefore, the UK Government making explicit that repetitive use of derogations is permitted is likely to cause divergence from the EU's regulatory framework.
202. Since the entry into force of the GDPR, it has been clear that derogations under Article 49 were to be used as exceptions to the rule, only to be used when strictly necessary and in the absence of adequacy or appropriate safeguards. This should not change now. Article 49 are exemptions from the general principle that personal data should only be transferred to third countries if an adequate level of protection is provided for in the third country or if appropriate safeguards have been adduced and the data subjects enjoy enforceable and effective rights in order to continue to benefit from their fundamental rights and safeguards.
203. The derogations must be interpreted restrictively so that the exception does not become the rule. When considering transferring personal data to third countries or

international organizations, it's essential to provide data subjects with a guarantee that they will continue to benefit from the fundamental rights and safeguards to which they are entitled as regards processing of their data once this data has been transferred. As derogations do not provide adequate protection or appropriate safeguards for the personal data transferred and as transfers based on a derogation are not required to have any kind of prior authorization from the ICO, transferring personal data to third countries on the basis of derogations leads to increased risks for the rights and freedoms of the data subjects concerned.

204. The phrasing of Article 49 including the use of terms 'occasional' and 'non-repetitive' indicate that such transfers may happen more than once, but not regularly, and would occur outside the regular course of actions, for example, under random, unknown circumstances and within arbitrary time intervals - The need for the transfer to be 'necessary' requires a close and substantial connection between the data transfer and the purposes of a contract. Based upon the above conditions which limit the extent to which the derogations may be relied on for repetitive transfers, the likelihood of regular and predictable transfers and systematic transfers must be close to nil.
205. We would welcome evidence from the UK Government on what benefits this proposal would have and how they outweigh the risks to the UK's adequacy status.

Chapter 4 - Delivering better public services

No questions answered in this section.

Chapter 5 - Reform of the Information Commissioner's Office

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

206. Any package of reforms should, among other things, ensure the ICO continues to have the independence, powers and resources needed to fulfil its remit and to ensure the public has confidence that it is able to protect their interests. It is vital that any changes to the data protection framework take account of the continuing need for a strong regulator and with the aim of enhancing its ability to deliver its objectives.
207. We are supportive of the ICO having clear statutory objectives. This approach would allow Parliament to clearly articulate the regulatory framework in which it wishes to see the ICO operate.
208. Further clarity and stability are important for business confidence.

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?

Strongly agree

209. We support the right to privacy. Our sector is reliant on data so upholding data rights and encouraging responsible data use makes sense in terms of business and corporate responsibility. However, a balance must be struck between the right to privacy and freedom to trade. Greater clarity on the interaction between these rights would be helpful.
210. The ICO's primary objectives are to uphold data rights and to encourage trustworthy and responsible data use and this objective should continue.

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

Yes

211. We think that proportionality should be considered as a third component. To be clear, by proportionality we mean that regulation must meet the necessity test and be the least restrictive measure to achieve the desired policy outcome.
212. Digital markets and technology changes rapidly. It is essential therefore that the ICO provides evidence and consults with businesses and sector bodies to ensure the proposed objectives and duties avoid unintended consequences. The ICO should be mindful of the compliance burden on businesses of all sizes, but particularly small and medium sized enterprises. It would also be useful to provide stakeholders timely access to information so that stakeholders understanding of the decision-making process is increased.

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 agree

213. The ICO's primary objectives are to uphold data rights and to encourage trustworthy and responsible data use.
214. In order for the ICO to continue to function independently, particularly in relation to regulatory interventions, it should be responsible for setting its own operational objectives and strategies. This would ensure the ICO retains its independence from government in regulatory and organisational decision-making, allowing to effectively discharge its duties as a UK regulator. This independence is also an important factor in preserving the ICO's international role and ability to influence on behalf of the UK government and its citizens and businesses to enhance trade and support cross border data flows.
215. If the Government wants to succeed with its ambitions for 'Global Britain' and unlock the power of data, it is necessary that regulators such as the ICO should be given a statutory duty to have regard to competition and innovation.

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 agree

216. Restricted access to data can amplify barriers to entry and distort competition. We think the ICO's new duty to have regard to competition is positive to help strike the correct balance between upholding users data rights and taking steps to ensure that smaller companies can access the market. However, the duty would require coordination with the CMA, as the lead regulator for competition.

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 DRCF (CMA, Ofcom and FCA)?

Strongly agree

217. We strongly agree with the proposal to introduce a new duty for the ICO to cooperate and consult with other regulators. Digital regulation is a complex and interdisciplinary issue that it can be argued that, currently, no single regulator can assume a monopoly of expertise or the resources necessary to regulate and must rely on other regulators and sectoral expertise.
218. Giving the ICO a statutory reciprocal duty to cooperate with other regulators suggests deeper cooperation and coordination than a statutory reciprocal duty to consult and this is helpful. Cooperation is especially important when regulating emerging markets. The statutory duty will ensure that regulators are consistent in their approach to safeguard businesses against conflicting rules between regulators.
219. This duty would formalise ICO's current approach to ensuring close working relationships with other regulators.

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

220. We agree with the requirement to liaise with existing regulators but would recommend that the ICO's duty to cooperate and consult should also apply to self-regulators such as MRS plus other relevant regulators e.g., the Advertising Standards Authority (ASA) and the Direct Marketing Commission (DMC).
221. MRS has a strong existing relationship with the ICO, and we believe it would be beneficial that non-statutory regulators are recognised to ensure that regulation is agile and supports the various sector self-regulatory systems which will apply digital regulation to specific professions and disciplines.

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

222. Information sharing is important. There may be instances where data sharing between digital regulators will be essential to address public policy issues and combat criminal activities. Data sharing can also play a role in minimising the potential for competition between regulators given the complex nature of digital regulation and the roles that various regulators have in regulating digital markets.

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

See answer to Q5.2.7

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?

Somewhat disagree

223. It is critical that any statement of strategic priorities still enables the regulator to operate independently of government.
224. It is for Parliament to set the ICO's objectives. In order to enhance the emphasis on independence in relation to the statement of strategic priorities, consideration should be given to whether the statement of strategic priorities should be subject to Parliamentary approval.
225. We urge caution for two reasons. First, we believe it is necessary to have an impartial regulator to protect the credibility of the ICO. Secondly, the EU is robust in its position that the regulator should be independent of Government. Awarding the Secretary of

State with additional powers that is perceived to weaken the independence of the ICO could therefore risk adequacy.

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?

Strongly agree

226. We agree that the ICO can play an important part in promoting responsible cross-border dataflows. The internationalisation of data means that the ICO cannot play an inward-looking role, especially as it no longer has a role on the European Data Protection Board. As the UK increases cooperation with other countries through data adequacy and Free Trade Agreements, there is scope to introduce mechanisms such "one-stop shop", which played an important role in aiding UK citizens to exercise their data rights across the EU, to other countries and participating in regulatory exchanges to deepen mutual understanding.
227. It is, however, critical that any statement of strategic priorities still enables the regulator to operate independently of government.
228. it is for Parliament to set the ICO's objectives. In order to enhance the emphasis on independence in relation to the statement of strategic priorities, consideration should be given to whether the statement of strategic priorities should be subject to Parliamentary approval.

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?

Somewhat disagree

229. The ICO must promote the free flow of personal data to its international trade partners which means considering the Government's wider international policies.
230. It is critical however that any statement of strategic priorities still enables the regulator to operate independently of government.
231. it is for Parliament to set the ICO's objectives. In order to enhance the emphasis on independence in relation to the statement of strategic priorities, consideration should be given to whether the statement of strategic priorities should be subject to Parliamentary approval.

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?

Somewhat disagree

232. There is a need to ensure that the unique role of the ICO in regulating government and the public sector, and the resulting need to maintain impartiality in doing that, is reflected in the proposals.

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

Somewhat disagree

233. The current proposal for the Chief Executive to be appointed through a public appointments process (paragraph 359) would mean that the ICO Board and Chair would not be responsible for the appointment of this role – the final decision would rest with Ministers. It should be recognised that this would then result in the ICO having a different model to that adopted by other economic regulators. For example, OFCOM, where the Chief Executive is a public appointment made by the OFCOM Board, with the approval of the Secretary of State. This proposal would, therefore, give the ICO a constitution less independent from government than that of other economic regulators, despite its role in overseeing the public sector and government.

Q.5.3.3. 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

234. the ICO Board should be responsible for the appointment of Executive level roles, including the Chief Executive. As the Chief Executive is the most senior Executive on the Board, the Board should have the final decision about this appointment, rather than Ministers. In addition, as the non-Executive Chair would be a Crown appointee it is vital that they, and the Board, have complete independence in making Executive appointments.

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

235. in order to safeguard the independence of the appointment we recommend that the Secretary of State is consulted as part of a public appointment process, rather than the appointment being made by Ministers. This would ensure confidence in the future ICO’s ability to regulate independently.

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?

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?

Somewhat agree

236. We agree with the proposal to strengthen accountability mechanisms and improve the transparency of the ICO’s performance. The ICO must be transparent and directly accountable to the UK Government and Parliament to ensure that there are democratic checks and balances.

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

237. We would welcome the requirement for the ICO to develop its KPIs as this would aid transparency and demonstrate that the regulator is providing value to the public money. Stakeholders will no doubt have an interest in knowing the ICO's resources are being used effectively and efficiently. Moreover, having comprehensive KPIs It would help the ICO make sure it is achieving its objectives. The NAO has published previous guidance on performance measurement by regulators[7], and this could form the basis of future KPI setting.

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?

Somewhat agree

238. Publication of the key strategies and processes that guide its work aligns well with the principle of transparency.

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

Q5.4.6. 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

239. It is critical to enable the ICO as a regulator to operate independently of the UK Government.
240. If the power to review is granted to the DCMS Secretary of State it should be used sparingly and initiated only if certain criteria is met. The review should only be concerned with the economy, efficiency and effectiveness with which the ICO has used its resources in discharging its functions. The independent review should be conducted by a person that is both independent of DCMS and the ICO.

[7] https://www.nao.org.uk/wp-content/uploads/2016/11/Performance-measurement-by-regulators.pdf

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?

Somewhat agree

241. We agree with the proposal to oblige the ICO to publish impact assessments and conduct enhanced consultation when developing codes of practice or complex guidance. We recognise this as a gap, so trying to ensure that the ICO reflects on the impact of its activities on other areas is helpful.

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?

Strongly agree

242. We are pleased with the opportunity to engage further with the ICO, via the proposal for a power for the Secretary of State to require the ICO to set up an expert panel when developing codes of practice, and complex or novel guidance. It is important that the ICO approach emerging markets with an open mind and listen respectfully to a broad range of stakeholders. This will make sure that action is proportionate and achieves the intended policy outcome.
243. MRS has input into ICO initiatives in the past and would welcome the ability to continue to do so in the future.

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?

Somewhat disagree

244. The ICO has a fully functioning consultative approach to guidance development already in place.
245. It is however important, for both government and the ICO, that the ICO has complete independence when it comes to the final sign-off
246. These proposals, which effectively amount to the right of veto for the UK Government over key pieces of guidance, have the potential to create a lack of clarity about the ownership and accountability for the content of the guidance. This undermines the role of the regulator and creates an increased risk of judicial review or challenge for both parties.
247. The introduction of a right of approval and veto of ICO guidance for the Secretary of State at the end of a process to develop, consult and then issue guidance may undermine the contributions of stakeholders to the development of the guidance. In fact it may create additional regulatory uncertainty for business, as well as operational uncertainty for the ICO.

248. This proposal is fundamentally at odds with safeguarding the ICO's independence, which is key to engendering the public's trust and confidence in the digital and data economy.

Q5.5.4. The proposals under this section 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

See answer to Q5.5.3

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

Don't know

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

Strongly agree

249. At the heart of any regulation or policy approach should be the principle of proportionality.

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?

Somewhat agree

250. It makes sense for complainants to first try to resolve complaints directly with relevant data controllers. However, this must be time-limited so that the process is not unnecessarily prolonged in an attempt to dissuade complainants from following up a legitimate complaints.

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?

Strongly agree

251. A simple and transparent complaints process to handle data subjects' complaints would be helpful. If complaints can be satisfactorily resolved in a timely manner this would build trust in the system and in principle reduce the volume of complaints to the ICO and free it up to handle cases that are higher risk.

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?

Somewhat agree

252. Whilst this would enhance the ICO's discretion in dealing with complaints, this would need to be carefully defined to ensure data subject rights are not adversely affected.

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?

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

253. This proposal would support ICO's work to supervise and implement the regulatory framework set by Parliament.

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?

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

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 attend an interview in the course of an investigation?

Strongly agree

254. This proposal would support ICO's work to supervise and implement the regulatory framework set by Parliament.

255. This scenario would be similar to the power the Financial Conduct Authority (FCA) has under the Financial Services and Market Act. Used in a risk-based, proportionate manner this would support ICO's ability to fully and efficiently investigate concerns and ensure identifying and mitigating both current and future risks to people.

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

256. The power to compel an individual to answer questions would ensure meaningful cooperation with investigations. The power is intended to enable the effective gathering of evidence, and thus a more robust resolution to 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

257. The proposal to amend the statutory deadline for the ICO to issue a final penalty notice following a Notice of Intent (NOI) from six to 12 months, and the provisions to stop the clock where information is not provided on time, would ensure that the ICO has sufficient time to investigate some of the more complex cases and properly consider any representations made by the parties under investigation

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

258. The proposal to amend the statutory deadline for the ICO to issue a final penalty notice following a Notice of Intent (NOI) from six to 12 months, and the provisions to stop the clock where information is not provided on time, would ensure that the ICO has sufficient time to investigate some of the more complex cases and properly consider any representations made by the parties under investigation

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?

Neither agree nor disagree

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?

Neither agree nor disagree