

## **Victims & Witnesses (Scotland) Bill**

### **Information Commissioner's Office**

**The ICO's mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.**

The ICO is the UK's independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on complaints providing information to individuals and organisations and taking appropriate action where the law is broken.

The ICO enforces and oversees the Data Protection Act and the Privacy and Electronic Communication Regulations, as well as the UK Freedom of Information Act and the UK Environmental Information Regulations, both of which apply to reserved matters in Scotland.

#### 1. Introduction

The Information Commissioner's Office (ICO) welcomes the opportunity to respond to the consultation by the Health and Sport Committee of the Scottish Parliament on S26 and S27 of the Victims and Witnesses (Scotland) Bill. These sections relate specifically to the creation of a National Confidential Forum (the Forum, NCF) for adult survivors of childhood abuse while in care. As the ICO is responsible for the regulation and enforcement of the Data Protection Act 1998 (DPA), our response will be limited to those aspects of the proposals which relate to the processing of personal data.

#### 2. Data Protection and the National Confidential Forum

Through S26 of the Victims and Witnesses Bill, the Mental Health Act (MHA) will be amended to require the Mental Health Welfare Commission to establish the National Confidential Forum (MHA, s4ZA) with general functions of providing a means through which persons who had been placed in care as children can describe their experiences during their period in care and, drawing upon such evidence (4ZB (a),(b)), then identify patterns and trends emerging from it and make recommendations about good practice (4ZB(c)). The NCF will also prepare reports on the testimony and consequent recommendations (4ZB(d)) as well as providing information about advice and assistance available to people giving or proposing to give testimony (4ZB(e)). As such, the NCF will be processing substantial volumes of personal data, some of which – for example, information relating to the physical and mental health of the person who had been in care or allegations of criminal offences undertaken by staff of the care home - will be defined as sensitive personal data.

The ICO welcomes the emphasis placed on preserving the anonymity of participants in the NCF, of establishments providing the care and of any other persons as outlined in s4ZB(d) of the proposed amendment to the MHA. This

is made more explicit within the proposal for Part 4 of Schedule 1A where, in paragraph 9(2), the NCF must take steps to anonymise information as soon as is reasonably practical after receiving it. Paragraph 11(2) of Part 5 of this Schedule also requires that reports prepared by the NCF must not include information which could lead to the identification of individuals or institutions.

In this regard, please note that the ICO has produced a Code of Practice on Anonymisation which gives guidance on appropriate techniques for anonymisation of data and which also considers issues surrounding the re-identification of individuals from sets of information.

The ICO also welcomes the obligation on the NCF to provide advice and assistance to persons offering testimony (4ZB(e)). Principle 1 of the DPA requires that processing of data be fair and lawful and individuals participating in the NCF should be informed about the procedures to be adopted by the Forum; the obligation placed upon the NCF to provide advice and assistance will help ensure compliance with this Principle. From the perspective of data protection, participants should be made aware that their testimonies normally will be confidential and anonymised but that some disclosure may be necessary under strictly limited circumstances. The ICO has produced guidance on the production of Privacy Notices which may assist in the development of advice to participants.

Part 6 of Schedule 1 of the proposed amendment to the MHA gives further emphasis to the need to protect confidentiality through the creation of a statutory bar to the disclosure of information provided to the NCF which is not already in the public domain unless otherwise exempted. Whilst any breach of the statutory bar may be an offence under S55 of the DPA, consideration should be given to creating a separate offence under the MHA. This may provide further reassurance to participants that the information they provide to the NCF is being treated appropriately.

The ICO would be pleased to work with Mental Welfare Commission and/or the National Confidential Forum to ensure that the policies and procedures for the protection of the personal information recorded by the Forum are robust and accord with our guidance on relevant aspects of the handling of personal data. However, in any event, we would recommend that consideration is given to the application of the Scottish Government's Identity Management and Privacy Principles and that a Privacy Impact Assessment is undertaken prior to the establishment of the forum in order to assess the privacy risks to individuals arising from their participation.

Finally, the DPA requires that all data controllers are notified with the ICO for inclusion on the public register in which the purposes for processing of personal data is formally recorded. The NCF will either come under the umbrella of the Mental Welfare Commission's notification or be a data controller in its own right. In any event, it is recommended that clarification is sought from the ICO Notifications helpline on 0303 123 1113 to ensure that the purposes for processing are properly recorded and, thereby, lawful.

**Ken Macdonald**  
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**Information Commissioner's Office**

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