Justice Committee
Victims and Witnesses (Scotland) Bill

Written submission from the Information Commissioner's Office

About the Information Commissioner’s Office (ICO)

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 Justice Committee of the Scottish Parliament on the Victims and Witnesses (Scotland) Bill (the Bill). The ICO has noted that S26 and S27 of the Bill are being considered by the Health and Sports Committee. As the ICO is responsible for the regulation and enforcement of the Data Protection Act 1998 (DPA), a separate response has been made to that Committee on the data protection issues relating to the creation of a National Confidential Forum for adult survivors of childhood abuse while in care. Similarly, our response to the Justice Committee will be limited to S3 of the Bill which covers the individual’s rights to information.

2. Victims’ rights to information

Section 3 of the Victims and Witnesses Bill (the Bill) requires specified information about criminal proceedings to be disclosed to victims and witnesses on request. As an organisation which promotes individuals’ access to information through both the Data Protection Act 1998 (the DPA) and the Freedom of Information Act 2000 (FOIA), the ICO welcomes transparency in decision making which affects individuals and, hence, broadly supports the proposals within S3 of the Bill. The rights which will be conferred by the legislation are limited to victims of, and witnesses to, an offence or alleged offence (S3(2)) and the information to be disclosed (S3(6)) is largely procedural; these restrictions provide a degree of proportionality to the release of the information, some of which may be considered to be sensitive personal data as defined by the DPA. Our comments below address issues relating to such disclosure of sensitive personal data.

Sensitive personal data is defined in S2 of the DPA and, amongst other individual characteristics, includes:
• a person’s physical or mental health or condition (S2(e));
• both the commission or alleged commission of any offence (S2(f)); and
• any proceedings for any offence committed or alleged to have been committed by a person, the disposal of such proceedings or the sentence of any court in such proceedings (S2(g)).

By definition, therefore, the disclosures of information relating to the proceedings against an individual will involve the disclosure of sensitive personal data. However, although sensitive personal data are subject to stricter conditions of processing than are non-sensitive personal data, the DPA allows for disclosure where the disclosure is required by or under any enactment, by any rule of law or by the order of a court (S35(1)). Such disclosures must nevertheless conform with the data protection principles.

Information which qualifies for disclosure to victims and witnesses is described in S3(6) of the Bill. Necessarily, some of that information will be the personal information of the accused, albeit largely relating to procedural matters which will be in the public domain (eg, the place, date and time of when a trial is to be held). However, under certain circumstances, revealing the grounds of a decision not to proceed with a criminal investigation (S6(a)), to end a criminal investigation (S6(b)) or the grounds not to institute criminal proceedings (S6(c)), may disclose additional sensitive personal information of the accused or of a third party (for example, where there are medical grounds for not proceeding with a prosecution). Under S3(3) of the Bill, the qualifying person need not comply with the request for information if it is considered to be inappropriate to disclose it.

Whilst recognising that the decision to disclose will be one of public interest and will be dependent upon both the nature of the offence and the reason not to proceed with the investigation or prosecution, consideration should be given to requiring guidance to be issued to qualifying persons to assist them in making consistent decisions between cases. It may also be appropriate for qualifying persons to consult with one another when determining what information can be released.

To ensure that the rights of victims and witnesses are upheld promptly, it would be appropriate for qualifying persons to be required to respond to any request for qualifying information within a defined timeframe. The DPA requires that requests for personal information are provided within 40 calendar days whilst both the UK and Scottish FOIAs require information to be provided to requestors within 20 working days. Similar timeframes should be made be applicable here. In addition, consideration should be given to introducing a right of appeal for victims and witnesses who have been denied access to qualifying information.

Dr Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)
12 April 2013