



**CRIMINAL BAR ASSOCIATION RESPONSE TO THE MINISTRY OF JUSTICE
CONSULTATION CP22/09**

**"THE KNOWING OR RECKLESS MISUSE OF PERSONAL DATA –
INTRODUCING CUSTODIAL SENTENCES"**

January 2010

1. In a Consultation dated 15th October 2009 the Ministry of Justice sought responses to its proposals to provide for custodial sanctions for those convicted of offences under section 55 of the Data Protection Act 1988.
2. The Criminal Bar Association welcomes the opportunity to respond to this consultation.
3. The present consultation also proposes the introduction of a new defence under section 55 for those who can show that they acted for the purposes of journalism art and literature with a view to publishing journalistic, literary or artistic material in the reasonable belief that they were acting in the public interest.
4. The present consultation arises against the background of The Information Commissioner's Office 2006 Report "What Price Privacy?"¹ and the Department of Constitutional Affairs Consultation CP 9/06 "Increasing Penalties for deliberate and wilful misuse of personal data"². The Information Commissioner has repeated his call for increased sanctions as recently as late 2009. The present Consultation is a comparatively brief document but we consider it against the broader background outlined above.

¹ http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/what_price_privacy.pdf

² http://www.dca.gov.uk/consult/misuse_data/consultation0906.pdf

5. We consider that the concerns raised by the Information Commissioner in "What Price Privacy?" that present sanctions are inadequate to act as a deterrent are well-founded. We consider the deterrent case for the introduction of the possibility of and, in an appropriate case, the imposition of a custodial sentence is made out.
6. Furthermore, the enabling legislation to adding custody as an available punishment has been in effect since Royal Assent to the Criminal Justice and Immigration Act 2008, i.e. since 8th May 2008.
7. It is in these circumstances that our response to this consultation is correspondingly brief.

Question 1: Should the Secretary of State introduce custodial penalties for offences committed under section 55 of the DPA?

Response: To the extent that we understand this question to mean "Should the Secretary of State introduce the necessary legislative changes (pursuant to the power conferred by section 77 of the Criminal Justice and Immigration Act 2008) so as to make custodial penalties available to the courts when dealing with offences under Section 55 of the DPA?", the answer is yes.

Question 2: Subject to the responses to Question 1, the Government believes that the level of the custodial sentences should be set at the maximum available under the power (i.e. twelve months' imprisonment on summary conviction and two years on conviction on indictment). Do you agree? If not, at what (lower) level do you believe the maximum sentence should be set?

Response: Subject to the magistrates court maximum sentence being six months' imprisonment in England and Wales pending the coming into force of section 282(1) of the Criminal Justice Act 2003, we agree with the proposals for the maximum sentences available upon summary conviction and upon conviction upon indictment.

Question 3: Subject to the responses to Question 1, the Government proposes to bring in the new custodial penalties from April 2010, when the intention is that the ICO be given enhanced powers. Do you agree with this approach?

Response: We respectfully enquire whether it is necessary to wait that long? The enabling provision, section 78 of the Criminal Justice and Immigration Act 2008, has been in force since 8th May 2008. We see no necessary connection between the bestowing of enhanced powers on the Information Commissioner and this legislative change. The new custodial penalties should come into force by April 2010, if not before. .

Question 4: Subject to the responses to Question 1, the Government proposes to commence the new defence for anyone who can show that he was acting for the special purposes with a view to publishing journalistic, literary or artistic material, in the reasonable belief that the obtaining, disclosing or procuring was in the public interest alongside the increased penalties (subject to responses received to Question 1). Do you agree with this approach?

Response: The enabling provision for this change to the law is contained in Section 78 of The Criminal Justice and Immigration Act 2008. The Act received Royal Assent on 8th May 2008, but section 78 has not yet been brought into force. The recognition of the special purposes of journalism, artistic and literary purposes forms a part of the original scheme of the Data Protection Act 1998: see section 3 of that Act, and see e.g. section 46 of that Act (restrictions on enforcement action by Information Commissioner in the case of processing for the special purposes). We consider that the “new” defence could well have been brought into effect well before now, in keeping with the legislative intention expressed in Section 78 of the 2008 Act. Accordingly, we would support it being brought into effect or “commenced” as soon as practicable, and certainly no later than the increased penalties are brought into force.

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