



Ministry of
JUSTICE

The knowing or reckless misuse of personal data – introducing custodial sentences CP 22/09

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: ollie.simpson@justice.gsi.gov.uk or fax to: 020 3334 2245. Thank you.

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

Comments: No. The Criminal Justice Alliance recognises the seriousness of offences related to the misuse of personal data. However, we do not think that the case for introducing custodial sentences for those who misuse personal data is sufficiently established in this consultation paper for this change to be made.

On page thirteen of the consultation paper, the Government's three reasons for introducing the increased penalties are summarised. The first, and seemingly most significant given its prominence throughout the consultation paper, is the perceived deterrent effect of custodial sentences. However, the evidence does not support the assumption that is made throughout this consultation paper that more severe sentencing has a greater deterrent effect on offending behaviour. Indeed, there is no empirical evidence to support the efficacy of deterrence in sentencing [p.76: Ashworth, A. (2005) *Sentencing and criminal justice*, Cambridge: Cambridge University Press]. The Halliday Report examined this issue, concluding that: 'The evidence, though limited in this area, provides no basis for making a causal connection between variations in sentence severity, and differences in deterrent effects' [p.128: Halliday, J. (2001) *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, London: Home Office]. This is supported by an overwhelming body of evidence, including, for example, an international review of the evidence which showed that sentencing has no significant deterrent effects and concluded that 'variation in sentence severity does not affect the levels of crime in society' [Doob, A. and Webster, C. (2003) 'Sentence Severity and Crime: Accepting the Null Hypothesis' in M. Tonry (ed.) *Crime and Justice: A Review of Research*, 30: 143-195]. This concurs with the conclusions of a Home Office-commissioned review which found that there is insufficient evidence to prove that there is link between the severity of sentences and crime rates [Von Hirsch, A., Bottoms, A., Burney, E. and Wikstrom, P.-O. (1999) *Criminal Deterrence and Sentencing Severity: An Analysis of Recent Research*, Oxford: Hart Publishing].

This calls into question the entire approach proposed by this consultation paper, which is centred on the premise that introducing custodial penalties for these offences would have a deterrent effect on potential offenders. In particular, the claim in the accompanying Impact Assessment (<http://www.justice.gov.uk/consultations/docs/data-misuse-impact->

assessment.pdf) that: 'As there are already monetary penalties in place but offences are still being committed, we can assume that the existing penalties do not provide a strong enough deterrent to prevent some individuals from being involved in criminal activities associated with personal data' [Paragraph 4.9, page 6] assumes that there is a straightforward relationship between criminal activity and sentencing severity, an assumption that is simply not supported by the evidence.

In addition, even if a deterrent effect of sentencing is accepted, it is not made clear in the consultation paper why a short custodial sentence (which would, in terms of time served in prison, be much shorter than the maximum lengths of time set out in the consultation paper, as is the case with all custodial sentences) would necessarily have a greater deterrent effect than a fine set at an appropriate level. Indeed, a financial penalty may be more likely to be given serious consideration by some potential offenders than a custodial sentence. For example, looking at another offence where financial gain is the primary motivation and where similar effects might therefore be expected, evidence on sentencing for drug supply suggests that 'the fear of financial reprisal is of more concern to offenders than the potential loss of liberty' [p.14: Sentencing Advisory Panel (2009) Consultation paper on sentencing for drugs offences - http://www.sentencing-guidelines.gov.uk/docs/drug_offences.pdf]. This suggests that an approach focusing on offenders' financial assets would be more effective than the use of custodial sentences.

However, while there is no evidence to support the deterrent effect of custodial sentences, evidence does show that even short prison sentences can cause disproportionate damage to an offender and their family. Prison has detrimental effects on prisoners' mental and physical health, their self-esteem, and their relationships with their families. On release, many prisoners face problems in obtaining accommodation and employment, and many have immediate financial problems. All of these factors increase the likelihood of future offending. In addition, the failings of custodial sentences are amplified by the current high level of overcrowding in the prison system, which is damaging to every aspect of the work of the Prison Service. Imprisonment also has a negative impact on the wellbeing of the prisoner's family. Yet these negative impacts of imprisonment appear not to have been taken into consideration in developing these proposals.

The second reason given is to provide public reassurance that those convicted may be given a custodial sentence. Yet no evidence is provided that any such reassurance is sought by the public. In fact, it seems equally likely that the public would like to see the use of large financial penalties to ensure that offenders are punished financially for an offence which can be extremely lucrative. The third reason given is to achieve parity across similar offences. However, again no evidence is presented as to why sentences should be levelled 'up', to introduce custodial penalties, rather than levelled 'down', so that all offences of this type are liable to a financial penalty. The latter would arguably be more appropriate and effective for offences of this type.

It should also be noted that paragraph 4.10 of the accompanying Impact Assessment [page 6], which states that the trend in prosecutions for these offences is already on a downward trend (from an average of four cases per year over the last four years), suggests that the current approach is working, and that changes are not needed. In general, the Government has been too quick to create imprisonable offences, resulting in (at the last count) nearly 1,500 new imprisonable offences since 1997. Although the overall impact on the criminal justice system of the changes proposed in the consultation paper would be small, they are representative of this broader overreliance on the use of custody, which is both ineffective and expensive. They should therefore not be made until a more complete and compelling case has been made for their introduction.

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?

Comments: The Criminal Justice Alliance does not support the introduction of custodial penalties for offences committed under Section 55 of the Data Protection Act 1998. However, if custodial sentences are introduced, a shorter maximum length should be considered.

In addition, the consultation paper fails to recognise that the proposals for 'Custody Plus', created by the Criminal Justice Act 2003, are now unlikely to be implemented, particularly in the current financial climate. As a result, Section 282(1) of the Criminal Justice Act 2003 will not be implemented. Consequently, where the paper states: 'This will mean those convicted could be imprisoned for up to two years on indictment, and up to twelve months on summary conviction (subject in England and Wales to section 282(1) of the Criminal Justice Act 2003 coming into force', it should be recognised that the maximum custodial penalty on summary conviction would be, in reality, six months for the foreseeable future.

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?

Comments: The Criminal Justice Alliance does not support the introduction of custodial penalties for offences related to the misuse of personal data. However, if custodial sentences are introduced, this timescale seems appropriate.

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. Do you agree with this approach?**

Comments: The Criminal Justice Alliance supports the introduction of the defence proposed in this consultation paper. However, it is not clear why this should be linked to the introduction of custodial penalties for those who misuse personal data. This defence is required whether or not custodial penalties are introduced and should therefore be put in place as soon as possible.

Please complete the section overleaf to tell us more about you.

About you

Please use this section to tell us about yourself

Full name	Jon Collins
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If you would like us to acknowledge receipt of your response, please tick this box	<input checked="" type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

The Criminal Justice Alliance (formerly the Penal Affairs Consortium) is a coalition of organisations committed to improving the criminal justice system. It has 49 members - including campaigning organisations, voluntary sector service providers, umbrella groups, research institutions and trade unions - bringing together a wide range of organisations involved in policy and practice across the criminal justice system.

The CJA's members are: Action for Prisoners' Families, Adullam Homes Housing Association, Anne Peaker Centre, Apex Charitable Trust, Association of Black Probation Officers, Association of Members of Independent Monitoring Boards, Bindman and Partners, Birth Companions, Catch22, Centre for Crime and Justice Studies, Churches' Criminal Justice Forum, Clean Break, Clinks, DrugScope, INQUEST, Institute for Criminal Policy Research, JUSTICE, Nacro, National Association of Official Prison Visitors, New Bridge Foundation, Pact, Penal Reform International, Prison Officers' Association, Prison Reform Trust, Prisoners Abroad, Prisoners' Advice Service, Prisoners' Education Trust, Prisoners' Families and Friends Service, Public and Commercial Services Union, the Quaker Crime, Community and Justice Group, RAPt, Release, Restorative Justice Consortium, Rethink, Revolving Doors Agency, RSA Prison Learning Network, Sainsbury Centre for Mental Health, SOVA, St Giles Trust, The Children's Society, The Fawcett Society, The Griffins Society, The National Appropriate Adult Network, The Police Foundation, The Young Foundation, Transform Drug Policy Foundation, UNLOCK, Women in Prison and Young Minds.

Although the Criminal Justice Alliance works closely with its members, this response should not be seen to represent the views or policy positions of each individual member organisation.