Ministry of JUSTICE

Government Response to the House of Commons Justice Committee Ninth Report of Session 2010–12: Referral fees and the theft of personal data

December 2011

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Introduction

The Government welcomes the House of Common's Justice Committee's (the Committee) Ninth Report of Session 2010–12 on Referral fees and the theft of personal data. The Government wishes to respond to each of the recommendations made.

Recommendation 1

We accept the Information Commissioner's argument that the issue of custodial sentences for section 55 offences is not exclusively, or even primarily, an issue relating to the media and that the issue should be dealt with by Parliament without waiting for the outcome of Lord Justice Leveson's inquiry. We urge the Government to exercise its power to provide for custodial sentences without further delay.

Government Response

The Government recognises the harm that section 55 offences can cause, and does take the unlawful obtaining and disclosure of personal data very seriously. For this reason, the issue is kept under review.

In his evidence to the Committee, the Information Commissioner stressed that custodial sentences would provide a deterrent for the commission of these offences. However, the Government is not yet convinced of this case. Many of the offenders who commit section 55 offences opportunistically are unlikely to be aware of the penalty for such offences. Indeed, there is good evidence that the probability of being detected and punished generates deterrence.

In considering the case for custodial offences, the Government believes that these should be reserved for the most serious offences, where neither a fine alone nor a community sentence can be justified. The court may only impose a custodial sentence where the offence is so serious that neither a fine alone nor a community sentence will do. It is not an alternative sentence where a fine is appropriate but the offender has limited means. Fines are means tested so that they impact equally on offenders of different means.

The Information Commissioner has made a case for introducing custodial sentences for what can clearly be a lucrative crime, and points to the T-Mobile case where two ex employees stole personal data and made considerable financial gain. As the Commissioner himself acknowledges, not all section 55 offences are motivated by financial gain, but he has put forward a strong argument that the level of fines handed down in practice does not match the profits which can be gained from the illegal trade in personal data.

As the Committee has heard, the Information Commissioner can seek to obtain an order under the Proceeds of Crime Act 2002 (POCA) by which any assets obtained through criminal activity can be confiscated. This was successfully used in the case of the two former employees of T-Mobile where orders totalling £73,700 were made. The Government understands that the Information Commissioner intends to make use of POCA where this is appropriate in future. This should mean that any financial gains made by section 55 convicted offenders will be lost to them, thereby removing the financial incentive to disregard the penalties available to the courts.

In addition, the Committee will note that the Government is seeking to remove the £5,000 upper limit on fines imposed in the magistrates' courts through the Legal Aid, Sentencing and Punishment of Offenders Bill, so that, in future, the magistrates' courts would have unlimited fining powers with respect to section 55 offences, as the Crown Court has currently.

The Committee's report notes that section 55 offences are not exclusively related to the media and recommends that there is therefore no need to wait until the outcome of the Leveson Inquiry. The Government accepts fully that the illegal obtaining and disclosure of personal data is an issue that affects people beyond those who are in the public spotlight or of interest to the press. However, it is also the case that the media have a direct interest in this issue and its implications for responsible investigative journalism. It has been argued in the past that the introduction of prison sentences in this area could have a "chilling effect" on responsible investigative journalism, which is why any consideration of the penalties in this area would need to take into account commencement of the defence for journalism, literature and art inserted by section 78 of the Criminal Justice and Immigration Act 2008 (CJIA). As noted in Lord McNally's submission to the Committee there is a statutory duty to consult the media before making an Order under section 77 of the CJIA to introduce custodial sentences for section 55 offences.

The Government believes that penalties for section 55 offences should be considered across all sectors at the same time. The Leveson Inquiry is specifically looking at *"the culture, practices, and ethics of the press, including… the extent to which the current policy and regulatory framework has failed including in relation to data protection",* so it would be wrong to pre-empt the findings of that Inquiry. The full landscape, including how the change could affect responsible investigative journalism, needs to be taken into consideration when looking at penalties for section 55 offences. This consideration needs to place at its heart not just the issue of deterrent, but the level of harm caused by the various forms of this activity, the motives involved, the penalties available for comparable offences and the wider criminal law in this area.

With regard to the wider law, the Government repeats the point made by Lord McNally in his letter of 22 September that a section 55 offence may be committed as part of a course of criminal conduct involving the commission of other offences. These might include unlawful interception of communications under Regulation of Investigatory Powers Act 2000 and unauthorised access to computer material under the Computer Misuse Act 1990, both of which carry a two year prison sentence. Under the Fraud Act 2006 it is an offence to dishonestly make a false representation (including as to identity) with a view to financial gain. The maximum sentence is ten years' imprisonment. Bribing another or being bribed contrary to the Bribery Act 2010 is an offence which carries a maximum penalty of ten years' imprisonment. In relation to police officers and other public sector workers, the common law offence of misconduct in public office may also be relevant, and this carries a custodial sentence.

The Government thanks the Committee for the interest it has shown in this area, and the contribution it has made to the debate by way of its report. For the reasons provided, we do not believe that now is the correct time to introduce custodial sentences for section 55 offences. However, we will continue to keep this issue under review. Once the Leveson Inquiry has reported we will be in a better position to consider the wider implications of any change to the penalties available to the courts in this area.

Recommendation 2

We welcome the Government's commitment to ban referral fees and we do not believe the ban should be limited to personal injury cases. We hope that when implementing the ban, the Government will take into account the fact that referral fees reward a range of practices that are already illegal. Banning referral fees, together with custodial sentences for breaches of section 55 of the Data Protection Act, would have the twin effect of both increasing the deterrent and reducing the financial incentives for these offences.

Government Response

The Government thanks the Justice Committee for its support for the ban on referral fees in personal injury cases and notes its recommendation for a wider ban across a range of practices.

Referral fees are paid by solicitors, amongst others, to third parties who 'refer' business to them. Claims management companies (CMCs) and insurers are the main recipients of referral fees from solicitors. CMCs may undertake a range of actions, including advertising, sending text messages and cold calling with a view to identifying potential claimants and encouraging them to make claims. In cases where policy holders contact insurers to make a claim an insurer might first confirm whether there is a related personal injury claim and then, if a potential claim is identified, refer the policy holder to a solicitor in return for a fee. In addition to insurers, other bodies e.g. care hire companies, accident management companies and repair garages, may also provide lawyers' access to such people for a fee.

Unsolicited direct marketing (including SMS communications) to individuals is a breach of Claims Management Companies (CMCs) conduct rules. CMCs which breach these requirements are subject to investigation and appropriate enforcement action. However, many of these leads or texts are not unsolicited as the recipient may have opted in or failed to opt out whilst taking part in a consumer survey, or when applying for insurance or a loan.

On 9 September 2011, the Government announced its intention to ban the payment and receipt of referral fees in personal injury cases, by way of a written ministerial statement to Parliament; the Legal Aid, Sentencing and Punishment of Offenders Bill has now been amended to this effect. The ban forms part of a wider package of reforms in respect of civil litigation funding and costs which are being taken forward under Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill. The provisions prohibit the payment and receipt of referral fees by making it a regulatory offence to pay or receive referral fees in personal injury cases.

The Government is not proposing to extend then ban further at present. The main concerns giving rise to the proposal have arisen in relation to personal injury claimants being actively encouraged to pursue their claims. The Government is therefore taking immediate action in this area. However, the provisions in the Bill do include powers to enable the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services, should the need arise in due course.

Recommendation 3

We are concerned that the Information Commissioner's lack of inspection power is limiting his ability to investigate, identify problems and prevent breaches of the Data Protection Act, particularly in the insurance and healthcare sectors. The audits he offers are free and operate on a risk-based approach and in the last year he has only carried out three or four a month. We call on the MoJ to work with the Information Commissioner to assess how the current system is working, and to consider why he has not formally requested the power to compel audits in any additional sectors and whether this process is unduly cumbersome. Following this the Government should consider the best way to ensure the Commissioner can investigate in a timely manner while minimising the regulatory burden on both the public and private sectors.

Government Response

The Government recognises that the ICO must have sufficient powers in order to enforce the DPA, and that Assessment Notices, as set out in section 41A of the DPA, are an important part of this.

It is worth noting that the ICO is currently not without powers to conduct non-consensual audits with private sector organisations. Schedule 9 of the DPA allows for the issue of a warrant to enter and search a premises if a judge is satisfied that there are reasonable grounds for suspecting that a data controller has contravened or is contravening any of the data protection principles, or that an offence under the DPA has been committed. The Schedule 9 power can be exercised on any body, and is not limited to Government Departments.

As noted in evidence to the Committee, Assessment Notices permit the ICO to enter specified premises without the consent of the data controller in order to determine compliance with the data protection principles. Currently Assessment Notices can only be served on data controllers specified in s41A(2), which includes government departments. The key differences between Assessment Notices and Schedule 9 warrants are that Assessment Notices do not require judicial oversight before being issued. Additionally, the ICO does not need to have reasonable grounds for suspecting the commission of an offence or the contravention of the data protection principles before serving an Assessment Notice. Instead, the Information Commissioner's statutory code of practice on Assessment Notices sets out the factors to be considered in determining whether to serve an Assessment Notice on a data controller.

The process in relation to extending the ICO's powers to inspect private sector bodies, involves exercising an order making power in section 41A(2)(c) of the DPA. However, this power cannot be used without the Information Commissioner making a formal recommendation once he is satisfied the extension is necessary due to the nature and quantity of data being processed, and the harm which could be caused by a breach of the data protection principles. The Secretary of State must then consult with the sector concerned and also be satisfied that designation is necessary having regard to the same criteria.

As noted in evidence, Ministers had not, at that time, received a request to designate a sector as liable for Assessment Notices from the Information Commissioner. However, the Information Commissioner has recently written to the Ministry of Justice (MoJ) asking that Assessment Notices be extended to cover the NHS and local government sectors. The ICO is also working on a recommendation covering parts of the private sector, which is likely to include the insurance sector, and expects to write to the MoJ in early 2012. MoJ will consider the Information Commissioner's business case and consult as is appropriate.

The Committee questions whether the process for extending the Assessment Notice power is unduly cumbersome. There are good reasons why such a process exists. Extending Assessment Notices to the private sector would act as a significant additional regulatory burden. Such additional burdens would conflict with the Hampton principles, which play a central role in ensuring that risks are adequately assessed and addressed before regulating. It is therefore important that the Government consult with those who are to be potentially regulated before introducing any new burdens, and indeed it would be inappropriate to introduce such powers without thorough consideration.

The Government will continue to work with the Information Commissioner to ensure he has appropriate powers with which to regulate compliance with the Data Protection Act 1998, including in relation to Assessment Notices. It is also worth nothing that the question of powers for independent supervisory authorities, including assessment notices, is likely to be discussed as part of forthcoming negotiations on a new EU data protection instrument.

Recommendation 4

We welcome the Framework Agreement because it enhances the independence of the Information Commissioner. However, our position is the same as that adopted by our predecessor Committee in 2006, namely that the Information Commissioner should become directly responsible to, and funded by, Parliament.

Government Response

The Government is committed to a strong and independent Information Commissioner to uphold information rights in the UK. The ICO plays a vital role in promoting and enforcing information rights legislation, and is key to the success of our work to increase transparency.

The Justice Select Committee's support for the new Framework Agreement is welcome. Together with relevant provisions in the Protection of Freedoms Bill, it delivers a real enhancement to the ICO's corporate and administrative independence. The Government believes this is the most appropriate course of action rather than to make the ICO a parliamentary body, because its functions do not primarily relate to the business of Parliament. The ICO's work affects all data controllers across the private, public and third sectors, everyone who has their data processed, and every public authority subject to the Freedom of Information Act.

Parliament already exercises considerable oversight of the ICO. The annual statement of the ICO's accounts and its annual report are laid before Parliament and are not subject to prior Government approval. The accounts are also subject to independent scrutiny by the National Audit Office before submission. The Information Commissioner is the Accounting Officer for the ICO and is responsible for all of its funds. He may be called before the Public Accounts Committee and may also be called before other Parliamentary committees to give evidence on a range of matters. The Commissioner regularly appears before select committees. Furthermore, as set out in Lord McNally's Written Ministerial Statement of 16 February 2011 the role of Parliament has been strengthened in relation to the appointment of the next Commissioner. Lord McNally set out that the Government will be bound by the pre-appointment scrutiny recommendation of the Justice Select Committee for the appointment of the next Commissioner in 2014.

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