TUC

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Consultation Response Data: A New Direction

TUC response to DCMS consultation Data: A New Direction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5. million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Trade unions play a key role in ensuring that the rights and interests of working people are represented and recognised. For example, we advocate the importance of strong collective bargaining rights, appropriate regulation and enforcement to ensure the protection of employment rights, as well as equality of treatment for all, regardless of factors such as race, religion, age, gender, disability, sexuality and access to financial resources.

Whilst we support the "pro-growth" approach outlined in this consultation in so far as this results in more and better jobs, we do not believe that this should be to the detriment of the fundamental rights of individuals in the workplace. Indeed, growth and productivity is dependent on there being a strong framework in place to protect the rights of workers and ensure good quality and rewarding work.

Neither do we believe that jeopardising the EU data adequacy statement will in any way assist with a "pro-growth" agenda.

Given the aims and purpose of the TUC, we respond only to the questions in this consultation within our direct sphere of work. However, by way of introduction to our consultation response, we believe it is important to highlight the significance of fundamental rights and the protection of personal data, both at work and in society as a whole.

Article 1 of the UK GDPR emphasises the critical importance of data protection rights in the UK. It states that the purpose of the regulation is to protect "fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data".

This is of particular relevance in the workplace, where there is often a significant imbalance of power between worker and employer. This is reflected in the degree of knowledge and control exercised over personal data at work.

However, the importance of these protections for personal data also applies across many aspects of our society. For example, the imbalance of power over data is relevant in a consumer-commercial context, as much as in a worker-employer context.

Protection of personal data has important implications for the individual. For example, in relation to the right to privacy, transparency and accountability, equality, the ability to understand and challenge decisions, and the ability to realise the commercial power of data.

Existing data protection legislation in the UK is not perfect. But the UK GDPR provides important protections for individuals, as well as some mechanisms to redress in part the imbalance of power over data at work and elsewhere.

For example, the right to make a data subject access request without charge, and the application of data protection impact assessments, help to offset the imbalance of power at work.

For these reasons, and as outlined in further detail in this consultation response, we are strongly opposed in principle to any dilution or removal of existing rights of data subjects under the UK GDPR.

Chapter 1: reducing barriers to responsible innovation

1.2 Research Purposes

We have significant concerns about the relaxation of protections for personal data used for research purposes. For example, we would oppose any relaxation of existing rules that would enable the appropriation of health data from NHS patients without their express consent.

The government welcomes views on the following question:

Q1.2.1. To what extent do you agree that consolidating and bringing together research-specific provisions will allow researchers to navigate the relevant law more easily? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible

The government welcomes views on the following questions:

Q1.2.2. To what extent do you agree that creating a statutory definition of 'scientific research' would result in greater certainty for researchers? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.3. Is the definition of scientific research currently provided by Recital 159 of the UK GDPR ('technological development and demonstration, fundamental research, applied research and privately funded research') a suitable basis for a statutory definition? ○ Yes ○ No ○ Do not know Please explain your answer, providing supplementary or alternative definitions of 'scientific research' if applicable.

The government welcomes views on the following questions:

Q1.2.4. To what extent do you agree that identifying a lawful ground for personal data processing for research processes creates barriers for researchers? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including by describing the nature and extent of the challenges.

Q1.2.5. To what extent do you agree that clarifying that university research projects can rely on tasks in the public interest (Article 6(1)(e) of the UK GDPR) as a lawful ground would support researchers to select the best lawful ground for processing personal data? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.6. To what extent do you agree that creating a new, separate lawful ground for research (subject to suitable safeguards) would support researchers to select the best lawful ground for processing personal data? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.7. What safeguards should be built into a legal ground for research?

Q1.2.8. To what extent do you agree that it would benefit researchers to clarify that data subjects should be allowed to give their consent to broader areas of scientific research when it is not possible to fully identify the purpose of personal data processing at the time of data collection? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.9. To what extent do you agree that researchers would benefit from clarity that further processing for research purposes is both (i) compatible with the original purpose and (ii) lawful under Article 6(1) of the UK GDPR? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.10. To what extent do you agree with the proposals to disapply the current requirement for controllers who collected personal data directly from the data subject to provide further information to the data subject prior to any further processing, but only where that further processing is for a research purpose and it where it would require a disproportionate effort to do so? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.2.11. What, if any, additional safeguards should be considered as part of this exemption?

1.3 Further Processing

Re-use of data for research and innovation

We are not responding to this section in full, but take this opportunity to highlight concerns expressed by our affiliate unions regarding the repurposing of data by employers.

Unions are concerned that employers collect data for a specified purpose, then later seek to use it for an alternative purpose. This is potentially in breach of one of the core principles of the UK GDPR. We refer to our response to the ICOs recent consultation on its employment practices code for more detail (link below).

Q1.3.1. To what extent do you agree that the provisions in Article 6(4) of the UK GDPR on further processing can cause confusion when determining what is lawful, including on the application of the elements in the compatibility test? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree 20 Please explain your answer, and provide supporting evidence where possible.

Q1.3.2. To what extent do you agree that the government should seek to clarify in the legislative text itself that further processing may be lawful when it is a) compatible or b) incompatible but based on a law that safeguards an important public interest? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer and provide supporting evidence where possible, including on: ○ What risks and benefits you envisage ○ What limitations or safeguards should be considered

Q1.3.3. To what extent do you agree that the government should seek to clarify when further processing can be undertaken by a controller different from the original controller? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer and provide supporting evidence where possible, including on: ○ How you envisage clarifying when further processing can take place ○ How you envisage clarifying the distinction between further processing and new processing ○ What risks and benefits you envisage ○ What limitations or safeguards should be considered

Q1.3.4 To what extent do you agree that the government should seek to clarify when further processing may occur, when the original lawful ground was consent? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer and provide supporting evidence where possible, including on: ○ How you envisage clarifying when further processing can take place ○ How you envisage clarifying the distinction between further processing and new processing ○ What risks and benefits you envisage ○ What limitations or safeguards should be considered

1.4 Legitimate Interests

The government welcomes views on the following questions:

Q1.4.1. To what extent do you agree with the proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Legitimate interests

We agree that the "legitimate interests" test requires clarification.

Our key concern is that the "legitimate interests" category should not be used as a "catch-all" provision for data processing in the employment relationship.

We are strongly of the view that the legitimate interests ground needs to be very carefully defined. Any further definition must clarify that data processing in the employment relationship is not necessarily a "legitimate interest".

However, this would be better achieved through statutory guidance from the ICO (in consultation with trade unions, civil society groups and other stakeholders) than through a defined list with no balancing test.

Statutory guidance could provide illustrative examples and case studies which would assist in the same way as the proposal for a defined list. But it would also allow for protection where the interests of the individual were at risk.

We consider the balancing test taking into account the rights of individuals to be a crucial element of the legitimate interests ground for lawful processing.

The protection afforded individuals as part of this balancing exercise is of the utmost importance where there may be an imbalance of power between data controller and data subject, as is the case in the workplace.

The other lawful grounds

We believe that further clarification by way of additional guidance from the ICO is also required in relation to the other lawful grounds for processing in Article 6.

The protections against potentially harmful forms of data processing offered by the limits set by Article 6 are of potentially of great value and protection to workers, especially in relation to the use of new technologies and highly intrusive forms of surveillance and monitoring.

However, in the absence of guidance and a developed body of case law, there is currently considerable uncertainty over the meaning of Article 6 (1) (b) which sets out that a potentially lawful basis for data processing is when it is "necessary" for the performance of the employment contract.

There is also uncertainty over what type of processing taking place within the context of the employment relationship would fall under the ambit of Art 6 (1)(b), or

alternatively Art (6) (1) (f). There is no guidance on the potential overlap between the two categories.

In this state of uncertainty, the current position is that there is a risk that employers will seek to argue that any processing at all, no matter how harmful, is "necessary" to the employment relationship, or falls into the "legitimate interests" category.

Art 6 as gatekeeper to Arts 21 and 22

An additional reason for the urgency to clarifying the Article 6 lawful grounds as above, is that the protections afforded under Articles 21 and 22 are only activated where data processing is undertaken in accordance with Art 6 (1) (f), but not when undertaken in accordance with Art 6 (1)(b). This is of considerable significance to workers who may otherwise benefit from these provisions and are being subject to ADM.

Consent

There is also a need for clarifying guidance on the operation of consent as a ground for lawful processing. We set out our views on this in our response to the ICO's consultation on their employment practices code. We believe the new code should set out how, in most cases, an employee will be unable to give valid consent to data processing because of the power imbalance in the employment relationship.

In effect, many employees will feel coerced into agreeing that the employer can collect and use their data, because they fear losing their employment if they do not do so. The code should set out that consent is only a valid basis for lawful processing where it is unambiguous, freely given, specific and informed. The code should also highlight that employees have a right to withdraw consent.

Q1.4.2. To what extent do you agree with the suggested list of activities where the legitimate interests balancing test would not be required? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, indicating whether and why you would remove any activities listed above or add further activities to this list.

We strongly disagree with most of the listed activities in the absence of a balancing test.

Several of the suggested activities are almost certainly already addressed by the existing grounds for processing. For example, reporting of criminal acts is likely to be necessary to comply with a legal requirement.

All of the listed interests, save for the one relating to detection of bias, represent the interests of business or organisations. In the absence of a balancing exercise with individual rights, we consider this to be an approach strongly and unfairly weighted against the protection of the rights of the individual, including workers.

We do support in principle the monitoring of AI systems to detect bias and discrimination, provided that appropriate protections are in place in relation to the personal data of individual data subjects. This is of particular importance where sensitive personal data is involved.

Q1.4.3. What, if any, additional safeguards do you think would need to be put in place?

As outlined above, we do not agree with the removal of the balancing test as this is an important safeguard.

Q1.4.4. To what extent do you agree that the legitimate interests balancing test should be maintained for children's data, irrespective of whether the data is being processed for one of the listed activities? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

We strongly agree the balancing test should be maintained for all data subjects.

1.5 AI and Machine Learning

Fairness in an AI context

The government welcomes views on the following questions:

Q1.5.1. To what extent do you agree that the current legal obligations with regards to fairness are clear when developing or deploying an AI system? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

We strongly disagree.

The use of AI-powered technologies in the workplace and the fairness of their operation (whether this is in terms of discrimination, or other forms of unfairness) is relevant to many different areas of law. For example, equality, data protection, human rights, health and safety, consumer law, standardisation and intellectual property.

It is crucial that the applicable areas of the law work together in a consistent way. At the moment this is not the case. See answer to 1.5.2.

Legal obligations relating to fairness must apply all the way down the AI-value chain. Therefore, there should be provision for all parties in the values chain from development to implementation of AI and ADM at work to be potentially liable for discrimination subject to a reasonable steps defence.

It is also important for workers to be protected against any form of detrimental treatment, including dismissal, as a result of the processing of inaccurate data. One way of addressing this would be to amend the Employment Rights Act (ERA) 1996 and insert a new cause of action to protect workers from any detriment caused by inaccurate processing or a data breach.

We refer you to our research report Technology Managing People- the Worker Experience which provides examples of the many forms of unfairness experienced by workers as a result of the use of AI to make decisions about them at work (https://www.tuc.org.uk/sites/default/files/2020-11/Technology_Managing_People_Report_2020_AW_Optimised.pdf).

Q1.5.2. To what extent do you agree that the application of the concept of fairness within the data protection regime in relation to AI systems is currently unclear? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible

The UK's data protection regime should be amended to state that discriminatory data processing is always unlawful.

Currently, the UK GDPR does not provide for a principle of non-discrimination. In light of the well-publicised dangers of discriminatory algorithms operating in the employment context, this should be resolved as a matter of urgency.

There should be specific cross-reference in the UK GDPR to discrimination as defined under the Equality Act 2010, and a clear statement that where there is any data processing that is discriminatory as defined under the Equality Act, this will be unlawful, without exception.

Q1.5.3. What legislative regimes and associated regulators should play a role in substantive assessments of fairness, especially of outcomes, in the AI context? Please explain your response.

Joint statutory guidance

There is an urgent need for joint statutory guidance on the steps that should be taken to avoid discrimination in consequence of the use of new technologies. This should be developed between the Equality and Human Rights Commission (EHRC), the Centre for Data Ethics and Innovation (CDEI), the Advisory conciliation and Arbitration Service (ACAS), the Confederation of British Industry (CBI) and the TUC and should give practical examples of how discrimination can take place when AI and ADM is operating in employment.

Data and Equality Impact Assessments

Data protection impact assessments and equality impact assessments are key measures of fairness in the AI context. Equality Impact Audits in the workplace should be made mandatory as part of the Data Protection Impact Assessment process and made accessible to workers, and their representatives.

Our affiliate unions say that DPIAs do not as a matter of course include an assessment of whether or not discrimination is taking place. We suggest that guidance state that it is obligatory to carry out an EIA as part of a DPIA and that these should be accessible by applicants, workers, employees and representatives.

Regulators

The EHRC, CDEI, the HSE, ACAS, all have an important role to play in assessments of fairness. For the range of negative implications for workers as a result of the use of AI at work, please see the TUC's Technology Managing People – the Worker Experience. This illustrates the equalities, health and safety, human rights and other employment rights implications.

Legislation and courts

Employment law is very relevant to assessment of fairness. This includes equalities law, human rights law, the law of unfair dismissal, contractual law, health and safety law, as well as data protection law. We refer you to the TUC's report commissioned from AI Law, Technology Managing People – the Legal Implications, for further detail on the applicable legislative framework in an employment context.

The Employment Tribunal therefore has a key role to play in assessment of fairness and enforcement of these rights.

Q1.5.4. To what extent do you agree that the development of a substantive concept of outcome fairness in the data protection regime - that is independent of or supplementary to the operation of other legislation regulating areas within the ambit of fairness - poses risks? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree 32 ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on the risks.

Please see our response to 1.5.2 and the importance of consistent definitions relating to fairness across the relevant legislation.

Building trustworthy AI systems

The government welcomes views on the following questions:

Q1.5.5. To what extent do you agree that the government should permit organisations to use personal data more freely, subject to appropriate safeguards, for the purpose of training and testing AI responsibly? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree 33 Please explain your answer, and provide supporting evidence where possible, including which safeguards should be in place.

As many of the current safeguards for data subjects are either inadequate, unclear or under-used, it would not be appropriate to further relax protections of personal data.

Q1.5.6. When developing and deploying AI, do you experience issues with identifying an initial lawful ground? Please explain your answer, and provide supporting evidence where possible.

Q1.5.7 When developing and deploying AI, do you experience issues with navigating re-use limitations in the current framework? Please explain your answer, and provide supporting evidence where possible.

Q1.5.8 When developing and deploying AI, do you experience issues with navigating relevant research provisions? Please explain your answer, and provide supporting evidence where possible.

Q1.5.9 When developing and deploying AI, do you experience issues in other areas that are not covered by the questions immediately above? Please explain your answer, and provide supporting evidence where possible.

Bias monitoring

We wholeheartedly support measures for the detection of bias, but have serious concerns about the use of sensitive data (for example, on sexuality or gender) without consent.

The government welcomes views on the following questions:

Q1.5.10. To what extent do you agree with the proposal to make it explicit that the processing of personal data for the purpose of bias monitoring, detection and correction in relation to AI systems should be part of a limited, exhaustive list of legitimate interests that organisations can use personal data for without applying the balancing test? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on: ○ the key benefits or risks you envisage 37 ○ what you envisage the parameters of the processing activity should be

Q1.5.11. To what extent do you agree that further legal clarity is needed on how sensitive personal data can be lawfully processed for the purpose of ensuring bias monitoring, detection and correction in relation to AI systems? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.5.12. To what extent do you agree with the proposal to create a new condition within Schedule 1 to the Data Protection Act 2018 to support the processing of sensitive personal data for the purpose of bias monitoring, detection and correction in relation to AI systems? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.5.13 What additional safeguards do you think would need to be put in place?

Automated decision-making and data rights

The government welcomes views on the following questions:

Q1.5.14. To what extent do you agree with what the government is considering in relation to clarifying the limits and scope of what constitutes 'a decision based solely on automated processing' and 'produc[ing] legal effects concerning [a person] or similarly significant effects? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on: ○ The benefits and risks of clarifying the limits and scope of 'solely automated processing' ○ The benefits and risks of clarifying the limits and scope of 'similarly significant effects'

We agree that the operation of the exceptions to Articles 21 and 22, should be clarified to ensure that these Articles provide the greatest possible protection to individuals who are the subject of AI and ADM.

We agree that at present, these rights are subject to inadequately defined exceptions which creates uncertainty around workers' rights. Workers should not be left so that their only option is to litigate to obtain clarity over the operation of these provisions.

We suggest that the appropriate solution is to ensure that the exceptions are properly defined with statutory guidance prepared in consultation with unions, other members of civil society and stakeholders.

We suggest that section 14 DPA is amended so that there is an entitlement to human review in relation to all decisions made in the workplace that are "high risk". This should also include a right to in-person engagement, to preserve the importance of human connection and one-to-one communication.

Q1.5.15. Are there any alternatives you would consider to address the problem? ○ Yes ○ No ○ Don't know Please explain your answer, and provide supporting evidence where possible.

Yes, see above.

Q1.5.16. To what extent do you agree with the following statement: 'In the expectation of more widespread adoption of automated decision-making, Article 22 is (i) sufficiently future-proofed, so as to be practical and proportionate, whilst (ii) retaining meaningful safeguards'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, on both elements of this question, providing suggestions for change where relevant

See response to 1.5.14

In addition, we believe the qualifications to Art 22 currently stand in the way of workers gaining access to adequate and meaningful information about exactly how AI and ADM is operating.

As explained in our legal report, Technology Managing People – the Legal Implications, "There is a requirement within the UK GDPR in Articles 13(2)(f), 14(2)(g) and 15(1)(h) to provide information to data subjects about "the existence of automated decision-making, including profiling". But there is an obligation to provide "meaningful information about the logic involved, as well as the envisaged consequences of such processing for the data subject" only where the decision making falls into Article 22.

As is plain from the text of Article 22, it is heavily qualified such that the obligation to provide "meaningful information about the logic involved" does not arise where, for example, there is human involvement in the decision-making (i.e., it is not automated) or the processing is necessary for the performance of the employment contract.

In our view, this qualified right to meaningful information in the context of the employment relationship is inadequate where there is a risk, for example, of discrimination arising from processing.

Moreover, there is nothing in the UK GDPR that requires a personalised as opposed to generic description of the logic which is to be provided. It can readily be seen that this type of "high level" generic description of the logic used by an algorithm in a work setting – which might drive crucial decisions such as whether someone is disciplined or dismissed – is simply inadequate. Employees could lose their jobs, be disciplined or have pay determined by reference to decisions that they can never really understand.

The only way for individuals to obtain the information they need may be to start litigation. "

In the circumstances, we propose:

- the amendment of UK data protection legislation to enact a universal right to explainability in relation to "high risk" AI or ADM systems in the workplace with a right to ask for a personalised explanation along with a readily accessible means of understanding when these systems will be used

- a new obligation on employers to disclose in the Sec 1 ERA 96 statement of particulars information about how AI/ADM is being used in the workplace in a "high risk" manner

- that employers be obliged to maintain a register that contains this information and to update this regularly. This should be accessible to workers, and job applicants, including those posted to sites controlled by organisations other than the employer.

We also refer you to the TUC's response to the ICO's recent consultation on its employment practices code (see link below) in which we make proposals for how the Code could be used to provide further clarification on the operation on Arts 21 and 22.

The government welcomes views on the following questions:

Q1.5.17. To what extent do you agree with the Taskforce on Innovation, Growth and Regulatory Reform's recommendation that Article 22 of UK GDPR should be removed and solely automated decision making permitted where it meets a lawful ground in Article 6(1) (and Article 9-10 (as supplemented by Schedule 1 to the Data Protection Act 2018) where relevant) and subject to compliance with the rest of the data protection legislation? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on: ○ The benefits and risks of the Taskforce's proposal to remove Article 22 and permit solely automated decision making where (i) it meets a lawful ground in Article 6(1) (and, Articles 9 and 10, as supplemented by Schedule 1 to the Data Protection Act 2018) in relation to sensitive personal data, where relevant) and subject to compliance with the rest of the data protection legislation. ○ Any additional safeguards that should be in place for solely automated processing of personal data, given that removal of Article 22 would remove the safeguards currently listed in Article 22 (3) and (4).

Strongly disagree. As outlined above, we believe that Articles 21 and 22 provide important protections to workers and that these provisions should be preserved. However, to ensure that workers fully benefit from this it is critical that the lawful grounds for processing and the exceptions are adequately defined.

The importance of the protections afforded by Art 22 have been illustrated recently by Uber drivers who had been unfairly dismissed as a result of Uber's algorithmic termination process.

The drivers went on to challenge this algorithmic decision using Article 22 and were successful in their claim to be reinstated.

Public trust in the use of data-driven systems

The government welcomes views on the following issues:

Q1.5.18. Please share your views on the effectiveness and proportionality of data protection tools, provisions and definitions to address profiling issues and their impact on specific groups (as described in the section on public trust in the use of data-driven systems), including whether or not you think it is necessary for the government to address this in data protection legislation.

We refer to the proposed reforms we have outlined in Section 1.5 above.

In summary, we consider there are potentially valuable protections against profiling for workers in the UKGDPR. However, these are inhibited by a lack of clarity and certainty. This can be resolved through the provision of statutory guidance in the form of a code of practice, with significant penalties for non-compliance attached.

The statutory guidance should include the following:

- Confirmation of the operation of Article 8 of the EHRC alongside data protection law, and the protection it affords workers in relation to monitoring, profiling and surveillance by AI-powered tools and ADM, especially when they are working from home, or these tools are being used to make judgments about people and their abilities.

- The circumstances in which an employer can lawfully process data on the basis that it is "necessary" to the employment contract under Article 6(1)(b) of the UK GDPR.

- The circumstances in which an employer can lawfully process data on the basis that it is "necessary" to protect their legitimate interests or those of a third party under Article 6(1)(f).

- The interplay between Article 6(1)(b) and (f) taking into account that the lawful basis for data processing determines whether Articles 21 and 22 can be invoked.

- The circumstances in which Articles 21 and 22 can be disapplied.

Data protection and equality impact assessments are highly valuable, but underused data protection tools which can be used to assess the suitability of profiling tools.

Q1.5.19. Please share your views on what, if any, further legislative changes the government can consider to enhance public scrutiny of automated decision-making and to encourage the types of transparency that demonstrate accountability (e.g. revealing the purposes and training data behind algorithms, as well as looking at their impacts).

We refer to all our suggestions above. We also make these proposals.

Transparency and explainability

The existing legal framework is inadequate in relation to transparency and explainability of algorithmic decision making and ADM. The use of AI in the workplace has potentially significant consequences for workers, including the possibility of discrimination. And yet it is extremely difficult, if not impossible, for workers to access understandable information about which technologies are being used and, crucially, how they affect them.

To resolve these difficulties, we suggest:

- the amendment of UK data protection legislation to enact a universal right to explainability in relation to "high risk" AI or ADM systems in the workplace. This should include a right to ask for a personalised explanation.

- a new obligation on employers to disclose in the Sec 1 ERA 96 statement of particulars information about how AI/ADM is being used in the workplace in a "high risk" manner.

- employers should also be obliged to maintain a register that contains this information and to update this regularly. This should be readily accessible to existing employees, workers, and job applicants, including employees and workers that are posted to sites controlled by organisations other than the employer.

Q1.5.20. Please share your views on whether data protection is the right legislative framework to evaluate collective data-driven harms for a specific AI use case, including detail on which tools and/or provisions could be bolstered in the data protection framework, or which other legislative frameworks are more appropriate.

We are of the view that whilst the UK GDPR is not perfect, it provides some important protections for workers in relation to the use of AI at work.

In relation to improving the operation of the UK GDPR in this respect and the evaluation of harms, we refer to our proposals above relating to transparency, explainability and the obligations to provide information under Articles 13(2)(f), 14(2)(g) and 15(1)(h) and the interaction with Article 22, as well as our proposals relating to statutory guidance and human review.

We also refer to our response to 1.5.3 in relation to the importance of DPIAs and EIAs.

In addition, we set out below other potential frameworks for the evaluation of harms that we contend can be used in conjunction with the UK GDPR.

Consultation and collective bargaining

Consultation and a right to collective bargaining over the introduction and use of AI/ADM at work is a key method to promote trust, avoid abuses and harm, and ensure that the technology benefits everyone .

We believe that there should be a statutory duty to consult trade unions in relation to the deployment of "high risk" AI and ADM systems in the workplace directly or through a third party.

Equality Act 2010 and guidance

The Equality Act 2010 and associated guidance is also critical in the evaluation of data-driven harms. Joint statutory guidance is urgently needed to explain the steps that should be taken to avoid discrimination in consequence of AI/ADM. This guidance should be prepared in collaboration between the EHRC, CDEI, ACAS, ICO, CBI and TUC. This should set out the ways in which discrimination can arise in the employment relationship as a result of new forms of technology such as AI and ADM, and the steps required to identify these risks and avoid them.

Collectivising data and the role of trade unions

Employees and workers should have a positive right to "data reciprocity", to collect and combine workplace data. This would allow them to better understand the ways new technologies are being and can be used in the workplace, and to take advantage of this information for themselves. This right could assist workers in exposing discriminatory, unethical, or inaccurate AI and ADM.

Clarifying that the test for anonymisation is a relative one

The TUC is not responding to these questions.

Data intermediaries

The TUC is not responding to these questions.

The government welcomes views on the following questions:

Q1.6.1. To what extent do you agree with the proposal to clarify the test for when data is anonymous by giving effect to the test in legislation? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree 34 Council of Europe Treaty Series - No. 223, 'Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data', paras 17-20, 2018 47 ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.6.2. What should be the basis of formulating the text in legislation? ○ Recital 26 of the UK GDPR ○ Explanatory Report to the Modernised Convention 108+ ○ N/A - legislation should not be amended ○ Other Please explain your answer, and provide supporting evidence where possible.

Q1.6.3 To what extent do you agree with the proposal to confirm that the reidentification test under the general anonymisation test is a relative one (as described in the proposal)? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q1.6.4. Please share your views on whether the government should be promoting privacy-enhancing technology, and if so, whether there is more it could do to promote its responsible use.

The government welcomes views on the following questions:

Q1.7.1. Do you think the government should have a role enabling the activity of responsible data intermediaries? ○ Yes ○ No ○ Don't know Please explain your answer, with reference to the barriers and risks associated with the activities of different types of data intermediaries, and where there might be a case to provide cross-cutting support). Consider referring to the styles of government intervention identified by Policy Lab - e.g. the government's role as collaborator, steward, customer, provider, funder, regulator and legislator - to frame your answer.

Q.1.7.2. What lawful grounds other than consent might be applicable to data intermediary activities, as well as the conferring of data processing rights and responsibilities to those data intermediaries, whereby organisations share personal data without it being requested by the data subject? Please explain your answer, and provide supporting evidence where possible, including on: 52 ○ If Article 6(1)(f) is relevant, i) what types of data intermediary activities might constitute a legitimate interest and how is the balancing test met and ii) what types of intermediary activity would not constitute a legitimate interest ○ What role the government should take in codifying this activity, including any additional conditions that might be placed on certain kinds of data intermediaries to bring them within scope of legitimate interest Whether you consider a government approved accreditation scheme for intermediaries would be useful

Further Questions Q1.8.1. In your view, which, if any, of the proposals in 'Reducing barriers to responsible innovation' would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Q1.8.2. In addition to any of the reforms already proposed in 'Reducing barriers to responsible innovation' (or elsewhere in the consultation), what reforms do you think would be helpful to reduce barriers to responsible innovation?

A key barrier to responsible innovation is the lack of voice and influence afforded to workers, trade unions and other civil society groups in relation to the development, procurement and application of new technologies. Without this voice and influence, we argue that there simply cannot be responsible innovation.

We refer you to Part 1 of our manifesto, Dignity at Work and the AI Revolution (https://www.tuc.org.uk/AImanifesto) in which we set out the values that we believe to be fundamental to responsible innovation. Our proposals for the change needed to achieve this are set out in Part 2.

Our manifesto highlights the importance of redressing the imbalance of power over data, and ensuring that workers have a reciprocal right of control over their personal data. Trade unions have a unique role to play in this and could be given recognition as data subject representatives under the UK GDPR to help workers collectivise and use their own data, and develop AI-powered tools for their own purposes. In addition, if trade unions were granted recognition as data subject representatives to bring claims on behalf of data subjects, where "high risk" uses of AI or ADM has led to infringements of data protection principles, this would act as a deterrent to unethical innovation.

We also advocate the use of employment-focussed ethical principles, formulated on a collaborative basis by trade unions and other stakeholders, to ensure the ethical development of AI and ADM systems.

Chapter 2 - Reducing burdens on businesses and delivering better outcomes for people

We oppose a risk-based approach to data protection and support a rights-based approach. We are strongly opposed to the implementation of a privacy management programme to replace existing statutory rights under the UKGDPR.

This is our response to the questions in this section, save for those below relating to DPIAs and data subject access requests and industrial relations.

Privacy management programmes

Q2.2.1. To what extent do you agree with the following statement: 'The accountability framework as set out in current legislation should i) feature fewer prescriptive requirements, ii) be more flexible, and iii) be more risk-based'? ○ Strongly agree 62 ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q2.2.2. To what extent do you agree with the following statement: 'Organisations will benefit from being required to develop and implement a risk-based privacy management programme'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible and in particular: ○ Please share your views on whether a privacy management programme would help organisations to implement better, and more effective, privacy management processes. ○ Please share your views on whether the privacy management programme requirement would risk creating additional burdens on organisations and, if so, how.

Q2.2.3. To what extent do you agree with the following statement: 'Individuals (i.e. data subjects) will benefit from organisations being required to implement a Risk based privacy management programme'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your choice, and provide supporting evidence where possible. ○ Please share your views on which, if any, elements of a privacy management programme should be published in order to aid transparency. ○ What incentives or sanctions, if any, you consider would be necessary to ensure that privacy management programmes work effectively in practice.

Data protection officer requirements

Q2.2.4. To what extent do you agree with the following statement: 'Under the current legislation, organisations are able to appoint a suitably independent data protection officer'? 63 ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your choice, and provide supporting evidence where possible.

Q2.2.5. To what extent do you agree with the proposal to remove the existing requirement to designate a data protection officer? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q.2.2.6. Please share your views on whether organisations are likely to maintain a similar data protection officer role, if not mandated.

Data protection impact assessments

Q2.2.7. To what extent do you agree with the following statement: 'Under the current legislation, data protection impact assessment requirements are helpful in the identification and minimisation of data protection risks to a project'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Strongly agree, but our affiliates report that DPIAs are often underused and there is a lack of knowledge amongst employers about how and when they should be used.

Q.2.2.8. To what extent do you agree with the proposal to remove the requirement for organisations to undertake data protection impact assessments? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree 64 Please explain your answer, and provide supporting evidence where possible, and in particular describe what alternative risk assessment tools would achieve the intended outcome of minimising data protection risks. Prior consultation requirements

We strongly oppose this. We believe DPIAs to be a crucial and important safeguard. We encourage the ICO to actively advocate for the use of DPIAS, and educate all stakeholders to make full use of this important process.

We also refer to our response to the ICO's consultation on its employment practices code and our proposals relating to more guidance on the use of DPIAS, as follows:

The new legal requirement for Data Protection Impact Assessments to be carried out in the event of processing likely to result in high risk to the rights and freedoms of

individuals and the situations where employers should be consulting with trade unions on the DPIA.

The duty established Under Article 35 (9), relating to the process of carrying out a data protection impact assessment, "where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing". This provision clearly sets out a duty on employers to consult with unions about the intended effects of their data processing. The new code should include examples of employers working with unions to develop data protection impact assessments.

Q. 2.2.9 Please share your views on why few organisations approach the ICO for 'prior consultation' under Article 36 (1)-(3). As a reminder Article 36 (1)-(3) requires that, where an organisation has identified a high risk that cannot be mitigated, it must consult the ICO before starting the processing. Please explain your answer, and provide supporting evidence where possible.

We understand from affiliates that many organisations simply do not know about the advisory role played by the ICO and the duty to involve the ICO in this process.

Q.2.2.10. To what extent do you agree with the following statement: 'Organisations are likely to approach the ICO before commencing high risk processing activities on a voluntary basis if this is taken into account as a mitigating factor during any future investigation or enforcement action'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, and in particular: what else could incentivise organisations to approach the ICO for advice regarding high risk processing?

Record keeping

Q.2.2.11. To what extent do you agree with the proposal to reduce the burden on organisations by removing the record keeping requirements under Article 30? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible. Breach reporting requirements

Q.2.2.12. To what extent do you agree with the proposal to reduce burdens on organisations by adjusting the threshold for notifying personal data breaches to the ICO under Article 33? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible and in particular: ○ Would the adjustment provide a clear structure on when to report a breach? ○ Would the adjustment reduce burdens on organisations? ○ What impact would adjusting the threshold for breach reporting under Article 33 have on the rights and freedoms of data subjects?

Voluntary undertakings process

Q.2.2.13. To what extent do you agree with the proposal to introduce a voluntary undertakings process? As a reminder, in the event of an infringement, the proposed voluntary undertakings process would allow accountable organisations to provide the ICO with a remedial action plan and, provided that the plan meets certain criteria, the ICO could authorise the plan without taking any further action. ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible. Further questions

Q.2.2.14. Please share your views on whether any other areas of the existing regime should be amended or repealed in order to support organisations implementing privacy management requirements.

Q.2.2.15. What, if any, safeguards should be put in place to mitigate any possible risks to data protection standards as a result of implementing a more flexible and risk-based approach to accountability through a privacy management programme?

The government welcomes views on the following questions, relating to alternative reform proposals should privacy management programmes not be introduced:

Record-keeping Q2.2.16. To what extent do you agree that some elements of Article 30 are duplicative (for example, with Articles 13 and 14) or are disproportionately burdensome for organisations without clear benefits? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, and in particular address which elements of Article 30 could be amended or repealed because they are duplicative and/or disproportionately burdensome for organisations without clear benefits. 68 Breach reporting requirements

Q.2.2.17. To what extent do you agree that the proposal to amend the breach reporting requirement could be implemented without the implementation of the privacy management programme? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Data protection officers Q.2.2.18. To what extent do you agree with the proposal to remove the requirement for all public authorities to appoint a data protection officer? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q.2.2.19. If you agree, please provide your view which of the two options presented at paragraph 184d(V) would best tackle the problem. Please provide supporting evidence where possible, and in particular: ○ What risks and benefits you envisage ○ What should be the criteria for determining which authorities should be required to appoint a data protection officer

Further questions Q2.2.20 If the privacy management programme requirement is not introduced, what other aspects of the current legislation would benefit from amendments, alongside 69 the proposed reforms to record keeping, breach reporting requirements and data protection officers?

There is a need for more clarity in relation to industrial relations and data protection.

Our affiliated unions report that huge difficulties arise from the sharing of data between employers and their recognised unions, for the purposes of facilitating union activities and union organising. Too often, the GDPR is presented as an obstacle to sharing workforce data. Unions have asked that the new employment practices code from the ICO includes a section on this topic illustrating how data can be shared to facilitate good industrial relations in the workplace. Case studies would be useful to demonstrate how this can be done in practice.

Guidance is needed on:

- What status unions have under data protection legislation to reflect the relationship between an employer and union and how local representatives use workplace systems for union work, for example are they joint controllers or is the employer a processor, and how will this status affect data sharing, subject access requests and breaches etc. In some circumstances information is shared

with trade unions for other reasons, for example during grievance/disciplinary processes/redundancy. Unions don't just negotiate on behalf of members.

- When personal data becomes special category data if shared with a trade union (Article 9).

The current ICO Employment Practices guide has an explicit commitment (section 2.11.3) that unions can have access to worker data for recruitment purposes (if recognised). This should be maintained. We refer you to our response to the ICO's consultation for more detail.

2.3 Subject Access Requests

In answer to the questions in this section, we highlight the vital importance of the right to make data subject access requests and fully support the preservation of this right. Our affiliate unions report to us that data subject access requests are often a crucial information gathering exercise for the purposes of gathering evidence of unfairness at work, for example, evidence of discrimination. In addition, data subject access requests ensure at least some degree of transparency in relation to the operation of AI/ADM at work.

We are strongly against the introduction of fees. They would exclude some data subjects from the right of access.

The government welcomes views on the following questions:

Q2.3.1. Please share your views on the extent to which organisations find subject access requests time-consuming or costly to process. Please provide supporting evidence where possible, including: ○ What characteristics of the subject access requests might generate or elevate costs ○ Whether vexatious subject access requests and/or repeat subject access requests from the same requester play a role ○ Whether it is clear what kind of information does and does not fall within scope when responding to a subject access request

Q2.3.2. To what extent do you agree with the following statement: 'The 'manifestly unfounded' threshold to refuse a subject access request is too high'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, providing supporting evidence where possible, including on what, if any, measures would make it easier to assess an appropriate threshold.

Q2.3.3. To what extent do you agree that introducing a cost limit and amending the threshold for response, akin to the Freedom of Information regime (detailed in the section on subject access requests), would help to alleviate potential costs (time and resource) in responding to these requests? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree

Please explain your answer, and provide supporting evidence where possible, including on: ○ Which safeguards should apply (such as mirroring Section 16 of the Freedom of Information Act (for public bodies) to help data subjects by providing advice and assistance to avoid discrimination) ○ What a reasonable cost limit would look like, and whether a different (i.e.. sliding scale) threshold depending on the size (based on number of employees and/or turnover, for example) would be advantageous

Q2.3.4. To what extent do you agree with the following statement: 'There is a case for re-introducing a small nominal fee for processing subject access requests (akin to the approach in the Data Protection Act 1998)'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including what a reasonable level of the fee would be, and which safeguards should apply.

Q2.3.5. Are there any alternative options you would consider to reduce the costs and time taken to respond to subject access requests? ○ Yes ○ No ○ Don't know Please explain your answer, and provide supporting evidence where possible

2.4 Privacy and electronic communications

The TUC is not responding to sections 2.4 and 2.5.

2.5 Use of personal data for the purposes of democratic engagement

The government welcomes views on the following questions:

Q2.5.1. To what extent do you think that communications sent for political campaigning purposes by registered parties should be covered by PECR's rules on direct marketing, given the importance of democratic engagement to a healthy democracy? Please explain your answer, and provide supporting evidence where possible.

Q2.5.2. If you think political campaigning purposes should be covered by direct marketing rules, to what extent do you agree with the proposal to extend the soft option to communications from political parties? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q2.5.3. To what extent do you agree that the soft opt-in should be extended to other political entities, such as candidates and third-party campaign groups registered with the Electoral Commission? See paragraph 208 for description of the soft opt-in ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q2.5.4. To what extent do you think the lawful grounds under Article 6 of the UK GDPR impede the use of personal data for the purposes of democratic engagement? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q2.5.5 To what extent do you think the provisions in paragraphs 22 and 23 of Schedule 1 to the DPA 2018 impede the use of sensitive data by political parties or elected representatives where necessary for the purposes of democratic engagement? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

2.6 Further Questions

Q2.6.1. In your view, which, if any, of the proposals in 'Reducing burdens on business and delivering better outcomes for people', would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Please see comments at 2.1-3 above.

Q2.6.2. In addition to any of the reforms already proposed in 'Reducing burdens on business and delivering better outcomes for people', (or elsewhere in the consultation), what reforms do you think would be helpful to reduce burdens on businesses and deliver better outcomes for people?

Please see comments at 2.1-3 above.

Data reciprocity

There is an imbalance of power over data between organisations and individuals. In the employment context this could be addressed by introducing a concept of "data reciprocity", whereby workers would be given a reciprocal right over their data, equal to that of an employer.

As a result of the unequal bargaining power between employer and worker, employers have far more power and control over worker data than workers themselves.

Accordingly, regulation should be premised on the understanding that data flows should be reciprocal. Reciprocity in this context means ensuring that employees and workers can access all the data that emanates from them, collate it to protect their own interests, and use it to their benefit. For example, by collectivising data relating to pay and hours worked to facilitate campaigning for fair wages, probably through their trade unions.

We believe the ICO should promote this best practice approach as a responsible way of data management and a pre-emptive method of preventing breaches of data rights.

Chapter 3 - Boosting trade and reducing barriers to data flows

3.2 Adequacy

The government welcomes views on the following questions:

Q3.2.1. To what extent do you agree that the UK's future approach to adequacy decisions should be risk-based and focused on outcomes? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer and provide supporting evidence if possible.

The TUC has concerns about a "risk-based" approach which may jeopardise the protection of the fundamental rights of data subjects.

The government welcomes views on the following questions:

Q3.2.2. To what extent do you agree that the government should consider making adequacy regulations for groups of countries, regions and multilateral frameworks? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

The TUC agrees this makes sense – the UK cannot judge individual EU member states' GDPR regimes. It would need to assess EU GDPR as a whole. Similarly, there may be other trading blocs with similar cohesive GDPR regimes, and it would be easier to grant a blanket adequacy decision, provided the standards are higher or equivalent to UK GDPR.

Q3.2.3. To what extent do you agree with the proposal to strengthen ongoing monitoring of adequacy regulations and relax the requirement to review adequacy regulations every four years? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible

There is merit in having fixed review points because it guarantees regular assessment. Such reviews and an ongoing monitoring mechanism are not mutually exclusive: an adequacy decision can presumably be withdrawn at any stage in the review cycle should a serious violation of the terms come to light.

The government welcomes views on the following questions:

Q3.2.4. To what extent do you agree that redress requirements for international data transfers may be satisfied by either administrative or judicial redress mechanisms, provided such mechanisms are effective? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your choice, and provide supporting evidence where possible

3.3 Alternative Transfer Mechanisms

The TUC is not responding to 3.3, 3.4 or 3.5

The government welcomes views on the following questions

Q3.3.1. To what extent do you agree with the proposal to reinforce the importance of proportionality when assessing risks for alternative transfer mechanisms? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q3.3.2. What support or guidance would help organisations assess and mitigate the risks in relation to international transfers of personal data under alternative transfer mechanisms, and how might that support be most appropriately provided?

The government welcomes views on the following question

Q3.3.3. To what extent do you agree that the proposal to exempt 'reverse transfers' from the scope of the UK international transfer regime would reduce unnecessary burdens on organisations, without undermining data protection standards? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible

The government welcomes views on the following questions

Q3.3.4. To what extent do you agree that empowering organisations to create or identify their own alternative transfer mechanisms that provide appropriate safeguards will address unnecessary limitations of the current set of alternative transfer mechanisms? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q3.3.5 What guidance or other support should be made available in order to secure sufficient confidence in organisations' decisions about whether an alternative transfer mechanism, or other legal protections not explicitly provided for in UK legislation, provide appropriate safeguards?

Q3.3.6. Should organisations be permitted to make international transfers that rely on protections provided for in another country's legislation, subject to an assessment that such protections offer appropriate safeguards? ○ Yes ○ No ○ Don't know Please explain your answer, and provide supporting evidence where possible

The government welcomes views on the following questions

Q3.3.7. To what extent do you agree that the proposal to create a new power for the Secretary of State to formally recognise new alternative transfer mechanisms would increase the flexibility of the UK's regime? 98 ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q3.3.8. Are there any mechanisms that could be supported that would benefit UK organisations if they were recognised by the Secretary of State? ○ Yes ○ No ○ Don't know Please explain your answer, and provide supporting evidence where possible

3.4 certification schemes

The government welcomes views on the following questions

Q3.4.1. To what extent do you agree with the approach the government is considering to allow certifications to be provided by different approaches to accountability, including privacy management programmes? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q3.4.2. To what extent do you agree that allowing accreditation for non-UK bodies will provide advantages to UK-based organisations? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Q3.4.3. Do you see allowing accreditation for non-UK bodies as being potentially beneficial for you or your organisation? ○ Strongly agree 100 ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain the advantages and risks that you foresee for allowing accreditation of non-UK bodies.

Q3.4.4. Are there any other changes to certifications that would improve them as an international transfer tool?

3.5 derogations

The government welcomes views on the following question

Q3.5.1. To what extent do you agree that the proposal described in paragraph 270 represents a proportionate increase in flexibility that will benefit UK organisations without unduly undermining data protection standards? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Further Questions

Q3.6.1. The proposals in this chapter build on the responses to the National Data Strategy consultation. The government is considering all reform options in the round and will carefully evaluate responses to this consultation. The government would welcome any additional general comments from respondents about changes the UK could make to improve its international data transfer regime for data subjects and organisations.

Q3.6.2. In your view, which, if any, of the proposals in 'Boosting Trade and Reducing Barriers to Data Flows' would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)? Q3.6.3. In addition to any of the reforms already proposed in 'Boosting Trade and Reducing Barriers to Data Flows' (or elsewhere in the consultation), what reforms do you think would be helpful to make the UK's international transfer regime more user-friendly, effective or safer?

In general, the TUC believes the UK should be mindful of the potential constraints posed by the EU-UK Trade and cooperation agreement and in particular the level playing field commitments therein. The non-regression clause might impede any significant departure from EU GDPR that has an impact on workers' acquired rights. If the proposals significantly diverge from EU GDPR the EU might also resort to withdraw its adequacy decision (which the EU can do unilaterally and at any time without waiting for the four-year review).

Chapter 4 - Delivering better public services

4.2 Digital Economy Act 2017

The government welcomes views on the following question:

Q4.2.1. To what extent do you agree with the following statement: 'Public service delivery powers under section 35 of the Digital Economy Act 2017 should be extended to help improve outcomes for businesses as well as for individuals and households'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

4.3 Use of Personal Data in the COVID-19 Pandemic

The government welcomes views on the following questions:

Q4.3.1. To what extent do you agree with the following statement: 'Private companies, organisations and individuals who have been asked to process personal data on behalf of a public body should be permitted to rely on that body's lawful ground for processing the data under Article 6(1)(e) of the UK GDPR'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, providing supporting evidence where possible. Q4.3.2. What, if any, additional safeguards should be considered if this proposal were pursued?

The government welcomes views on the following questions:

Q4.3.3. To what extent do you agree with the proposal to clarify that public and private bodies may lawfully process health data when necessary for reasons of substantial public interest in relation to public health or other emergencies? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, providing supporting evidence where possible.

Processes for collecting health data must be responsible and proportionate. Health data should be processed in a transparent and ethical manner, assigned its true value and used for public good.

Q4.3.4. What, if any, additional safeguards should be considered if this proposal were pursued

Maintaining public trust is essential if more personal data is to be used for the purpose of improving the delivery of public services. Any process for collecting personal data on behalf of a public body must be responsible and proportionate.

4.4 Building Trust and Transparency

Transparency mechanisms for algorithms. The government welcomes views on the following questions:

Q4.4.1. To what extent do you agree that compulsory transparency reporting on the use of algorithms in decision-making for public authorities, government departments and government contractors using public data will improve public trust in government use of data? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your choice, and provide supporting evidence where possible.

Please see our response to Q 1.5.19 for the TUC's recommendations in relation to transparency and explainability.

Q4.4.2. Please share your views on the key contents of mandatory transparency reporting.

Q4.4.3. In what, if any, circumstances should exemptions apply to the compulsory transparency reporting requirement on the use of algorithms in decision-making for public authorities, government departments and government contractors using public data

Processing in the 'substantial public interest'

The government welcomes views on the following questions:

Q4.4.4. To what extent do you agree there are any situations involving the processing of sensitive data that are not adequately covered by the current list of activities in Schedule 1 to the Data Protection Act 2018? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer and provide supporting evidence where possible, including on: ○ What, if any, situations are not adequately covered by existing provisions ○ What, if any, further safeguards or limitations may be needed for any new situations

Q4.4.5. To what extent do you agree with the following statement: 'It may be difficult to distinguish processing that is in the substantial public interest from processing in the public interest'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

Strongly agree.

Q4.4.6. To what extent do you agree that it may be helpful to create a definition of the term 'substantial public interest'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on: ○ What the risks and benefits of a definition would be ○ What such a definition might look like ○ What, if any, safeguards may be needed

Strongly agree.

Q4.4.7. To what extent do you agree that there may be a need to add to, or amend, the list of specific situations in Schedule 1 to the Data Protection Act 2018 that are deemed to always be in the substantial public interest? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible, including on: ○ What such situations may be ○ What the risks and benefits of listing those situations would be ○ What, if any, safeguards may be needed

Clarifying rules on the collection, use and retention of biometric data by the police

The government welcomes views on the following question:

4.4.8. To what extent do you agree with the following statement: 'There is an opportunity to streamline and clarify rules on police collection, use and retention of data for biometrics in order to improve transparency and public safety'? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, providing supporting evidence where possible

4.5 Public Safety and National Security

The TUC is not responding to question 4.5

The government welcomes views on the following question:

Q4.5.1. To what extent do you agree with the proposal to standardise the terminology and definitions used across UK GDPR, Part 3 (Law Enforcement processing) and Part 4 (Intelligence Services processing) of the Data Protection Act 2018? ○ Strongly agree ○ Somewhat agree ○ Neither agree nor disagree ○ Somewhat disagree ○ Strongly disagree Please explain your answer, and provide supporting evidence where possible.

4.6 Further Questions

Q4.6.1. In your view, which, if any, of the proposals in 'Delivering Better Public Services' would impact on people who identify with the protected characteristics under the Equality Act 2010 (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

Q4.6.2. In addition to any of the reforms already proposed in 'Delivering Better Public Services' (or elsewhere in the consultation), what reforms to the data protection regime would you propose to help the delivery of better public services?

Chapter 5 - Reform of the Information Commissioner's Office

This is the TUC's response to all the questions in Chapter 5.

We are opposed in principle to any measures that would dilute the existing powers held by the ICO. We do not support the ICO adopting a risk-based approach to regulation which would result in a greater focus on the needs of business by reducing regulatory burdens. We emphasise the importance of the ICO placing the fundamental rights of data subjects at the heart of its work, and the necessity of the ICO being fully supported and resourced to fulfil this role.

We also encourage the development of the ICO as an organisation that promotes the education of data subjects about the value of their own data. The ICO could, for example, lead education programmes to ensure that individuals understand their rights and assist them in achieving control over their own data through data trusts and the collectivisation of worker data.

We also encourage a higher degree of cross-regulator and stakeholder cooperation, both nationally and internationally. For example, in the context of the use of AI – powered tools at work and ADM, it is vital the ICO undertakes work and knowledge sharing with organisations such as the EHRC, the CDEI and ACAS, as well as trade unions. We refer to section 128 of the Data Protection Act which sets out that the Information Commissioner must consult organisations that represent data subjects. And this includes trade unions.

Our unions report to us a significant lack of awareness amongst employers and workers of how they can make use of some of the safeguards under the UK GDPR. For example, despite being incredibly useful in assessing the AI applications at work, data protection impact assessments seem to be widely under-used. We encourage the ICO to take a more active role in educating and advertising about these mechanisms, and undertaking more active investigation where employers are failing to comply with the UK GDPR.

We also refer to our response to the ICO's recent consultation on their employment practices code (see below) in which we make proposals for clarification of the ICO's enforcement role.

We believe that the new code should have a section covering the ICO's role as a regulator and enforcement body. This section could include the following guidance on when an employee can make a complaint to the ICO, what the ICO will do, the ICO's powers and potential sanctions.

Supporting evidence

We refer you to the following documents for supporting evidence to our consultation response.

The TUC's response to the ICO's consultation on the ICO Employment Practices Code: https://www.tuc.org.uk/blogs/unions-can-ensure-new-guidance-data-supports-workers-and-employers (please contact the TUC for a full copy of the response).

Technology Managing People - the Worker Experience (a TUC research report) https://www.tuc.org.uk/AImanifesto

Technology Managing People – the Legal Implications (a legal report commissioned by the TUC from Robin Allen QC and Dee Masters, AI Law) https://www.tuc.org.uk/AImanifesto

Dignity at Work and the AI Revolution (a TUC manifesto) https://www.tuc.org.uk/AImanifesto

Data Protection Impact Assessments- a union guide by Prospect https://prospect.org.uk/about/data-protection-impact-assessments-a-union-guide/