



Ministry of  
**JUSTICE**

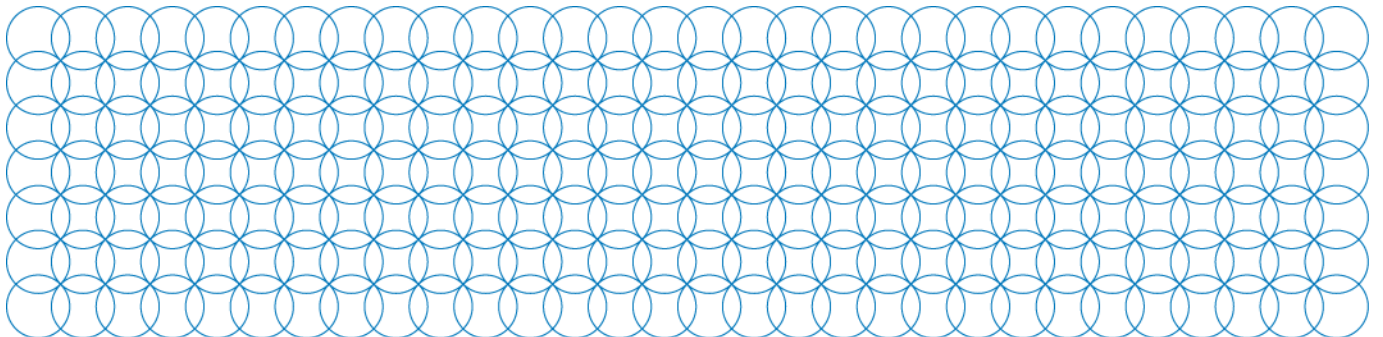
# **The knowing or reckless misuse of personal data**

## Introducing custodial sentences

**Consultation Paper CP22/09**

Published on 15 October 2009

This consultation will end on 7 January 2010







Ministry of  
**JUSTICE**

## **The knowing or reckless misuse of personal data**

Introducing custodial sentences

**A consultation produced by the Ministry of Justice.**

**This information is also available on the Ministry of Justice website:  
[www.justice.gov.uk](http://www.justice.gov.uk)**

## About this consultation

- To:** The Information Commissioner's Office (ICO),  
media organisations and the general public.
- Duration:** From 15/10/09 to 07/01/09
- Enquiries (including requests for the paper in an alternative format) to:** Ollie Simpson  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ
- Tel: 020 3334 4566  
Fax: 020 3334 2245  
Email: [ollie.simpson@justice.gsi.gov.uk](mailto:ollie.simpson@justice.gsi.gov.uk)
- How to respond:** Please send your response by 7 January 2010 to:  
Ollie Simpson  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ
- Tel: 020 3334 4566  
Fax: 020 3334 2245  
Email: [ollie.simpson@justice.gsi.gov.uk](mailto:ollie.simpson@justice.gsi.gov.uk)
- Additional ways to feed in your views:** Consultees are invited to meet Ministry of Justice officials as part of this consultation exercise
- Response paper:** A response to this consultation exercise is due to be published by 31 January 2010 at:  
[www.justice.gov.uk](http://www.justice.gov.uk)

## Contents

Foreword	3
Executive summary	4
Introduction	5
The proposals	10
Questionnaire	16
About you	17
Contact details/How to respond	18
The consultation criteria	19

---



## Foreword

Technology has transformed the way information can be created, stored, moved, accessed and used to deliver goods and services. This offers the public sector and the private sector alike exciting opportunities to improve what they do. However it also opens up the potential for abuses, including threats to privacy and liberty. Public trust in the processes for managing and securing data is therefore essential and there has been growing public concern about the misuse of personal data. This has reinforced the need to demonstrate that greater use of personal data by both Government and business is compatible with a proper respect for the individual's privacy.

The security and integrity of personal data must be paramount once it has been provided. Since the publication of 'What Price Privacy?' in 2006, the Information Commissioner's Office has been monitoring the illegal trade in personal data, and in September this year the Information Commissioner called on the Government to bring an order before Parliament to introduce custodial sentences for those who seek to profit from the illegal trade in personal data, and for those who knowingly or recklessly disclose personal data to those who have no right to have it. We are therefore consulting on amending the Data Protection Act 1998 to provide for such a penalty.

However, the Government does not wish to restrict legitimate data processing in the public interest, and in particular, we have no intention of curtailing responsible investigative journalism which can be essential for the effective scrutiny and accountability of the powerful. So, subject to the outcome of this consultation we intend to commence simultaneously, with any new penalties, the additional defence for journalism inserted into the Data Protection Act 1998 by the Criminal Justice and Immigration Act 2008.

We hope that everyone with an interest in this important issue will contribute to this consultation.



**Michael Wills**

**Minister of State, Ministry of Justice**

## Executive summary

The Government is proposing to introduce increased maximum penalties available to the courts for those guilty of offences under section 55 of the Data Protection Act 1998 (DPA). This will mean those convicted could be imprisoned for up to two years on indictment, and up to twelve months on summary conviction (subject in England and Wales to section 282(1) of the Criminal Justice Act 2003 coming into force; six months' imprisonment in Northern Ireland). This is in addition to the fines not exceeding the statutory maximum (currently £5,000) on summary conviction or unlimited fines on indictment which are available to the courts.

The Government also proposes to commence simultaneously the defence for obtaining, disclosing or procuring the disclosure to another person of personal data, or the information contained in personal data, without the consent of the data controller provided for by section 78 of the Criminal Justice and Immigration Act 2008 (CJIA) for anyone who can show that he acted:

- for the special purposes (defined by section 3 of the DPA as (a) the purposes of journalism, (b) artistic purposes, and (c) literary purposes);
- with a view to the publication by any person of any journalistic, literary or artistic material; and
- in the reasonable belief that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

This consultation paper seeks views on whether:

1. the Secretary of State should introduce custodial penalties for offences committed under section 55 of the DPA;
2. subject to the responses to Question 1, the custodial sentences should be set at the maximum available under the power (i.e. twelve months' imprisonment on summary conviction and two years' imprisonment on conviction on indictment);
3. subject to the responses to Question 1, the Government should bring in the new custodial penalties from April 2010, when the ICO is provisionally being given enhanced powers; and
4. subject to the responses for Question 1, the additional defence for anyone who can show that he was acting for the special purposes (as defined by section 3 of the DPA) with a view to publishing journalistic, literary or artistic material, in the reasonable belief that the obtaining, disclosing or procuring was in the public interest should be introduced alongside the increased penalties.

## Introduction

This paper sets out for consultation the proposal to exercise the power to provide for custodial sanctions for those convicted of offences under section 55 of the Data Protection Act 1998 (DPA). We propose to commence simultaneously a new defence under section 55 relating to the purposes of journalism, art and literature. In line with Section 77 of the Criminal Justice and Immigration Act 2008, the consultation is aimed at the Information Commissioner's Office (ICO), media organisations and any others with an interest in the issue.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 19, have been followed.

An Impact Assessment has been completed and indicates that costs to the Ministry of Justice (the courts service, the prison service and the legal aid budget) are likely to be affected in particular. Comments on the Impact Assessment which accompanies this consultation are welcome.

Copies of the consultation paper are being sent to:

ACXIOM

AEGON UK

APACS

Association of British Insurers (ABI)

Association of British Investigators

Association of Chief Police Officers

Association of Chief Police Officers for Scotland

Bar Council

Bisnode PLC

British Bankers' Association (BBA)

British Computer Society (BCS)

British Dental Association

British Medical Association (BMA)

Christchurch Borough Council/Dorset Information Management and Compliance Working Group

Call Credit

CIFAS

Council of HM Circuit Judges

COSLA

Crown Prosecution Service (CPS)

Crown Office and Procurator Fiscal Service

Data (Practical Application) Protection Ltd

Department for Business, Innovation and Skills (BIS)

Department for Children, Schools and Families (DCSF)

Department for Communities and Local Government (DCLG)

Department for Environment, Food and Rural Affairs (DEFRA)

Department for Health (DoH)

Department for Transport (DfT)

Direct Marketing Association (DMA)

Driver Vehicle Licensing Agency

Environment Agency

Equifax

Ernst & Young LLP

Experian

Faculty of Advocates

The Finance & Leasing Association (FLA)

Financial Services Authority (FSA)

Friends Provident

General Medical Council (GMC)

Grampian Health Board

Greater Manchester Health & Social Care Information Governance Local Learning Group

Greenwich Council

Guardian News and Media (GN&M)

Health and Safety Executive (HSE)

HM Revenue and Customs (HMRC)

Identity and Passport Service

Information Commissioner's Office (ICO)

Institute for the Management of Information Systems (IMIS)

Law Society of Scotland (Privacy Law Sub Committee)

Law Society

Law Society of Scotland

Legal Services Commission

Leicester Partners NHS

Liberty

Local Government Association

Magistrates' Association: Judicial Policy & Practice Committee

Market Research Association

Market Research Society (MRS)

Ministry of Defence (MoD)

National Archives of Scotland

National Association of Citizens' Advice Bureaux

National Health Service (NHS)

National Union of Journalists

National Association of Data Protection Officers

Nationwide

Newspaper Publishing Association

Newspaper Society

Periodical Publishers Association

Scottish Newspaper Publishers Association

Society of Editors

Northern Ireland Executive

OFCOM

Office of Fair Trading (OFT)

OFGEM

Peterborough City Council

Press Complaints Commission

Privacy Laws & Business

The Royal Academy of Engineering

Royal Mail

Scottish Ambulance Service

Scottish Executive

Scottish Legal Aid Board

The Security Institute (SI)

Serious Fraud Office (SFO)

Sheriffs Association

Society of Editors

Socitm Consulting

South Holland District Council

Staffordshire Moorland District Council

Transport for London (TfL)

Treasury Solicitors Department

Universities and Colleges Admission Service

Victim Support

Victim Support Scotland

Welsh Assembly Government

Which? (Consumers Association)

Wrightington, Wigan & Leigh NHS Trust

## The proposals

### **Custodial sentences for section 55 offences**

The Government is committed to ensuring a robust framework of protection for personal data. We want to increase public confidence in its use and deter and punish appropriately those who seek to profit from its illegal trade.

The Information Commissioner's 2006 Special Report to Parliament "What Price Privacy? The unlawful trade in confidential personal information" highlighted the corrosive effect of the trade in personal information. The report detailed how the sums of money those engaged in such transactions can make – up to £120,000 per month in one case. Individuals involved in such a lucrative trade are unlikely be deterred by a fine only. The Information Commissioner's Office (ICO) followed up this report with "What Price Privacy Now?" in December 2006, which reviewed the progress in curtailing the illegal trade in confidential personal information.

In September 2006, the Government consulted on whether to introduce custodial penalties for those guilty of offences under section 55 of the Data Protection Act 1998 (DPA) and the length of the proposed custodial penalties. The consultation received 63 responses, from both the public and private sectors, with the overwhelming majority agreeing that custodial penalties would be a proportionate sanction for and effective deterrent against section 55 offences.

Media organisations, however, expressed concerns about the proposals, opposing the introduction of custodial sentences. In particular, they believed that such penalties would impinge on the right to the freedom of expression.

The Criminal Justice and Immigration Act 2008 (CJIA) subsequently provided for the necessary amendments to the DPA as set out below. After working closely with interested stakeholders, the Government brought forward a power in section 77 of the CJIA to make an order (subject to the affirmative procedure) enabling the maximum penalty for an offence under section 55 to be increased to up to twelve months' imprisonment on summary conviction and two years' imprisonment on indictment.

Since 2006 the Government has been working closely with the ICO who have been monitoring the trade in personal data. At one point this trade appeared to subside. However, the new Information Commissioner has recently called for the introduction of these penalties. The Government has also listened to further concerns from media organisations about the chilling effect which such a penalty would have on legitimate investigative journalism, and created a new defence for those who act for the special purposes (as defined in section 3 of the DPA) with a view to publishing journalistic, literary or artistic material, in the reasonable belief that the obtaining, disclosing or procuring was in the public interest. This defence has not yet been commenced.

### **Section 55 of the Data Protection Act 1998**

Sections 55(1) and (3) of the DPA make it an offence to obtain or disclose personal data or the information contained in personal data or procure the disclosure to another person of the information contained in personal data if the person acted knowingly or recklessly and without the consent of the data controller. Sections 55(4) and (5) also make it an offence to sell or offer to sell personal data which has been obtained (or, in the case of offering to sell, is subsequently obtained) in contravention of the provisions of section 55(1) described above. An advertisement indicating that personal data may be available for sale constitutes an offer to sell data.

The offences are not committed if the person can show:

- the obtaining, disclosing or procuring was necessary for the prevention or detection of crime – for example if an employee obtained information from the personnel files of his employer to pass to the authorities as evidence of working practices that amounted to offences under health and safety law;
- the obtaining, disclosing or procuring was required or authorised by an enactment, rule of law, or court order – for example, if an employee is ordered by a judge to disclose personal data in the course of a court case, even when the employer has not consented;
- he acted in the reasonable belief that he had a right in law to obtain or disclose the data or information, or procure the disclosure of information to another person – for example a person mistakenly but reasonably believed they had the agreement of the data controller to make a disclosure but in fact they did not have that agreement; or
- he acted in the reasonable belief that he would have had the consent of the data controller if they had known of the disclosing, obtaining or procuring and the circumstances of it; or
- the obtaining, disclosing or procuring was, in the particular circumstances, justified as being in the public interest – for example, if a journalist procures the disclosure of information to a private investigator in order to expose widespread corruption.

In addition, the CJIA made provision – as yet un-commenced – for a defence for anyone who can show that he acted:

- for the special purposes (defined by section 3 of the DPA as (a) the purposes of journalism, (b) artistic purposes, and (c) literary purposes);
- with a view to the publication by any person of any journalistic, literary or artistic material; and
- in the reasonable belief that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

A person who knowingly obtains personal data by deception, ie. "blagging" personal information from a bank or individual data controller, would be guilty of this offence. In that situation the employer would not be committing an offence under section 55 of the DPA. It is also unlikely that employees who mistakenly release information to "blaggers" would be guilty of an offence – if they were at the time of releasing the information, acting in the reasonable belief that they had authority in law to act as they did.

On 2 September 2009, the Information Commissioner, in giving evidence to the Culture, Media and Sport Select Committee inquiry 'Press Standards, Privacy and Libel', called on Government to introduce custodial sentences for section 55 offences as a matter of urgency. The Government's proposal is therefore to make an order under section 77 of the CJIA which would amend section 60 of the DPA (which sets out the sanctions available to courts for DPA offences) to allow, on conviction under section 55 of the DPA, for:

- Up to twelve months' imprisonment (6 months in Northern Ireland, and currently 6 months in England and Wales pending commencement of section 282(1) of the Criminal Justice Act 2003) on summary conviction (that is, conviction in a Magistrates' Court, or in Scotland a Sheriff Court sitting without a jury) and/or a fine of up to £5,000; and
- Up to two years' imprisonment on indictment (that is, conviction in a Crown Court, or in Scotland either before a sheriff and jury or in the High Court) and/or an unlimited fine.

Custodial sentences are the ultimate deterrent that the courts are able to use. In addition, they will be able to sentence offenders to suspended sentences (other than in Scotland) and community sentences. These are all more onerous than simply fining offenders and the Government believes they will be a greater deterrent to those engaged in the illegal trade in personal data than existing punishments.

When considering the proposals to allow for a custodial sentence, and the length of any such sentence, the Government has considered the sanctions available for similar types of offences. Various pieces of legislation have, over a number of years, put in place custodial sanctions for the misuse of personal data or information that could include personal data in particular circumstances, for example, section 27 of the Identity Cards Act 2006 and section 19 of the Commissioners for Revenue and Customs Act 2005. However, the DPA is the central piece of legislation which governs how personal data should be processed and we believe it should be this piece of legislation which sets the standards for offences relating to the knowing or reckless misuse of personal data.

It is appropriate that the DPA should enable the courts to have access to the same sanctions for the misuse of personal data as they would have for other similar offences. The Government therefore proposes to set the maximum penalty at the upper limit of that available under section 77 of the CJIA, i.e. twelve months' imprisonment on summary conviction and/or a fine of up to £5,000; and two years' imprisonment on indictment and/or an unlimited fine. This is also in line with the majority view of respondents to the DCA's 2006 consultation 'Increasing penalties for deliberate and wilful misuse of personal data'.

It may currently be possible to recover profits from an offence committed under section 55 by the prosecutor (ICO) or the Director of Public Prosecutions applying for a confiscation order (or in some cases the Court can of its own motion, if it is appropriate to do so) under the Proceeds of Crime Act 2002. This can only be done where the defendant is before the Crown Court. This may be the case under section 55 since the offence is "either way" and can be tried either in the Magistrates Court or Crown Court. However to make such an order there are hurdles to overcome, the most important of which is to show that the defendant has a criminal lifestyle. Alternatively, it may also be possible to recover profits under Part 5 of the Act by applying for a civil recovery order for property obtained through unlawful conduct.

In addition to fines and custodial sentences, a court may impose a community sentence on any offender who has been convicted of a criminal offence where it judges that such a sentence would be appropriate.

Community sentences combine punishment with measures designed for changing offenders' behaviour and making amends. They can also encourage the offender to identify and tackle any issues that might make them more likely to reoffend. Community orders can include up to twelve different requirements, including unpaid work and curfews.

We would consider that those responsible for large scale abuse of personal data, or repeat offenders, would be more likely to receive a custodial or a community sentence than those engaged at a lower level where a fine may be a more appropriate punishment.

The Government therefore believes it is necessary to introduce the increased penalties available to the courts for three reasons:

- to provide a greater deterrent to those who seek to knowingly or recklessly obtain, disclose or procure the disclosure of personal data without the consent of the data controller or sell or offer to sell personal data obtained in that way;
- to provide public reassurance that those who are successfully prosecuted may, depending on the gravity of the offence, be sent to jail;
- to achieve parity of approach across a number of disparate pieces of legislation which deal with similar types of offences.

The ICO is set to receive enhanced powers in early 2010 as a result of provisions contained elsewhere in the CJA and, subject to Parliamentary approval, the Coroners and Justice Bill. Subject to responses to this consultation, we therefore propose to commence these higher penalties in April 2010 in order to maximise awareness among the public and interested parties of these changes.

**Questions:**

- 1. Should the Secretary of State introduce custodial penalties for offences committed under section 55 of the DPA?**
- 2. Subject to the responses to Question 1, the Government believes that the level of the custodial sentences should be set at the maximum available under the power (i.e. twelve months' imprisonment on summary conviction and two years on conviction on indictment) Do you agree? If not, at what (lower) level do you believe the maximum sentence should be set?**
- 3. Subject to responses to Question 1, the Government proposes to bring in the new custodial penalties from April 2010, when the intention is that the ICO be given enhanced powers. Do you agree with this approach?**

### **A new defence for section 55 offences**

Legitimate and responsible journalism has an important place within a democratic society and the Government firmly supports the right to freedom of the press. Alongside our commitment to the protection of personal data, the right to freedom of expression, which is protected by Article 10 of the European Convention on Human Rights, must be preserved.

We therefore propose to commence the new defence under section 55 for those who can show that they acted for the purposes of journalism, art and literature with a view to publishing journalistic, literary or artistic material, in the reasonable belief that the obtaining, disclosing or procuring was in the public interest. The Government has always been clear that the additional defence should be introduced alongside the increased penalties.

#### **Question:**

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

## Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- 1. Should the Secretary of State introduce custodial penalties for offences committed under section 55 of the DPA?**
  
- 2. Subject to the responses to Question 1, the Government believes that the level of the custodial sentences should be set at the maximum available under the power (i.e. twelve months' imprisonment on summary conviction and two years on conviction on indictment) Do you agree? If not, at what (lower) level do you believe the maximum sentence should be set?**
  
- 3. Subject to the responses to Question 1, the Government proposes to bring in the new custodial penalties from April 2010, when the intention is that the ICO be given enhanced powers. Do you agree with this approach?**
  
- 4. Subject to the responses to Question 1, the Government proposes to commence the new defence for anyone who can show that he was acting for the special purposes with a view to publishing journalistic, literary or artistic material, in the reasonable belief that the obtaining, disclosing or procuring was in the public interest alongside the increased penalties (subject to responses received to Question 1). Do you agree with this approach?**

Thank you for participating in this consultation exercise.

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

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

---



---



---



---

## Contact details/How to respond

Please send your response by 7 January 2010 to:

**Ollie Simpson**  
**Ministry of Justice**  
**Information Policy Division**  
**6.19**  
**102 Petty France**  
**London SW1H 9AJ**

**Tel: 020 3334 4566**  
**Fax: 020 3334 2245**  
**Email: [ollie.simpson@justice.gsi.gov.uk](mailto:ollie.simpson@justice.gsi.gov.uk)**

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at [www.justice.gov.uk](http://www.justice.gov.uk)

Alternative format versions of this publication can be requested from [ollie.simpson@justice.gsi.gov.uk](mailto:ollie.simpson@justice.gsi.gov.uk)

### Publication of response

A paper summarising the responses to this consultation will be published in early 2010. The response paper will be available online at [www.justice.gov.uk](http://www.justice.gov.uk)

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

**These criteria must be reproduced within all consultation documents.**

## Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496, or email her at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

**Julia Bradford**  
**Consultation Co-ordinator**  
**Ministry of Justice**  
**102 Petty France**  
**London SW1H 9AJ**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 18.



© Crown copyright  
Produced by the Ministry of Justice

Alternative format versions of this report are available on request from  
[ollie.simpson@justice.gsi.gov.uk](mailto:ollie.simpson@justice.gsi.gov.uk)