



Equality Impact Assessment [EIA]

Demonstrating Compliance with the Public Sector Equality Duty (PSED)

Due regard must be shown:

- ✓ Decision-makers must be made aware of their duty to have 'due regard' and to the aims of the duty
- ✓ Due regard is fulfilled before and at the time a particular policy or operational activity, that will or might affect people with protected characteristics is under consideration, as well as at the time a decision is taken. It is not a box ticking exercise.
- ✓ Due regard involves a conscious approach and state of mind. The duty must be exercised with rigour and an open mind.
- ✓ The duty cannot be delegated to another body and will always remain on the body subject to it.
- ✓ The duty is a continuing one.
- ✓ It is good practice for the public body to keep an adequate record showing that they have considered their equality duties and considered relevant questions.

1. Name and outline of policy proposal, guidance or operational activity

This document is the Equality Impact Assessment for the Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022 (the "Regulations"). This is a supplementary impact assessment to the one that was completed on 30 October 2017 by the Department for Digital, Culture Media and Sport (DCMS) for the Data Protection Act. It is available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711171/Equality_Impact_Assessment.pdf

[Article 23](#) of the UK GDPR allows for EU/member states to restrict certain data subject rights in certain specific circumstances; such as to safeguard national security, public security or general public interest. Where a legislative measure related to this is introduced, the measure should include where relevant, details of:

- a. The purposes of the processing or categories of processing;
- b. The categories of personal data;
- c. The scope of the restrictions introduced;
- d. The safeguards to prevent abuse or unlawful access or transfer;
- e. The specification of the controller or categories of controllers;
- f. The storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;
- g. The risks to the rights and freedoms of data subjects; and
- h. The right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

The immigration exemption, in the Data Protection Act 2018, allows for certain data rights to be suspended where it would otherwise be prejudicial to 'effective immigration control'. For example, we may limit subject access rights.

On 26 May 2021 the Court of Appeal ruled that the immigration exemption as worded in the Data Protection Act 2018 does not include sufficient safeguards (e.g. to prevent abuse or safeguard against risks to data subjects). To address the Court's concerns, we propose amending Schedule 2 of the Data Protection Act, to include all of the safeguards listed in Article 23(2) of the UK GDPR where they are relevant.

We are adding provisions to the Act in relation to:

- a. The safeguards to prevent abuse or unlawful access or transfer (Article 23(2)(d) UK GDPR). This will include an obligation to have regard to an Immigration Exemption Policy Document (IEPD). The IEPD will include:
 - i. When the immigration exemption should be used;
 - ii. What the prejudice (to immigration control) test is;
 - iii. How a restriction may be applied;
 - iv. The rationale for doing so;
 - v. The need for it to be applied on an individual case by case basis;
 - vi. The time constraint on any such use;
 - vii. Rights and obligations that may be disapplied or restricted under the immigration exemption;
 - viii. Prevention of abuse and unlawful access / transfer
- b. The specification of the controller or categories of controllers (Article 23(2)(e) UKGDPR). We will specify that the exemption can only be used by the Home Office, rather than the previous wording of controller 1 and controller 2;
- c. The right of data subjects to be informed about the restriction. We will put into legislation a requirement to inform data subjects when we have applied the immigration exemption, unless that may be prejudicial to the purpose of the restriction (Article 23(2)(h) UKGDPR).

We believe that some of the limbs of Article 23(2) are already sufficiently covered in the Act or are not relevant. Therefore, where this occurs, no legislative change is proposed, but it will be addressed in the Explanatory Memorandum accompanying the Regulations.

The provisions in which no legislative change is proposed are:

- a. The purposes of the processing or categories of processing (Article 23(2)(a) UK GDPR);
- b. The categories of personal data (Article 23(2)(b) UK GDPR);
- c. The scope of the restrictions introduced (Article 23(2)(c) UK GDPR);

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

- d. The storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing (Article 23(2)(f) UK GDPR);
- e. The risks to the rights and freedoms of data subjects (Article 23(2)(g) UK GDPR);

2. Summary of the evidence considered in demonstrating due regard to the Public-Sector Equality Duty.

The Public Sector Equality Duty under section 149 of the Equality Act 2010 requires public bodies to have due regard to the need to:

- a. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010;
- b. Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- c. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The equality duty covers the following protected characteristics:

- a. Age;
- b. Disability;
- c. Gender reassignment;
- d. Pregnancy and maternity;
- e. Race;
- f. Religion or belief;
- g. Sex; and
- h. Sexual orientation.

Assessment

We have no reason to believe that the proposal will lead to any direct or indirect discrimination. The immigration exemption in the Data Protection Act is not targeted at any specific group, national origin or entry regime to the UK. The Immigration Exemption does not specify particular methods for addressing any of the protected characteristics in a data protection context. It can only be applied on a case-by-case basis and where complying with those specific provisions would be likely to prejudice effective immigration control.

Furthermore, this proposal does not impose any additional limitations on a data subject's rights. Instead, it introduces additional safeguards into legislation that makes it clearer when the immigration exemption can be used. Furthermore, some of the policy on the immigration exemption has moved from a strictly policy stance to one that is set out in legislation. The immigration exemption will continue to apply to all data subjects irrespective of age, disability, gender re-assignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

EIA enquires **must** also be sent to PSSED@homeoffice.gov.uk

There is reason to believe that the strengthening of safeguards for the immigration exemption will serve to promote equality. For example, data subjects will benefit from strengthened safeguards in respect of their rights to access personal data held about them. Data subjects will continue to benefit from the ability to confirm personal data is accurately recorded, including by correcting inaccurate or outdated information, and backed by increased sanctions and penalties available to the Information Commissioner.

The Equality Impact Assessment for the Data Protection Act provides a detailed assessment of the due regard to the Public-Sector Equality Duty. This includes consideration of the required exemptions and safeguards in the Act. It found that there would be minimal impact on equality.

Age

There is no identifiable impact on data subjects as a result of this proposal. As indicated, the proposals do not place any additional restrictions on the data subject (irrespective of age) and are intended to provide additional safeguards in line with the Court ruling.

More broadly, the immigration exemption which this proposal amends is used in exactly the same way, regardless of age. In recent times with the emergence of technological advancements, online and other environmental threats, the need to reform the safeguards in place for children has been highlighted. As indicated in the earlier equality impact assessment relating to the Data Protection Act, the Act addresses this by children benefiting from specific protection with regard to their personal data. This is because they may be less aware of the risks, consequences and safeguards concerned and their 9 rights in relation to the processing of personal data. The broader Data Protection equality considerations have been reflected on as part of the consideration for this legislative amendment, however no direct implications have been identified for this Statutory Instrument.

Religion or belief

While each case is considered on its own merits and must be assessed in context, it is considered unlikely that personal data pertaining to religious belief would be restricted on grounds of undermining the maintenance of effective immigration control. Furthermore, the proposals outlined in the Regulations, enhance data subject rights rather than restrict them, and are applicable to all data captured by the immigration exemption equally irrespective of a data subject's religious belief. For these reasons, the Regulations are not considered to adversely affect any particular religious group.

More broadly, the Data Protection Act protects personal data regarding 'religious or philosophical beliefs' as a 'special category of data' in the case of Part 2 of the Act. As a result, any processing of personal data concerning religious or philosophical beliefs must now satisfy at least one of the narrowly defined circumstances as set out in Article 9 of the UK GDPR.

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

Where these circumstances arise in many places the Data Protection Act provides additional safeguards. The overall effect is that the grounds for processing special category data are broadly comparable to the 1998 Data Protection Act. An existing condition, which allows certain categories of sensitive personal data to be processed ‘for the purpose of identifying or keeping under review the existence or absence of equality of opportunity’, including data revealing religious or philosophical beliefs, is retained. This helps to promote equality of opportunity between those who share these protected characteristics and those who do not.

Disability

The proposals outlined in the Regulation are not considered to directly or indirectly discriminate against data subjects with disabilities. The proposals outlined in the Regulations enhance data subject rights rather than restrict them, and are applicable to all data captured by the immigration exemption equally. We have considered the need to make reasonable adjustments in applying the policy. The IEPD reminds decision-makers to consider whether the data subject may be entitled to reasonable adjustments by virtue of a disability.

Gender Re-assignment

The Gender Recognition Act 2004 provides individuals with legal recognition in their acquired gender. Section 7 of the Equality Act 2010 enshrines gender re-assignment as a protected characteristic. The Data Protection Act creates a comprehensive legal framework for data protection, which is applicable to everyone. The Data Protection Act seeks to work in harmony with existing rights for individuals. Furthermore, it does not specify particular rights for a certain gender and should provide reassurance to individuals that have or may wish to clarify their preferences in the future. The Data Protection Act including the immigration exemption therefore has no identifiable impact on individuals with this particular characteristic. Consequently, the proposals outlined in the Regulations do not adversely impact this group.

Pregnancy and Maternity

The immigration exemption can only be used to maintain effective immigration control or detect activities that would undermine it. Pregnancy and maternity are not relevant factors in determining the applicability of the exemption. Moreover, as indicated above, the proposals outlined in the Regulations enhance data subject rights rather than restrict them, and are applicable to all data captured by the immigration exemption equally. For these reasons, this group is not adversely affected by the changes proposed in the Regulation.

More generally, the data protection framework protects personal data ‘concerning health’ as a ‘special category of data’ Part 2. Consequently, additional safeguards are provided throughout the data protection framework, for example processing of health data by health workers and social workers, and where a data subject is legally incapable of giving consent the processing is necessary to protect their vital interests. Where these circumstances arise

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

in many places the Data Protection Act provides additional safeguards. The overall effect is that the grounds for processing sensitive personal data are broadly comparable to the 1998 Act. The existing condition for processing health data 'for the purpose of identifying or keeping under review the existence or absence of equality of opportunity' is retained. This is intended to help promote equality of opportunity between those who share these protected characteristics and those who do not.

Race

Under s.9 of the Equality Act 2010, "race" is defined as including (a) colour; (b) nationality; and (c) ethnic or national origins. While the immigration exemption is not targeted towards any particular racial group, it will by its very nature affect nationals from countries other than the UK more than British citizens. The exemption is already strictly limited to applying only to the extent that failing to do so would likely prejudice effective immigration control. The measures outlined in the Regulations are aimed at further enhancing the protections afforded to those who are subject to the immigration exemption by adding provisions to the Act as outlined above in section 1 of this assessment. The proposals therefore do not place any additional restrictions on the data subject irrespective of race. Furthermore, for these reasons, we do not consider these proposals would cause any indirect discrimination on grounds of race.

More generally, the data protection framework protects personal data 'revealing racial or ethnic origin' as a 'special category of data' in Part 2 of the Data Protection Act. As noted above, the overall effect is that the grounds for processing sensitive personal data are broadly comparable to the 1998 Act. The existing condition for processing personal data revealing racial or ethnic origin 'for the purpose of identifying or keeping under review the existence or absence of equality of opportunity' is retained. This is intended to help promote equality of opportunity between those who share these protected characteristics and those who do not. Furthermore, the Home Office treats nationality as a special category of personal data; therefore, providing further protection to the data subject.

Sex

Someone's sex is not a relevant factor when applying the immigration exemption and therefore the Regulation does not directly or indirectly effect this protected characteristic.

The Data Protection Act does not specify particular methods for addressing sex in a data protection context. It creates a comprehensive legal framework for data protection, which is applicable to everyone and seeks to work in harmony with existing rights for individuals.

Sexual Orientation

The immigration exemption can only be used to maintain effective immigration control or detect activities that would undermine it. The proposals in the

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

Regulation are therefore unlikely to directly or indirectly impact a data subject based on their sexual orientation. Moreover, as indicated above, the proposals outlined in the Regulations enhance data subject rights rather than restrict them, and are applicable to all data captured by the immigration exemption equally. For these reasons, this group is not adversely affected by the changes proposed in the Regulation.

More broadly, the data protection framework protects personal data 'concerning sex life and sexual orientation' as a 'special category of data' under Part 2 of the Data Protection Act 2018. As noted above, the overall effect is that the grounds for processing sensitive personal data are broadly comparable to the 1998 Act. The existing condition for processing personal data 'for the purpose of identifying or keeping under review the existence or absence of equality of opportunity' is newly expanded to include personal data concerning an individual's sexual orientation. This is intended to help promote equality of opportunity between those who share these protected characteristics and those who do not.

Consultation

As part of the Data Protection Act, on 12 April 2017 the government published a Call for Views, available here:

<https://www.gov.uk/government/consultations/general-data-protection-regulation-call-for-views>, on the exercise of the Regulation derogations.

Workshops have also been conducted with key law enforcement bodies to ensure the Directive is transposed into domestic legislation in a way that best meets the needs of the UK. In addition to these workshops, law enforcement stakeholders were sent a questionnaire to provide their views on the impacts of the Directive. On 7 August 2017 the responses received to the April Call for Views were published, together with a Statement of Intent, available here:

<https://www.gov.uk/government/news/government-to-strengthen-uk-data-protection-law>. This formed the basis of the Data Protection Act.

As part of this proposal to further strengthen the safeguards for the immigration exemption, we have consulted with the Information Commissioner's Office the 3 million and the Open Rights Group. Following their feedback we have clarified the legislation by making it clear that the policy document will be openly published and that only the Home Office can make use of the exemption.

Overall Impact of the proposal

The Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022 strengthens safeguards for use of the immigration exemption and provides further protection to data subject rights.

4. In light of the overall policy objective, are there any ways to avoid or mitigate any of the negative impacts that you have identified above?

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk

Not applicable. The Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022, aims to strengthen safeguards for use of the immigration exemption and provides further protection to data subject rights.

5. Review date 08/06/2022

6. Declaration

I have read the available evidence and I am satisfied that this demonstrates compliance, where relevant, with Section 149 of the Equality Act and that due regard has been made to the need to: eliminate unlawful discrimination; advance equality of opportunity; and foster good relations.

SCS sign off: Krisztina Katona

Name/Title: Krisztina Katona/Deputy Director, Head of Data Policy

Directorate/Unit: Data and Identity Directorate/Data Policy Unit

Lead contact: Tom Dooley

Date: 08/12/2021

For monitoring purposes all completed EIA documents **must** be sent to the PSED@homeoffice.gov.uk

Date sent to PSED Team:

EIA enquires **must** also be sent to PSED@homeoffice.gov.uk