



Office of the Data Protection Registrar

WITHOUT PREJUDICE

Formal response to the  
Consultation Paper:  
“Monitoring and Regulation of  
Migration”

October 2004



## 1. Introduction

- 1.1. The role of the Office of the Data Protection Registrar ("the Registrar") is to promote respect for the private lives of individuals through ensuring privacy of their personal information by:
  - implementing and ensuring compliance with the Data Protection (Jersey) Law 1987, and; influencing thinking on privacy and processing of personal information matters on a local and international basis; and
  - maintaining a Statutory Register of personal data users who are processing personal information in Jersey.
- 1.2. In addition to the above, the Registrar must also consider the impact of the new Data Protection (Jersey) Law 2004, which is due for implementation in January 2005, and the requirements of the European Commission as regards compliance with European Directive on data protection (95/46/EC), which affects the free movement of information and freedom to trade as well as the rights of individuals.
- 1.3. Failure to achieve adequacy with European requirements would mean that information transfers to or from the Island would be restricted, thus resulting in severe constraints in the ability of other jurisdictions to do business with Jersey. This would have a major impact on general trade as well as Jersey's finance industry.
- 1.4. Therefore, the implementation and application of the new Law to a standard recognised by the European Commission is vital to ensure the continued economic growth of the Island, and achieving the States vision and Strategic Plan.
- 1.5. By harmonizing local law with European Law, Jersey's reputation will be enhanced as a highly reputable and safe jurisdiction with which to do business and Island residents will enjoy important protection of their personal information.
- 1.6. Jersey and the other Crown Dependencies have based their local legislation on the UK's Data Protection Act 1998. The new legislation has implications for all businesses and data users and also provides important safeguards for the use of personal information, which has implications for everyone in the community.
- 1.7. The prime purpose of the new Data Protection (Jersey) Law 2004 is:-
  - to safeguard the rights of individuals with regard to personal information which may be held, stored or processed about them;
  - to establish legally enforceable criteria that must be met before any holding or processing of personal information can commence;
  - to ensure that organisations and individuals holding or processing such information notify with the Data Protection Authority, declaring the purposes for which the information is being held or processed, to whom it will be disclosed and the security measures to be applied;
  - to ensure that organisations and individuals hold and process personal information that is accurate, up to date and only used for the purposes



that are described in their notification details to the Data Protection Authority;

- to establish a supervisory authority that can act with independence in exercising the statutory powers entrusted to them by Law.

1.8. The Registrar therefore has a major role in ensuring that Jersey complies with, and continues to meet with European standards and best practice. The proposed introduction of a population register raises significant data protection issues which must be considered carefully before such a scheme is compulsorily introduced ensuring due regard is given to the fundamental rights of individuals in respect of their privacy and personal information.

## 2. Background

2.1. During a Migration Policy Steering Group meeting attended by the Registrar on Monday 4 October 2004, it was noted that the Registrar had not been included as part of the formal consultation process, and as such no formal response to the paper had been prepared by the Registrar.

2.2. This report therefore details the Registrar's comments and concerns with regard to the proposals and questions asked in the consultation paper from a data protection perspective, and specifically with regard to the proposal to introduce a central population register and registration card. The comments are based on issues identified both locally and in other jurisdictions where similar schemes have been proposed, and also on the adequacy of the consultation process and the subsequent responses.

## 3. Consideration of Data Protection Issues and the Eight Principles

3.1. Any scheme which includes allocating a unique personal identification number, and relates directly to a central population register controlled by the Island's Government raises significant data protection issues and concerns over individual's rights to privacy.

3.2. This is not to say that the Registrar is opposed to such a scheme, indeed many European jurisdictions have successfully implemented schemes which appear to operate without infringing their respective data protection legislation. That said, at least one data protection authority has issued a decision restricting the amount of information processed in relation to its national identity card scheme. It should be emphasised that the Registrar will support such a local scheme, but only where due regard has been given to the data protection issues arising.

3.3. Paragraph 5.4 of the Consultation Paper makes a statement that "*consideration has been given to the data protection issues arising.*" Whilst we welcome the recognition that these issues need to be considered, the paper does not explain exactly how these issues have been addressed.

3.4. Taking each of the eight Data Protection Principles in turn, as detailed in the new Law, it is difficult to identify how the fundamental requirements of these Principles have been addressed. Some of the issues falling within



these Principles are briefly described below; however most will be detailed later in this report.

- 3.5. The First Principle discusses the requirement for personal data to be processed fairly and lawfully and in every case, at least one of the conditions set out in Schedule 2 must apply. Whilst it would be arguable that the processing would be necessary for compliance with a legal obligation, i.e. the proposed legal requirement to register, this new legislation in itself will need to consider proportionality if the scheme is intended to be compulsory (part of ECHR audit) as well as how this will be enforced.
- 3.6. Schedule 1, Part 2 of the new Law gives an interpretation to the Principles. Paragraph 4 discusses the issue of 'general identifiers'. This paragraph states:
  - *"For the purposes of the first principle, personal data that contain a general identifier falling within such description as may be prescribed by Regulations are not to be treated as processed fairly and lawfully unless they are processed in compliance with any conditions so prescribed in relation to general identifiers of that description.*  
*In this paragraph, "general identifier" means any identifier (for example, a number or code used for identification purposes) that relates to an individual and forms part of a set of similar identifiers that is of general application".*
- 3.7. The paper clearly indicates that the intention is to use a general identifier. Regulations will therefore be required. The proposal to utilise the existing Social Security identifier will be dealt with in more detail later in the report.
- 3.8. The Second Principle requires that personal data is obtained only for one or more specified and lawful purposes, and shall not be processed in any manner incompatible with that purpose or purposes. Paragraph 5.4 of the paper emphasises the importance that the registration card has "*wide use throughout public sector services*", yet does not define what these services will be. This therefore increases the risk that the card could be used for many future but as yet undefined public services which significantly raises the risk of 'function creep' (the identification and subsequent addition of different uses/purposes over time, for which the card could be used and who would have access to the data held on the card). The purposes of the register and card need to be explicitly detailed at the outset and included in the primary legislation. Any future increase of use should only be effective by amendment to that legislation thus ensuring full and public debate on the proposals.
- 3.9. The paper implies that there is a diverse range of purposes for which the registration card and population register would be used. Each of these purposes has its own requirements in terms of the amount of information that would appear on the card and in the central register. Such a broad approach could lead to the recording and retention of information unnecessary for the particular service on offer, not only undermining efficiency, but also data protection compliance. This impacts on the requirements of both the Second, Third, Fourth and Fifth Principles.
- 3.10. The Third Principle states that personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed. Paragraph 5.4 of the paper discusses the type of information that



may be held on the registration card. It is noted that in the original policy document the use of biometrics was muted as a method of identification on the card. This important element requires clarification. As evidenced throughout UK trials for their proposed ID card scheme, the recording of biometric data such as fingerprints, iris scans or voice recognition, can be deemed as excessive for certain purposes and the use of such data requires high levels of integrity and security. Similarly, as stated above, where the public services to be used have not been defined, there is an increased risk that the data collected from the individual may be excessive for one or more of the public sector services for which it is to be used.

- 3.11. The Fourth Principle requires that data shall be accurate, and where necessary kept up to date. Having had the benefit of reading the summary of consultation responses to the first option of a population register, it is interesting to note that our thoughts on the potential lack of accuracy of this register have already been extensively highlighted. The Registrar agrees that the logistics involved in maintaining the accuracy of a central register of an Island's population are highly complicated, and there is a significant risk that the data held on this register would never be completely accurate, taking into account the many changes in different individual's circumstances or status. The data controller would be responsible for this aspect. Clarification is required as to who exactly the data controller is to be bearing in mind Article 63(3) of the Data Protection (Jersey) Law 2004 requires each department or administration of the States to be treated as a separate person for the purposes of the Law.
- 3.12. The Fifth Principle leads on from the Fourth, in that it would prove extremely difficult to identify every case where a person either leaves the Island or ceases to be resident in Jersey. The Principle requires that personal data shall not be kept for longer than is necessary for that purpose. It must also be considered that where data is collected for several purposes, and one or more of those purposes cease to be relevant to the individual, is that data then held for longer than is required to fulfil that purpose?
- 3.13. Paragraph 5.4 of the consultation paper talks of the intention to 'trail' individuals by being able to access details of their interaction with States departments and identify when individuals leave the Island. Any such 'trailing' or 'tracking' is intrusive and will, again, need to be proportionate to the aim. This is particularly important as we are dealing here with all aspects of government functions; therefore the 'trail' left by every citizen is likely to include highly sensitive, personal data, building up an extensive picture of individual lives and movements. Who will have access to this data and what will the procedures be for enforcement agencies to access it? Will such 'trails' be accessible under Regulation of Investigatory Powers (Jersey) Law 200-? If so, the fact that authorizations for access to such data may be granted by the AG or any other designated person as empowered by Article 23(3)(a) and (b) will need additional and detailed consideration.

Any government clearly has special privacy obligations arising from:

- the handling of sensitive information;
- its special position of trust;
- the huge power difference between government and citizen;



- its position as a monopoly service provider; and
  - the wide range of related and un-related services provided.
- 3.14. The Sixth Principle relates to the rights of data subjects in accessing their personal information. It was interesting to note that no reference to subject access was made in the paper. In a scheme which requires compulsory registration, detailed guidance should be given to data subjects in order that they understand their legal rights to establish exactly what data is held about them.
- 3.15. The Seventh Principle requires that appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data, and against accidental loss or destruction of, or damage to personal data. No reference was made in the paper as to the safeguards that would need to be put in place to prevent such unauthorised access or the extensive audit facility any central database would require. How will access to data be restricted? How many people will have access to personal data? What security measures will be taken to prevent and detect unlawful processing?
- 3.16. The Eighth Principle requires that personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.
- 3.17. Whilst this Principle does not have any significant direct effect on the proposed policy, as there should not be any reason for data to be transferred overseas, the Principle is the same in the UK and other Crown Dependencies' legislation and is a requirement of the European data protection directive. Should Jersey not achieve adequacy from the European Commission, then data could not be transferred to Jersey, thus affecting trade as detailed in the introduction above. As a result, any proposed amendments to the primary legislation need to remain compliant with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.
- 3.18. It is therefore our submission that the statement made in paragraph 5.4 of the paper to the effect that consideration has been given to data protection issues is questionable. There are many issues yet to be resolved and the Registrar would like to see further documentary evidence that these issues have in fact been considered in detail.

## 4. Registration Cards

- 4.1. The paper makes continued reference to registration cards using the current Social Security number as the identifier. Whether these cards are called registration cards, entitlement cards, identification cards or smart cards, they are still identity cards of some sort. With advances in technology, such cards are able to carry sensitive personal information, including such data as confidential medical records, thus demonstrating that registration cards can be advantageous to the individual, but can also be extremely



dangerous, and a very attractive proposition to the criminally minded. Any data on such cards should be the minimum required for the purpose and serve as a method of identifying an individual in order to gain access to information held at departmental level only. Any proposal to enable the cards to hold data would need further significant research on resulting security and privacy issues.

- 4.2. The most important consideration in the implementation of such a scheme is to strike a balance between providing the individual with an efficient service, but at the same time offering comfort in the knowledge that their personal information is secure and well protected. As the Earl of Selbourne, Chairman of the Royal Society's Science in Society Committee said when asked to comment on the proposed introduction of ID cards in the UK, *"There has been a lack of public debate and there is a very real danger that we are 'sleepwalking' into our technological future."*
- 4.3. The UK Information Commissioner, Richard Thomas, has also spoken publicly many times in relation to the UK Government's proposed introduction of a similar scheme and ID cards. Mr. Thomas warned that the theft of such cards or errors on the central register could cause problems such as people being denied access to certain public services, or even the loss of their livelihoods. The impact incorrect data can have on an individual should not be underestimated and the Jersey Data Protection office currently deals with many such issues.
- 4.4. Mr. Thomas has also told MP's of the Commons home affairs select committee's inquiry into the draft legislation in identity cards that, *"this is not just about citizens having a piece of plastic to identify themselves...It's about the amount, the nature of the information held about every citizen and how that's going to be used in a wide range of activities"*. In effect presenting *"a sea change in the relationship between state and every individual in the country"*.
- 4.5. To embark on a compulsory registration card scheme solely on the grounds of increased convenience or efficiency, would be to overlook the need to ensure that such a scheme is initiated in response to pressing social need, especially where the scheme is Government run, and potentially affects an individual's right to respect for their private life. The grounds for a scheme of this nature need to be more clearly identified and the measures adopted must be proportionate to the reasons behind the scheme, with the appropriate safeguards identified. Only then is it possible to make a judgement on whether the scheme is acceptable in principle.
- 4.6. With regard to the 'compulsory' registration and carrying of a registration card, in order to justify the imposition of such a requirement there must be a pressing public need, and the compulsion must be proportionate to the problem faced. It is the Registrar's submission that the consultation paper has not made the case for this.

## 5. Identity Fraud & Theft

- 5.1. For any scheme considering the use of entitlement or registration cards, the issue of identity fraud and identity theft must be addressed. To do this successfully, it must involve the verification of identity to a high level and



minimise the opportunities for fraudulent assumption of an individual's identity.

- 5.2. There are many factors to address when considering the use of a registration card, including the amount of information that should appear on the face of such a card, encryption methods, biometric inclusion, software developments and cost. It is therefore the Registrar's submission that this should be dealt with by way of separate consultation.

## 6. Unique Personal Identifiers

- 6.1. Careful consideration should be given to the composition, use and disclosure of a unique personal identification number. The starting point should be to allocate a number on the basis of this being recorded on the central database for the sole purpose of administering the scheme. The continued use of context specific numbers would minimise the risks of a single identification number permitting increased tracking of an individual's discrete activities or the impersonation of an individual should the unique number become known to others. Serious consideration needs to be given to the use of such privacy enhancing technologies.
- 6.2. The format of the number should not reveal anything about the individual. Guernsey have tackled the issue of unique identifiers as part of their "CCDOG" project, and have stated that their system ID reference will be 100% confidential with no access or use of the 'number' outside of the system administration purposes.
- 6.3. The number would also constitute an identifier of general application under the terms of Schedule 1, Part 2, Paragraph 4 of the Data Protection (Jersey) Law 2004 (see above section on the First Principle), requiring specific safeguards to be established by Regulation to restrict its wider use. Displaying the number on the face of the registration card runs the risk that it will become more widely known and perhaps used by others for the provision of their services. The potential collateral impact of the use of the Social Security number should not be underestimated. The UK Information Commissioner has already seen attempts to use other publicly issued numbers, such as the national insurance number, for unconnected purposes. The ready availability of the unique personal number by printing it on the face of a card could significantly reduce its value as part of a strong identity validation system and facilitate impersonation.
- 6.4. If a personal identification number were to be introduced it is the Registrars view that the system should be thought through from first principles and thus would require the development of a new number and oppose the inclusion of coded personal information within the new personal identification number. In the Registrar's view, the use of the Social Security number as a general personal identification number would be inappropriate. The number was introduced for a specific purpose and its use should remain context specific. If the States wish to proceed with proposals for a personal identification number, serious consideration should be given to the creation of an entirely new number system.



## 7. A Central Population Register

- 7.1. The development of a population register should not be entered into lightly. The Data Protection Commissioner of the Netherlands has publicly stated that they have experienced its efficient and extensive population register being utilised for other purposes in times of a national emergency with serious adverse consequences for particular groups in society.
- 7.2. Establishing and maintaining a central population register poses a number of challenges. Whether the quality of personal information on what may be the contributing databases is adequate for a reliable register to be established without significant data validation is questionable. Existing databases were established for different purposes divorced from the need for high levels of identity validation and with less of an imperative to keep data up to date and always fit for its purpose. Substantial work would have to be undertaken to revalidate this data and then keep it up to date as individuals circumstances change.
- 7.3. The consultation paper makes clear that the States foresee a population register as central to the targeted pro-active delivery of services, which again raises questions of continued function creep. The information to be included on any register should be the minimum to achieve the purpose. The potential and undefined purposes envisaged at present make it difficult to determine how wide-ranging this may need to be in practice. No information should be held about particular service delivery. The ability to provide an overview of the various services being utilised in order to build up a picture of an individual's activities or circumstances should be restricted (see 3.13). The ability to access or request such details by third parties such as law enforcement agencies must also be strictly controlled. In order to provide safeguards against pressure for wider use or disclosure, the responsibility for any register and the card issuing scheme in general, consideration should be given to placing it under independent control and oversight, possibly with a statutory body established for this sole purpose.

## 8. Limitations of Use

- 8.1. One of the issues highlighted by the UK Information Commissioner during the consultation process for the introduction of a similar scheme in the UK was that of the potential for 'function creep' over time.
- 8.2. Whilst the Registrar acknowledges that the States may only permit use of the registration cards for benign purposes, there remains the possibility that over time, and as a result of increasing political or administrative pressure to make full use of an expensive infrastructure, further uses for the card and register may be identified and subsequently added, thus increasing the scope of access to an individual's personal data.
- 8.3. It is therefore essential that the purposes for which the card and register are to be used are identified at the earliest stage and enshrined in primary legislation along with the necessary safeguards to prevent such function creep. It is vital that the various uses of the card and register are narrowly defined. If too broad, then this will still allow for some scope of function



creep as a result of misinterpretation of the Law. In addition, any amendments to the legislation must be thoroughly and publicly debated.

- 8.4. Consideration should be given to the primary legislation making provision for an independent body responsible to the States for the conduct of the scheme's functions. Their duties should include the administration of the scheme, monitoring and reviewing of its use and raising awareness of the safeguards in place.

## 9. Legislative Changes

- 9.1. The Registrar welcomes the acceptance of the need for legislation to be introduced and trusts that the appropriate level of scrutiny is ensured. The new legislation should include detailed arrangements for the issuing of the registration card, the information to be contained on the card and on the population register, the specific functions that this may be used for and substantial restrictions on wider use and disclosure, including offences relating to the fraudulent obtaining of a card and misuse of the information on the card and population register.
- 9.2. The consultation paper also suggests that amendments to certain primary legislation will need to be made, including amendments to the Data Protection (Jersey) Law 2004. The Registrar is of the opinion that the uses for which the card and register are to be used need to be defined and established in bespoke primary legislation in the first instance. Once this has been achieved, the interactions with any other relevant legislation can be identified and then reviewed.
- 9.3. Furthermore, any proposed amendments to the Data Protection (Jersey) Law 2004 should be submitted by the Office of the Data Protection Registrar, so as to ensure that the new legislation remains compliant with the European Directive on Data Protection, reducing the risk of the European Commission declaring Jersey 'inadequate' for the purposes of the Directive.

## 10. The Consultation Process and Scope

- 10.1. Where a scheme is proposed that will have large scale implications on the rights of privacy for Island residents, the Registrar would expect an extended debate, covering all groups and sectors of the population. P&R have made efforts to engage people in the consultation. It is the opinion of the Registrar that consultation needs to continue to ensure that the majority of the Island's population are aware of the intentions proposed in this consultation paper as it extends beyond a registration scheme for immigrants. The benefits of any policy such as this will only be realised if the people of Jersey trust the way that public services handle their personal information.
- 10.2. The Registrar is also concerned that further research should be carried out into similar schemes in operation in other jurisdictions. The UK, for example, has been debating the issue of identification cards and a national population register for some time, with the UK Information Commissioner having raised many significant concerns in relation to the basic rights to



privacy of UK citizens. Such concerns have been similar to those raised in this document, especially in relation to issues such as ‘function creep’ and unique identifiers, although probably the most noticeable difference is that the proposed UK scheme is voluntary, and has gone through many stages of public debate since the initial concept was conceived. The scheme has also gone through a trial period with 10,000 people taking part, and has been the subject of much debate for many groups, including human rights and privacy specialists.

- 10.3. Guernsey has also been working on an E-Government project, with an E-Citizen working group looking at the possibilities of a Central Citizen Database of Guernsey (“CCDOG”). As previously discussed, they have addressed the issue of unique personal identifiers, ensuring that the number does not reveal anything about the individual. The Guernsey Data Protection Commissioner is a member of the working group.
- 10.4. As also discussed earlier in this report, the Netherlands have a similar scheme which has seen its population register being utilised for other purposes in times of a national emergency with serious adverse consequences for particular groups in society.
- 10.5. There are many other jurisdictions, both in Europe and internationally, that have implemented such schemes successfully with full regard paid to the data protection and human rights issues. The Registrar would be interested to see what documentary evidence is available of the research conducted with these other jurisdictions to establish which type of scheme would be best for Jersey, and to what extent the public were involved in its development and implementation.
- 10.6. With regard to the overall scope of the consultation paper, it is easy to forget what the paper is setting out to achieve. The paper is entitled “Monitoring and Regulation of Migration”, indicating that the main problem is with the increase of non-resident persons entering and working in Jersey. With that in mind, it is surprising that much of the paper is centred on the introduction of a population register and registration card for the existing population, highlighting the benefits to public services and citizen interaction. The report itself acknowledges that this concept “*extends beyond the immediate requirements for monitoring inward migration*”. It is the submission of the Registrar that the concept of a population register and registration card are much more significant proposals than implied in the report, and indeed extend beyond the scope of this project and should be dealt with accordingly.

## 11. Conclusion

- 11.1. The Registrar supports any project that will enable greater efficiency, improved public service, and generally look after the interests of Jersey citizens. However, it is vitally important that where the fundamental human right to respect for the privacy of those citizens is affected, such projects are conducted with utmost integrity and transparency, and all issues raised during the development process are examined in detail and resolved before implementation.
- 11.2. The Registrar therefore recommends that the proposed scheme be subject of extensive review in order to ensure that all issues relating to data protection



are satisfactorily resolved prior to any further consultation or ratification, and in respect of the issues highlighted in this report, compliance is achieved with the Principles of the Data Protection (Jersey) Law 2004.