

**Response to the Department for Digital, Culture, Media & Sport's  
Call for views and evidence - Review of Representative Action Provisions,  
Section 189 Data Protection Act 2018**

**Submitted by Prof. Derek McAuley, Dr. Elvira Perez,  
Dr. Ansgar Koene and Dr. Jiahong Chen of  
Horizon Digital Economy Research Institute, University of Nottingham**

**22 October 2020**

1. Horizon<sup>1</sup> is a Research Institute centred at The University of Nottingham and a Research Hub within the UKRI Digital Economy programme<sup>2</sup>. Horizon brings together researchers from a broad range of disciplines to investigate the opportunities and challenges arising from the increased use of digital technology in our everyday lives. Prof. McAuley is Director of Horizon and Principal Investigator of the EPSRC-funded DADA<sup>3</sup> (Defence Against Dark Artefacts) project, addressing smart home IoT network security, and its acceptability and usability issues, the ESRC-funded CaSMA<sup>4</sup> (Citizen-centric approaches to Social Media analysis) project to promote ways for individuals to control their data and online privacy, and the EPSRC-funded UnBias<sup>5</sup> (Emancipating Users Against Algorithmic Biases for a Trusted Digital Economy) project for raising user awareness and agency when using algorithmic services. Dr. Perez is Associate Professor at the Nottingham NIHR Biomedical Research Centre for Mental Health and Technology<sup>6</sup>, the Nottingham lead on the EPSRC-funded ReEnTrust<sup>7</sup> (Rebuilding and Enhancing Trust in Algorithms) project, and Co-Investigator of the EPSRC-funded Network+ Human Data Interaction<sup>8</sup> and ESRC-funded Network+ eNurture<sup>9</sup>. Dr. Koene was a lead researcher of the CaSMA and UnBias projects, is Research co-Investigator on the ReEnTrust project and chairs the working group for developing the IEEE P7003 Standard for Algorithm Bias Considerations. Dr. Chen is Researcher Fellow of Horizon, working on the DADA project. We are happy to be contacted for further evidence, and for our response to be published in full.

**Q1. Are you responding to this consultation as:**

2. e. Other: Research Institute

**Q10. What, if any, impacts might the provisions discussed in Chapter 2 have had on data controllers which might be the subject of a complaint or legal claim, particularly businesses, including any increase to compliance and other costs, or risks? Please explain.**

3. For organisations whose business practices are compliant with the substantive rules of data

---

<sup>1</sup> <http://www.horizon.ac.uk>

<sup>2</sup> <https://epsrc.ukri.org/research/ourportfolio/themes/digitaleconomy/>

<sup>3</sup> <https://www.horizon.ac.uk/project/defence-against-dark-artefacts/>

<sup>4</sup> <http://casma.wp.horizon.ac.uk>

<sup>5</sup> <http://unbias.wp.horizon.ac.uk>

<sup>6</sup> <https://nottinghambrc.nihr.ac.uk/>

<sup>7</sup> <https://reentrust.org/>

<sup>8</sup> <https://hdi-network.org/>

<sup>9</sup> <https://www.enurture.org.uk/>

protection law, we do not see why the introduction of representative actions discussed in Chapter 2 would create any additional compliance cost. Non-compliant practices may indeed see a surge of challenges initiated by non-profit organisations on behalf of data subjects, but this should not be seen as an unjustified source of compliance costs, but rather a regulatory incentive for better observance of the law and enhanced protection for data subjects. Ultimately, lowered barriers for individual data subjects to exercise their rights through a third-party organisation would mean better enforcement of data protection law, which will create a more level playing field for businesses in the digital economy.

***Q11. What, if any, impacts might the current provisions have had on the ICO and the judicial system and their capacity to handle claims? What, if any, measures might help to manage pressures?***

4. In the short term, there might be an increased number of complaints and claims made to the ICO and courts, both as a result of the more comprehensive protection provided by the GDPR since its entry into force, and also the representative actions introduced by the GDPR and Data Protection Act (DPA) 2018. This may represent a challenge for their capacity to handle the additional cases. In the long run, however, representative actions could in turn alleviate the regulatory and judicial burden in processing data protection cases for two major reasons. For one thing, the experience and expertise of the non-profit organisations representing data subjects mean that claims made or supported by these organisations often have a stronger factual and legal ground, presented in a more professional manner, which would facilitate the decision-making of the ICO or courts to some extent. For another, encouraging private enforcement may also improve the overall level of compliance across the country, which will likely reduce the number of complaints from a longer-term perspective.

***Q12. Do you think the data protection legislation should be changed to allow non-profit organisations to act on behalf of individuals who have not given express authorisation? Please explain whether and why to permit such action in relation to the exercise of some or all of a data subject's rights.***

5. We can perceive scenarios where certain groups of data subjects – especially vulnerable groups – may lack the legal capacity, resources, skills or knowledge to take actions against violations of their rights, freedoms and interests under data protection law. Children and young people, for example, may feel unmotivated as a result of their own experiences feeling powerless in terms of changing how the internet works. Our work with a total of 27 Youth Juries taking place between 2017-2018, involving 273 children and young people, who were predominantly aged between 13 and 17 years of age, shows that there is a noticeable sense of fatalism and resignation when it comes to protection against online harms. In such cases, there is strong case for intervention by non-profit organisations on their behalf, even without their express consent.

*“Well, I just get annoyed, because yesterday I was on Facebook and it was just coming up with a lot of ads like ad after ad, so I just decided to block all of them but that didn’t stop it.”*

*“Because how else are they going to collect data... it’s kind of unstoppable, unpreventable in some ways.”*

*“They’ve got to know, they’ve got to be exposed to everything eventually.”*

**Q13. Should a children's rights organisation be permitted to exercise some or all of a data subject's rights on behalf of a child, with or without being authorised to do so? Please explain**

6. As noted in the call document, under Article 80(1) GDPR and Section 187 DPA 2018, data subjects already have the right to mandate a non-profit organisation active in the field of data protection to represent them in legal actions. Neither the GDPR nor the DPA 2018 has defined what constitutes "active in the field", and therefore, there is no doctrinal reason to preclude the explicit recognition of children's rights organisations as an eligible body for cases concerning children for this purpose. Arguably, since the right to data protection forms an importance part of the well-being of children, and the expertise in promoting the best interest of children contributes significantly to the protection of such a right for children, they should be considered active in the field of data protection in this specific domain. The goes for cases of representative actions whether *with* or *without* the authorisation of the data subject once this kind of action is introduced in accordance with Section 190 DPA 2018.

**Q16. What conditions, limitations or safeguards should apply if non-profit organisations act on behalf of individuals who have not authorised them to do so? For example, should individuals be given the right to object to a non-profit organisation taking action on their behalf without their consent? Please explain.**

7. Civil Procedure Rules (CPR) 21.4(3) sets out the conditions for a person to act as a litigation friend for a child or protected party (as defined by Section 21 Mental Capacity Act (MCA) 2005), namely: "(a) can fairly and competently conduct proceedings on behalf of the child or protected party; (b) has no interest adverse to that of the child or protected party; and (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party." We are of the view that the non-profit organisations acting on behalf of a non-consenting data subject should be subject to the same set of criteria.
8. There might also be legitimate reasons for the data subject or their legal guardian to object to the unauthorised representation by a non-profit organisation, in which case a court should be empowered to decide based on the principle of the best interests of the data subject as stipulated in Section 4 MCA 2005.

**Q18. If the new provisions discussed in this chapter were adopted, what are the likely impacts on the ICO or the judicial system, which will be required to consider representations made by non-profit organisations? What is their capacity to handle new claims brought under any new provisions, and how might the design of any new provisions help to manage pressures?**

9. For the same reasons we explained above in Paragraph 3, although the provisions discussed in Chapter 3 may pose a short-term burden to the ICO and the judicial system, they will likely improve the compliance landscape, which in the long term relieves the pressure.