



**AN BILLE UM CHOSAINT SONRAÍ (LEASÚ), 2002
DATA PROTECTION (AMENDMENT) BILL, 2002**

*Mar a tionscnaíodh
As initiated*

ARRANGEMENT OF SECTIONS

Section

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Section

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ACTS REFERRED TO

Data Protection Act, 1988	1988, No. 25
Dentists Act, 1985	1985, No. 9
Interpretation Act, 1937	1937, No. 38
Medical Practitioners Act, 1978	1978, No. 4
Social Welfare (Consolidation) Act, 1993	1993, No. 27
Statistics Act, 1993	1993, No. 21



AN BILLE UM CHOSAINT SONRAÍ (LEASÚ), 2002
DATA PROTECTION (AMENDMENT) BILL, 2002

BILL

entitled

5 AN ACT TO GIVE EFFECT TO DIRECTIVE 95/46/EC OF THE
EUROPEAN PARLIAMENT AND OF THE COUNCIL OF
24 OCTOBER 1995 ON THE PROTECTION OF INDIVID-
UALS WITH REGARD TO THE PROCESSING OF PER-
10 SONAL DATA AND ON THE FREE MOVEMENT OF
SUCH DATA, FOR THAT PURPOSE TO AMEND THE
DATA PROTECTION ACT, 1988, AND TO PROVIDE FOR
RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—In this Act—

Definitions.

15 “Minister” means Minister for Justice, Equality and Law Reform;

“the Principal Act” means the Data Protection Act, 1988.

2.—Section 1 of the Principal Act is amended—

Amendment of
section 1
(interpretation and
application of Act)
of Principal Act.

(a) in subsection (1)—

(i) by the insertion of the following definitions:

20 “‘the Act of 2002’ means the *Data Protection
(Amendment) Act, 2002*;

‘automated data’ means information that—

25 (a) is being processed by means of equipment
operating automatically in response to
instructions given for that purpose, or

(b) is recorded with the intention that it should
be processed by means of such
equipment;

30 ‘blocking’, in relation to data, means so marking the
data that it is not possible to process it for purposes
in relation to which it is marked;

‘the Directive’ means 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 on the free movement of such data⁽¹⁾;

‘the EEA Agreement’ means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993; 5

‘enactment’ means a statute or a statutory instrument (within the meaning of the Interpretation Act, 1937);

‘the European Economic Area’ has the meaning assigned to it by the EEA Agreement; 10

‘manual data’ means information that is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;

‘relevant filing system’ means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible; 15 20

‘sensitive personal data’ means personal data as to—

(a) the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject, 25

(b) whether the data subject is a member of a trade union,

(c) the physical or mental health or condition or sexual life of the data subject, 30

(d) the commission or alleged commission of any offence by the data subject, or

(e) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings;”, 35

(ii) by the substitution of the following definition for the definition of “data”: 40

“‘data’ means automated data and manual data;”,

(iii) by the substitution of the following definition for the definition of “personal data”:

“‘personal data’ means data relating to a living individual who is or can be identified either from the 45

⁽¹⁾ O.J. No. L 281/38 of 23.11.95, p. 31.

data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller;”,

and

5 (iv) by the substitution of the following definition for the definition of “processing”:

10 “‘processing’, of or in relation to information or data, means performing any operation or set of operations on the information or data, whether or not by automatic means, including—

(a) obtaining, recording or keeping the information or data,

(b) collecting, organising, storing, altering or adapting the information or data,

15 (c) retrieving, consulting or using the information or data,

(d) disclosing the information or data by transmitting, disseminating or otherwise making it available, or

20 (e) aligning, combining, blocking, erasing or destroying the information or data;”,

(b) by the insertion of the following subsections after subsection (3):

25 “(3A) A word or expression that is used in this Act and also in the Directive has, unless the context otherwise requires, the same meaning in this Act as it has in the Directive.

(3B) (a) Subject to any regulations under section 15(2) of this Act, this Act applies to data controllers in respect of the processing of personal data only if—

(i) the data controller is established in the State and the data are processed in the context of that establishment, or

35 (ii) the data controller is established neither in the State nor in any other state that is a contracting party to the EEA Agreement but makes use of equipment in the State for processing the data otherwise than for the purpose of transit through the territory of the State.

(b) For the purposes of paragraph (a) of this subsection, each of the following shall be treated as established in the State:

45 (i) an individual who is normally resident in the State,

(ii) a body incorporated under the law of the State,

- (iii) a partnership or other unincorporated association formed under the law of the State, and
- (iv) a person who does not fall within subparagraphs (i), (ii) or (iii) of this paragraph, but maintains in the State—

- (I) an office, branch or agency through which he or she carries on any activity, or

- (II) a regular practice,

and the reference to establishment in any other state that is a contracting party to the EEA Agreement shall be construed accordingly.

(c) A data controller to whom paragraph (a)(ii) of this subsection applies must, without prejudice to any legal proceedings that could be commenced against the data controller, designate a representative established in the State.

(3C) Section 2 and sections 2A and 2B (which sections were inserted by the *Act of 2002*) of this Act shall not apply to data kept solely for the purpose of historical research and the keeping of which complies with such requirements (if any) as may be prescribed for the purpose of safeguarding the fundamental rights and freedoms of data subjects.”

and

(c) by the insertion of the following subsection after subsection (4):

“(5) Where personal data to which subsection (4)(b) of this section applies is processed for a purpose other than that for which it was collected, the said subsection (4)(b) shall cease to apply to it.”

Amendment of section 2 (collection, processing, keeping, use and disclosure of personal data) of Principal Act.

3.—Section 2 of the Principal Act is amended—

(a) by the substitution of the following subsection for subsection (1):

“(1) A data controller shall, as respects personal data kept by him or her, comply with the following provisions:

- (a) the data or, as the case may be, the information constituting the data shall have been obtained, and the data shall be processed, fairly and lawfully,

- (b) the data shall be accurate and complete and, where necessary, kept up to date,

- (c) the data—

(i) shall have been obtained only for one or more specified, explicit and legitimate purposes,

(ii) shall not be further processed in a manner incompatible with that purpose or those purposes,

(iii) shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they were collected or are further processed, and

(iv) shall not be kept for longer than is necessary for that purpose or those purposes,

(d) appropriate security measures shall be taken against unauthorised access to, or unauthorised alteration, disclosure or destruction of, the data, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.”,

(b) in subsection (5), by the substitution of the following paragraph for paragraph (a):

“(a) Subparagraphs (ii) and (iv) of paragraph (c) of the said subsection (1) do not apply to personal data kept for statistical or research or other scientific purposes, and the keeping of which complies with such requirements (if any) as may be prescribed for the purpose of safeguarding the fundamental rights and freedoms of data subjects, and”,

and

(c) by the substitution of the following subsections for subsection (7):

“(7) Where—

(a) personal data are kept for the purpose of direct marketing, and

(b) the data subject concerned requests the data controller in writing—

(i) not to process the data for that purpose, or

(ii) to cease processing the data for that purpose,

then—

(I) if the request is under paragraph (b)(i) of this subsection, the data controller—

(A) shall, where the data are kept only for the purpose aforesaid, as soon as may be and in any

event not more than 40 days after the request has been given or sent to him or her, erase the data, and

(B) shall not, where the data are kept for that purpose and other purposes, process the data for that purpose after the expiration of the period aforesaid, 5

(II) if the request is under paragraph (b)(ii) of this subsection, as soon as may be and in any event not more than 40 days after the request has been given or sent to the data controller, he or she— 10 15

(A) shall, where the data are kept only for the purpose aforesaid, erase the data, and

(B) shall, where the data are kept for that purpose and other purposes, cease processing the data for that purpose, 20

and

(III) the data controller shall notify the data subject in writing accordingly and, where appropriate, inform him or her of those other purposes. 25

(8) Where a data controller anticipates that personal data kept by him or her will be processed for the purposes of direct marketing, the data controller shall inform the persons to whom the data relates that they may object, by means of a request in writing to the data controller and free of charge, to such processing.”. 30

Provisions in relation to processing.

4.—The following sections are inserted in the Principal Act after section 2: 35

“Processing of personal data.

2A.—(1) Personal data shall not be processed by a data controller unless section 2 of this Act (as amended by the *Act of 2002*) is complied with by the data controller and at least one of the following conditions is met: 40

(a) the data subject has given his or her explicit consent to the processing or, if the data subject is under the age of 18 years or is mentally or physically incapacitated to such an extent as to be or to be likely to be unable to appreciate the nature and effect of such consent, it is given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject, 45 50

(b) the processing is necessary—

(i) for the performance of a contract to which the data subject is a party,

(ii) in order to take steps at the request of the data subject prior to entering into a contract,

(iii) for compliance with a legal obligation to which the data controller is subject other than an obligation imposed by contract, or

(iv) to prevent—

(I) injury or other damage to the health of the data subject, or

(II) serious loss of or damage to property of the data subject,

or otherwise to protect his or her vital interests where the seeking of the consent of the data subject or another person referred to in paragraph (a) of this subsection is likely to result in those interests being damaged,

(c) the processing is necessary—

(i) for the administration of justice,

(ii) for the performance of a function conferred on a person by or under an enactment,

(iii) for the performance of a function of the Government or a Minister of the Government,

(iv) for the performance of any other function of a public nature performed in the public interest by a person,

(d) the processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the fundamental rights and freedoms or legitimate interests of the data subject.

(2) The Minister may, after consultation with the Commissioner, by regulations specify particular circumstances in which subsection (1)(d) of this section is, or is not, to be taken as satisfied.

2B.—(1) Sensitive personal data shall not be processed by a data controller unless:

(a) sections 2 and 2A (as amended and inserted, respectively, by the *Act of 2002*) are complied with, and 5

(b) in addition, at least one of the following conditions is met:

(i) the data subject has given his or her explicit consent to the processing or, if the data subject is mentally or physically incapacitated to such an extent as to be or to be likely to be unable to appreciate the nature and effect of such consent, it is given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject and the giving of such consent is not prohibited by law, 10 15 20

(ii) the processing is necessary for the purpose of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment, 25

(iii) the processing is necessary to prevent injury or other damage to the health of the data subject or another person or serious loss in respect of, or damage to, property or otherwise to protect the vital interests of the data subject or of another person in a case where— 30 35

(I) consent to the processing cannot be given by or on behalf of the data subject in accordance with section 2A(1)(a) (inserted by the *Act of 2002*) of this Act, or 40

(II) the data controller cannot reasonably be expected to obtain such consent,

or the processing is necessary to prevent injury to, or damage to the health of, another person, or serious loss in respect of, or damage to, the property of another person, in a case where such consent has been unreasonably withheld, 45 50

(iv) the processing—

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- (I) is carried out in the course of its legitimate activities by any body corporate, or any unincorporated body of persons, that—
 - (A) is not established, and whose activities are not carried on, for profit, and
 - (B) exists for political, philosophical, religious or trade union purposes,
- (II) is carried out with appropriate safeguards for the fundamental rights and freedoms of data subjects,
- (III) relates only to individuals who either are members of the body or have regular contact with it in connection with its purposes, and
- (IV) does not involve disclosure of the data to a third party without the consent of the data subject,
- (v) the information contained in the data has been made public as a result of steps deliberately taken by the data subject,
- (vi) the processing—
 - (I) is required for the purpose of obtaining legal advice or for the purposes of, or in connection with, legal proceedings or prospective legal proceedings, or
 - (II) is otherwise necessary for the purposes of establishing, exercising or defending legal rights,
- (vii) the processing is necessary for medical purposes and is undertaken by—
 - (I) a health professional, or
 - (II) a person who in the circumstances owes a duty of confidentiality to the data subject that is equivalent to that which would exist if that person were a health professional,

- (viii) the processing is necessary in order to obtain information for use, subject to and in accordance with the Statistics Act, 1993, only for statistical, compilation and analysis purposes, 5
- (ix) the processing is carried out by political parties, or candidates for election to, or holders of, elective political office, in the course of electoral activities for the purpose of compiling data on people's political opinions and complies with such requirements (if any) as may be prescribed for the purpose of safeguarding the fundamental rights and freedoms of data subjects, 10 15
- (x) the processing is authorised by regulations that are made by the Minister and are made for reasons of substantial public interest, 20
- (xi) the processing is necessary for the purpose or the assessment or payment of any tax or duty and the data has been provided by the data subject solely for that purpose, 25
- (xii) the processing is necessary for the purposes of determining entitlement to or control of, or any other purpose connected with the administration of any benefit, pension, assistance, allowance, supplement or payment under the Social Welfare (Consolidation) Act, 1993, or any non-statutory scheme administered by the Minister for Social, Community and Family Affairs. 30 35 40

(2) The Minister may by regulations—

- (a) exclude the application of subsection (1)(b)(ii) of this section in such cases as may be specified, or 45
- (b) provide that, in such cases as may be specified, the condition in the said subsection (1)(b)(ii) is not to be regarded as satisfied unless such further conditions as may be specified are also satisfied. 50

(3) In this section—

'health professional' includes a registered medical practitioner, within the meaning of the Medical

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Practitioners Act, 1978, a registered dentist, within the meaning of the Dentists Act, 1985, or a member of any other class of health worker or social worker standing specified by regulations made by the Minister after consultation with the Minister for Health and Children and any other Minister of the Government who, having regard to his or her functions, ought, in the opinion of the Minister, to be consulted;

‘medical purposes’ includes the purposes of preventive medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

Security measures for personal data.

2C.—(1) In determining appropriate security measures for the purposes of section 2(1)(d) of this Act, in particular (but without prejudice to the generality of that provision), where the processing involves the transmission of data over a network, a data controller—

- (a) may have regard to the state of technological development and the cost of implementing the measures, and
- (b) shall ensure that the measures provide a level of security appropriate to—
 - (i) the harm that might result from unauthorised or unlawful processing, accidental or unlawful destruction or accidental loss of, or damage to, the data concerned, and
 - (ii) the nature of the data concerned.

(2) A data controller or data processor shall take all reasonable steps to ensure that—

- (a) persons employed by him or her, and
- (b) other persons at the place of work concerned,

are aware of and comply with the relevant security measures aforesaid.

(3) Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller shall—

- (a) ensure that the processing is carried out in pursuance of a contract in writing or in another equivalent form between the data controller and the data processor and that the contract provides that the data processor carries out the processing only on and subject to the instructions of the data controller and that the data processor complies with obligations equivalent

to those imposed on the data controller by section 2(1)(d) of this Act,

- (b) ensure that the data processor provides sufficient guarantees in respect of the technical security measures, and organisational measures, governing the processing, and
- (c) take reasonable steps to ensure compliance with those measures.

Fair processing of personal data.

2D.—(1) Personal data shall not be treated, for the purposes of section 2(1)(a) of this Act, as processed fairly unless—

- (a) in the case of data obtained from the data subject, the data controller ensures, so far as practicable, that the data subject has, is provided with, or has made readily available to him or her, at least the information specified in subsection (2) of this section,
- (b) in any other case, the data controller ensures, so far as practicable, that the data subject has, is provided with, or has made readily available to him or her, at least the information specified in subsection (3) of this section—
 - (i) not later than the time when the data controller first processes the data, or
 - (ii) if disclosure of the data to a third party is envisaged, not later than the time of such disclosure.

(2) The information referred to in subsection (1)(a) of this section is:

- (a) the identity of the data controller,
- (b) if he or she has nominated a representative for the purposes of this Act, the identity of the representative,
- (c) the purpose or purposes for which the data are intended to be processed, and
- (d) any other information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data to be fair to the data subject such as information as to the recipients or categories of recipients of the data, as to whether replies to questions asked for the purpose of the collection of the data are obligatory, as to the possible

consequences of failure to give such replies and as to the existence of the right of access to and the right to rectify the data concerning him or her.

5 (3) The information referred to in subsection (1)(b) of this section is:

(a) the information specified in subsection (2) of this section,

(b) the categories of data concerned, and

10 (c) the name of the original data controller.

(4) The said subsection (1)(b) does not apply—

15 (a) where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of the information specified therein proves impossible or would involve a disproportionate effort, or

20 (b) in any case where the processing of the information contained or to be contained in the data by the data controller is necessary for compliance with a legal obligation to which the data controller is subject other than an obligation imposed by contract,

25 if such conditions as may be prescribed by regulations made by the Minister are complied with.”.

5.—Section 4 of the Principal Act is amended—

Amendment of section 4 (right of access) of Principal Act.

30 (a) in subsection (1), by the substitution of the following paragraphs for paragraphs (a) and (b):

“(a) Subject to the provisions of this Act, an individual shall, if he or she so requests a data controller by notice in writing—

35 (i) be informed by the data controller whether the data processed by or on behalf of the data controller include personal data relating to the individual,

40 (ii) if it does, be supplied by the data controller with a description of—

(I) the categories of data being processed by or on behalf of the data controller,

(II) the personal data constituting the data of which that individual is the data subject,

45 (III) the purpose or purposes of the processing, and

- (IV) the recipients or categories of recipients to whom the data are or may be disclosed,
 - (iii) have communicated to him or her in intelligible form—
 - (I) the information constituting any personal data of which that individual is the data subject, and 5
 - (II) any information known or available to the data controller as to the source of those data, 10

and

 - (iv) where the processing by automatic means of the data of which the individual is the data subject has constituted or is likely to constitute the sole basis for any decision significantly affecting him or her, be informed free of charge by the data controller of the logic involved in the processing, 15
- as soon as may be and in any event not more than 40 days after compliance by the individual with the provisions of this section and, where any of the information is expressed in terms that are not intelligible to the average person without explanation, the information shall be accompanied by an explanation of those terms. 20 25
- (b) A request under paragraph (a) of this subsection that does not relate to all of its subparagraphs shall, in the absence of any indication to the contrary, be treated as relating to all of them.”,
 - (b) by the insertion of the following subsection after subsection (4): 30
 - “(4A) (a) Where personal data relating to a data subject consist of an expression of opinion about the data subject by another person, the data may be disclosed to the data subject without obtaining the consent of that person to the disclosure. 35
 - (b) Paragraph (a) of this subsection does not apply to personal data held by or on behalf of the person in charge of an institution referred to in section 5(1)(c) of this Act and consisting of an expression of opinion by another person about the data subject if the data subject is being or was detained in such an institution.”, 40

and 45

 - (c) by the insertion of the following subsections after subsection (8):

“(9) The obligations imposed by subsection (1)(a)(iii) (inserted by the *Act of 2002*) of this section shall be complied with by supplying the data subject with a copy of the information concerned in permanent form unless—

5 (a) the supply of such a copy is not possible or would involve disproportionate effort, or

 (b) the data subject agrees otherwise.

10 (10) Where a data controller has previously complied with a request under subsection (1) of this section, the data controller is not obliged to comply with a subsequent identical or similar request under that subsection by the same individual unless, in the opinion of the data controller, a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

15 (11) In determining for the purposes of subsection (10) of this section whether the reasonable interval specified in that subsection has elapsed, regard shall be had to the nature of the data, the purpose for which the data are processed and the frequency with which the data are altered.

20 (12) Subsection (1)(a)(iv) of this section is not to be regarded as requiring the provision of information as to the logic involved in the taking of a decision if and to the extent only that such provision would adversely affect trade secrets or intellectual property (in particular any copyright protecting computer software).

25 (13) (a) A person shall not, in connection with—

30 (i) the recruitment of another person as an employee,

 (ii) the continued employment of another person, or

 (iii) a contract for the provision of services to him or her by another person,

35 require that other person—

 (I) to make a request under subsection (1) of this section, or

 (II) to supply him or her with data relating to that other person obtained as a result of such a request.

40 (b) A person who contravenes paragraph (a) of this subsection shall be guilty of an offence.”.

6.—Section 6 of the Principal Act is amended—

(a) in subsection (1), by the insertion after “where appropriate,” of “blocked or”, and

(b) by the substitution of the following subsection for subsection (2): 5

“(2) Where a data controller complies, or is deemed to have complied, with a request under subsection (1) of this section, he or she shall, as soon as may be and in any event not more than 40 days after the request has been given or sent to him or her, notify— 10

(a) the individual making the request, and

(b) if such compliance materially modifies the data concerned, any person to whom the data were disclosed during the period of 12 months immediately before the giving or sending of the request unless such notification proves impossible or involves a disproportionate effort, 15

of the rectification, blocking, erasure or statement concerned.”. 20

7.—The following sections are inserted in the Principal Act after section 6:

“Right of data subject to object to processing likely to cause damage or distress.

6A.—(1) Subject to subsection (3) and unless otherwise provided by any enactment, an individual is entitled at any time, by notice in writing 25 served on a data controller, to request him or her to cease within a reasonable time, or not to begin, processing or processing for a specified purpose or in a specified manner any personal data in respect of which he or she is the data subject if 30 the processing falls within subsection (2) of this section on the ground that, for specified reasons—

(a) the processing of those data or their processing for that purpose or in that manner is causing or likely to cause substantial damage or distress to him or her or to another person, and 35

(b) the damage or distress is or would be unwarranted. 40

(2) This subsection applies to processing that is necessary—

(a) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller or in a third party to whom the data are or are to be disclosed, or 45

5 (b) for the purposes of the legitimate interests pursued by the data controller to whom the data are or are to be disclosed, unless those interests are overridden by the interests of the data subject in relation to fundamental rights and freedoms and, in particular, his or her right to privacy with respect to the processing of personal data.

10 (3) Subsection (1) does not apply—

(a) in a case where the data subject has given his or her explicit consent to the processing,

(b) if the processing is necessary—

15 (i) for the performance of a contract to which the data subject is a party,

20 (ii) in order to take steps at the request of the data subject prior to his or her entering into a contract,

25 (iii) for compliance with any legal obligation to which the data controller is subject other than one imposed by contract, or

(iv) to protect the vital interests of the data subject,

30 (c) to processing carried out by political parties or candidates for election to, or holders of elective political office, in the course of electoral activities, or

(d) in such other cases, if any, as may be specified by regulations made by the Minister.

35 (4) Where a notice under subsection (1) of this section is served on a data controller, he or she shall, as soon as practicable and in any event not later than 20 days after the receipt of the notice, serve a notice on the individual concerned—

40 (a) stating that he or she has complied or intends to comply with the request concerned, or

45 (b) stating that he or she is of opinion that the request is unjustified to any extent and the reasons for the opinion and the extent (if any) to which he or she has complied or intends to comply with it.

(5) If the Commissioner is satisfied, on the application to him or her in that behalf of an individual who has served a notice under subsection (1) of this section that appears to the Commissioner to be justified, or to be justified to any extent, that the data controller concerned has failed to comply with the notice or to comply with it to that extent and that not less than 40 days have elapsed since the receipt of the notice by him or her, the Commissioner may, by an enforcement notice served on the data controller, order him or her to take such steps for complying with the request, or for complying with it to that extent, as the Commissioner thinks fit and specifies in the enforcement notice, and that notice shall specify the reasons for the Commissioner being satisfied as aforesaid.

Rights in relation to automated decision taking.

6B.—(1) Subject to subsection (2) of this section, a decision which produces legal effects concerning a data subject or otherwise significantly affects a data subject may not be based solely on processing by automatic means of personal data in respect of which he or she is the data subject and which is intended to evaluate certain personal matters relating to him or her such as, for example (but without prejudice to the generality of the foregoing), his or her performance at work, creditworthiness, reliability or conduct.

(2) Subsection (1) of this section does not apply—

(a) in a case in which a decision referred to in that subsection—

(i) is made in the course of steps taken—

(I) for the purpose of considering whether to enter into a contract with the data subject,

(II) with a view to entering into such a contract, or

(III) in the course of performing such a contract,

or

(ii) is authorised or required by any enactment and the data subject has been informed of the proposal to make the decision, and

(iii) either—

(I) the effect of the decision is to grant a request of the data subject, or

(II) adequate steps have been taken to safeguard the legitimate interests of the data subject by, for example (but without prejudice to the generality of the foregoing), the making of arrangements to enable him or her to make representations to the data controller in relation to the proposal,

or

(b) if the data subject consents to the processing referred to in subsection (1).”.

15 **8.**—Section 9 of the Principal Act is amended by the insertion of the following subsections after subsection (1):

Additional
functions of
Commissioner.

20 “(1A) (a) The lawfulness of the processing of personal data (including their transmission to the Central Unit of Eurodac established pursuant to the Council Regulation) in accordance with the Council Regulation shall be monitored by the Commissioner.

25 (b) In paragraph (a) of this subsection, ‘the Council Regulation’ means Council Regulation (EC) No. 2725/2000 of 11 December 2000⁽²⁾ concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention.

(1B) The Commissioner shall arrange for the dissemination in such form and manner as he or she considers appropriate of—

30 (a) any Community finding (within the meaning of subsection (2)(b) (inserted by the *Act of 2002*) of section 11 of this Act),

35 (b) any decision of the European Commission or the European Council under the procedure provided for in Article 31(2) of the Directive that is made for the purposes of paragraph 3 or 4 of Article 26 of the Directive, and

40 (c) such other information as may appear to him or her to be expedient to give to data controllers in relation to the protection of the rights and freedoms of data subjects in respect of the processing of personal data in countries and territories outside the European Economic Area.

45 (1C) The Commissioner shall be the supervisory authority in the State for the purposes of the Directive.

50 (1D) The Commissioner shall also perform any functions in relation to data protection that the Minister may confer on him or her by regulations for the purpose of enabling the Government to give effect to any international obligations of the State.”.

⁽²⁾ O.J. No. L 316, 15.12.00, P. 0001-0010.

9.—Section 10 of the Principal Act is amended—

(a) in subsection (1)—

(i) in paragraph (a), by the deletion of “by a data controller or a data processor”, and

(ii) in paragraph (b), by the substitution of the following subparagraph for subparagraph (ii):

“(ii) if he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by him or her of the notification.”,

(b) by the insertion of the following subsection after subsection (1):

“(1A) The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with the provisions of this Act and to identify any contravention thereof.”,

(c) in subsection (2), by the deletion of “, being a data controller or a data processor,”,

(d) in subsection (3), by the substitution of the following paragraph for paragraph (a):

“(a) to block, rectify, erase or destroy any of the data concerned, or”,

and

(e) in subsection (7), by the substitution of the following for so much of the subsection as follows paragraph (a):

“(b) if such compliance materially modifies the data concerned, any person to whom the data were disclosed during the period beginning 12 months before the date of the service of the enforcement notice concerned and ending immediately before such compliance unless such notification proves impossible or involves a disproportionate effort,

of the blocking, rectification, erasure, destruction or statement concerned.”.

10.—The following section is substituted for section 11 of the Principal Act:

“11.—(1) The transfer of personal data to a country or territory outside the European Economic Area may not take place unless that country or territory ensures an adequate level of protection for the privacy and the fundamental rights and freedoms of data subjects in relation to the processing of personal data having regard to all the circumstances surrounding the transfer

and, in particular, but without prejudice to the generality of the foregoing, to—

- (a) the nature of the data,
- 5 (b) the purposes for which and the period during which the data are intended to be processed,
- (c) the country or territory of origin of the information contained in the data,
- (d) the country or territory of final destination of that information,
- 10 (e) the law in force in the country or territory referred to in paragraph (d),
- (f) any relevant codes of conduct or other rules which are enforceable in that country or territory,
- 15 (g) any security measures taken in respect of the data in that country or territory, and
- (h) the international obligations of that country or territory.

(2) (a) Where in any proceedings under this Act a question arises—

- 20 (i) whether the adequate level of protection specified in subsection (1) of this section is ensured by a country or territory outside the European Economic Area to which personal data are to be transferred, and
- 25 (ii) a Community finding has been made in relation to transfers of the kind in question,

the question shall be determined in accordance with that finding.

30 (b) In paragraph (a) of this subsection ‘Community finding’ means a finding of the European Commission made for the purposes of paragraph (4) or (6) of Article 25 of the Directive under the procedure provided for in Article 31(2) of the Directive in relation to whether the adequate level of protection specified in subsection (1) of this section is ensured by a country or territory outside the European Economic Area.

40 (3) The Commissioner shall inform the Commission and the supervisory authorities of the other Member States of any case where he or she considers that a country or territory outside the European Economic Area does not ensure the adequate level of protection referred to in subsection (1) of this section.

(4) (a) This section shall not apply to a transfer of data if—

- 45 (i) the transfer of the data or the information constituting the data is required or authorised by or under any enactment or required by any convention or other instrument imposing an international obligation on the State,

- (ii) the data subject has given his or her consent to the transfer,
- (iii) the transfer is necessary—
 - (I) for the performance of a contract between the data subject and the data controller, or 5
 - (II) for the taking of steps at the request of the data subject with a view to his or her entering into a contract with the data controller,
- (iv) the transfer is necessary— 10
 - (I) for the conclusion of a contract between the data controller and a person other than the data subject that—
 - (A) is entered into at the request of the data subject, and 15
 - (B) is in the interests of the data subject, or
 - (II) for the performance of such a contract,
- (v) the transfer is necessary for reasons of substantial public interest, 20
- (vi) the transfer is necessary for the purpose of obtaining legal advice or for the purpose of or in connection with legal proceedings or prospective legal proceedings or is otherwise necessary for the purposes of establishing or defending 25 legal rights,
- (vii) the transfer is necessary in order to prevent injury or other damage to the health of the data subject or serious loss of or damage to property of the data subject or otherwise to protect his or 30 her vital interests, and informing the data subject of, or seeking his or her consent to, the transfer is likely to damage his or her vital interests,
- (viii) the transfer is of part only of the personal data 35 on a register established by or under an enactment, being—
 - (I) a register intended for consultation by the public, or
 - (II) a register intended for consultation by persons 40 having a legitimate interest in its subject matter,

and, in the case of a register referred to in clause (II) of this subparagraph, the transfer is made, at the request of, or to, a person referred to in 45 that clause and any conditions to which such consultation is subject are complied with by any

person to whom the data are or are to be transferred, or

5 (ix) the transfer has been authorised by the Commissioner where the data controller adduces adequate safeguards with respect to the privacy and fundamental rights and freedoms of individuals and for the exercise by individuals of their relevant rights under this Act or the transfer is made on terms of a kind approved by the Commissioner as ensuring such safeguards.

10 (b) The Commissioner shall inform the European Commission and the supervisory authorities of the other states in the European Economic Area of any authorisation or approval under paragraph (a)(ix) of this subsection.

15 (c) The Commissioner shall comply with any decision of the European Commission under the procedure laid down in Article 31.2 of the Directive made for the purposes of paragraph 3 or 4 of Article 26 of the Directive.

20 (5) The Minister may, after consultation with the Commissioner, by regulations specify—

25 (a) the circumstances in which a transfer of data is to be taken for the purposes of subsection (4)(a)(v) of this section to be necessary for reasons of substantial public interest, and

(b) the circumstances in which such a transfer which is not required by or under an enactment is not to be so taken.

30 (6) Where, in relation to a transfer of data to a country or territory outside the European Economic Area, a data controller adduces the safeguards for the data subject concerned referred to in subsection (4)(a)(ix) of this section by means of a contract embodying the contractual clauses referred to in paragraph 2 or 4 of Article 26 of the Directive, the data subject shall have the same right—

35 (a) to enforce a clause of the contract conferring rights on him or her or relating to such rights, and

40 (b) to compensation or damages for breach of such a clause,

that he or she would have if he or she were a party to the contract.

45 (7) The Commissioner may, subject to the provisions of this section, prohibit the transfer of personal data from the State to a place outside the State unless such transfer is required or authorised by or under any enactment or required by any convention or other instrument imposing an international obligation on the State.

50 (8) In determining whether to prohibit a transfer of personal data under this section, the Commissioner shall also consider whether the transfer would be likely to cause damage or distress

to any person and have regard to the desirability of facilitating international transfers of data.

(9) A prohibition under subsection (7) of this section shall be effected by the service of a notice (referred to in this Act as a prohibition notice) on the person proposing to transfer the data concerned. 5

(10) A prohibition notice shall—

(a) prohibit the transfer concerned either absolutely or until the person aforesaid has taken such steps as are specified in the notice for protecting the interests of the data subjects concerned, 10

(b) specify the time when it is to take effect,

(c) specify the grounds for the prohibition, and

(d) subject to subsection (12) of this section, state that the person concerned may appeal to the Court under section 26 of this Act against the prohibition specified in the notice within 21 days from the service of the notice on him or her. 15

(11) Subject to subsection (12) of this section, the time specified in a prohibition notice for compliance with the prohibition specified therein shall not be expressed to expire before the end of the period of 21 days specified in subsection (10)(d) of this section and, if an appeal is brought against the prohibition, the prohibition need not be complied with and subsection (15) of this section shall not apply in relation thereto, pending the determination or withdrawal of the appeal. 20 25

(12) If the Commissioner—

(a) by reason of special circumstances, is of opinion that a prohibition specified in a prohibition notice should be complied with urgently, and 30

(b) includes a statement to that effect in the notice,

subsections (10)(d) and (11) of this section shall not apply in relation to the notice but the notice shall contain a statement of the effect of the provisions of section 26 (other than subsection (3)) of this Act and shall not require compliance with the prohibition before the end of the period of 7 days beginning on the date on which the notice is served. 35

(13) The Commissioner may cancel a prohibition notice and, if he or she does so, shall notify in writing the person on whom it was served accordingly. 40

(14) (a) This section applies, with any necessary modifications, to a transfer of information from the State to a place outside the State for conversion into personal data as it applies to a transfer of personal data from the State to such a place. 45

(b) In paragraph (a) of this subsection ‘information’ means information (not being data) relating to a living individual who can be identified from it.

(15) A person who, without reasonable excuse, fails or refuses to comply with a prohibition specified in a prohibition notice shall be guilty of an offence.”.

5 **11.**—The following section is inserted into the Act of 1988 after section 12: Prior checking of processing by Commissioner.

“12A (1) This section applies to any processing that is of a prescribed description, being processing that appears to the Commissioner to be particularly likely—

10 (a) to cause substantial damage or substantial distress to data subjects, or

(b) otherwise significantly to prejudice the rights and freedoms of data subjects.

(2) The Commissioner, on receiving—

15 (a) an application under section 17 of this Act by a person to whom section 16 of this Act applies for registration in the register and any prescribed information and any other information that he or she may require, or

(b) a request from a data controller in that behalf,

20 shall consider and determine—

(i) whether any of the processing to which the application or request relates is processing to which this section applies,

25 (ii) if it does, whether the processing to which this section applies is likely to comply with the provisions of this Act.

(3) Subject to subsection (4) of this section, the Commissioner shall, within the period of 90 days from the day on which he or she receives an application or a request referred to in subsection (2) of this section, serve a notice on the data controller concerned stating the extent to which, in the opinion of the Commissioner, the proposed processing is likely or unlikely to comply with the provisions of this Act.

35 (4) Before the end of the period referred to in subsection (3), the Commissioner may, by reason of special circumstances, extend that period once only, by notice in writing served on the data controller concerned, by such further period not exceeding 90 days as the Commissioner may specify in the notice.

40 (5) If, for the purposes of his or her functions under this section, the Commissioner serves an information notice on the data controller concerned before the end of the period referred to in subsection (3) of this section or that period as extended under subsection (4) of this section—

45 (a) the period from the date of service of the notice to the date of compliance with the requirement in the notice, or

(b) if the requirement is set aside under section 26 of this Act, the period from the date of such service to the date of such setting aside,

shall be added to the period referred to in the said subsection (3) or that period as so extended as aforesaid. 5

(6) Processing to which this section applies shall not be carried on unless—

(a) the data controller has—

(i) previously made an application under section 17 of this Act and furnished the information specified in that section to the Commissioner, or 10

(ii) made a request under subsection (2) of this section,

and

(b) the data controller has complied with any information notice served on him or her in relation to the matter, and 15

(c) (i) the period of 90 days from the date of the receipt of the application or request referred to in subsection (3) of this section (or that period as extended under subsections (4) and (5) of this section or either of them) has elapsed without the receipt by the data controller of a notice under the said subsection (3), or 20

(ii) the data controller has received a notice under the said subsection (3) stating that the particular processing proposed to be carried on is likely to comply with the provisions of this Act, or 25

(iii) the data controller—

(I) has received a notice under the said subsection (3) stating that, if the requirements specified by the Commissioner (which he or she is hereby authorised to specify) and appended to the notice are complied with by the data controller, the processing proposed to be carried on is likely to comply with the provisions of this Act, and 30
35

(II) has complied with those requirements.

(7) A person who contravenes subsection (6) of this section shall be guilty of an offence. 40

(8) An appeal against a notice under subsection (3) of this section or a requirement appended to the notice may be made to and heard and determined by the Court under section 26 of this Act and that section shall apply as if such a notice and such a requirement were specified in subsection (1) of the said section 26. 45

(9) The Minister, after consultation with the Commissioner, may by regulations amend subsections (3), (4) and (6) of this

section by substituting for the number of days for the time being specified therein a different number specified in the regulations.

5 (10) A data controller shall pay to the Commissioner such fee (if any) as may be prescribed in respect of the consideration by the Commissioner, in relation to proposed processing by the data controller, of the matters referred to in paragraphs (i) and (ii) of subsection (2) of this section and different fees may be prescribed in relation to different categories of processing.

10 (11) In this section a reference to a data controller includes a reference to a data processor.”.

12.—(1) Section 13 of the Principal Act is amended—

Amendment of section 13 (codes of practice) of Principal Act.

(a) by the substitution of the following subsection for subsection (2):

“(2) The Commissioner shall—

15 (a) where a code of practice (referred to subsequently in this section as a code) so prepared is submitted to him or her for consideration, consider the code and, after such consultation with such data subjects or persons representing data subjects and with the relevant trade associations or other bodies aforesaid as appears to him or her to be appropriate—

25 (i) if he or she is of opinion that the code provides for the data subjects concerned a measure of protection with regard to personal data relating to them that conforms with that provided for by section 2, sections 2A to 2D (inserted by the Act of 2002) and sections 3 and 4 (other than subsection (8)) and 6 of this Act, approve of the code and encourage its dissemination to the data controllers concerned, and

35 (ii) in any event notify the association or body concerned of his or her decision to approve or not to approve the code,

40 (b) where he or she considers it necessary or desirable to do so and after such consultation with any trade associations or other bodies referred to in subsection (1) of this section having an interest in the matter and data subjects or persons representing data subjects as he or she considers appropriate, prepare, and arrange for the dissemination to such persons as he or she considers appropriate of, codes of practice for guidance as to good practice in dealing with personal data, and subsection (3) of this section shall apply to a code of practice prepared under this subsection as it applies to a code,

50

(c) in such manner and by such means as he or she considers most effective for the purposes of this paragraph, promote the following of good practice by data controllers and, in particular, so perform his or her functions under this Act as to promote compliance with this Act by data controllers, 5

(d) arrange for the dissemination in such form and manner as he or she considers appropriate of such information as appears to him or her to be expedient to give to the public about the operation of this Act, about the practices in processing of personal data (including compliance with the requirements of this Act) that appear to the Commissioner to be desirable having regard to the interests of data subjects and other persons likely to be affected by such processing and about other matters within the scope of his or her functions under this Act, and may give advice to any person in relation to any of those matters.”, 10 15 20

and

(b) by the insertion of the following subsections after subsection (4): 25

“(5) The Commissioner shall be paid by a person in relation to whom a service is provided under this section such fee (if any) as may be prescribed and different fees may be prescribed in relation to different such services and different classes of persons. 30

(6) In proceedings in any court or other tribunal, any provision of a code, or a code of practice, approved under subsection (3) of this section that appears to the court or other tribunal concerned to be relevant to the proceedings may be taken into account in determining the question concerned.”. 35

(2) A code of practice approved under subsection (2) of the said section 13 and in force immediately before the commencement of this section shall continue in force after such commencement as if approved under subsection (2)(inserted by this section) of section 13 of the Principal Act. 40

Amendment of section 14 (annual report) of Principal Act.

13.—Section 14 of the Principal Act is amended by the insertion of the following subsection after subsection (2):

“(3) For the purposes of the law of defamation, a report under subsection (1) shall be absolutely privileged.”. 45

Amendment of section 16 (the register) of Principal Act.

14.—Section 16 of the Act of 1988 is amended by the substitution of the following subsection for subsection (1):

“(1) In this section ‘person to whom this section applies’ means a data controller and a data processor (other than such (if any) categories of data controller and data processor as may stand prescribed for the time being) except in so far as— 50

(a) they carry out—

5 (i) processing whose sole purpose is the keeping in accordance with law of a register that is intended to provide information to the public and is open to consultation either by the public in general or by any person demonstrating a legitimate interest,

10 (ii) processing of manual data (other than such categories, if any, of such data as may be prescribed), or

(iii) any combination of the foregoing categories of processing,

or

15 (b) the data controller is a body that is not established or conducted for profit and is carrying out processing for the purposes of establishing or maintaining membership of or support for the body or providing or administering activities for individuals who are either members of the body or have regular contact with it.”.

20

15.—Section 17 of the Principal Act is amended—

Amendment of section 17 (applications for registration) of Principal Act.

(a) in subsection (1)—

(i) by the substitution of the following paragraph for paragraph (b):

25 “(b) Where a data controller intends to keep personal data for two or more related purposes, he or she shall make an application for registration in respect of those purposes and, subject to the provisions of this Act, entries shall be made in the register in accordance with any such application,” and

30

(ii) by the insertion of the following paragraph after paragraph (b):

35 “(c) Where a data controller intends to keep personal data for two or more unrelated purposes, he shall make an application for separate registration in respect of each of those purposes and, subject to the provisions of this Act, entries shall be made in the register in accordance with each such application.”,

40

and

(b) by the substitution of the following subsection for subsection (3):

45 “(3) The Commissioner shall not accept such an application for registration as aforesaid from a data controller who keeps sensitive personal data unless he or she is of opinion that appropriate safeguards for the protection of

the privacy of the data subjects are being, and will continue to be, provided by him or her.”.

Amendment of section 18 (duration and continuance of registration) of Principal Act.

16.—Section 18 of the Principal Act is amended by the substitution of the following subsection for subsection (2):

“(2) The prescribed period (which shall not be less than one year) shall be calculated— 5

(a) in the case of a first registration from the date on which the relevant entry was made in the register, and

(b) in the case of a registration which has been continued under this section, from the day following the expiration of the latest prescribed period.”. 10

Amendment of Second Schedule (the Data Protection Commissioner) to Principal Act.

17.—The Second Schedule to the Principal Act is amended by the insertion of the following paragraph after paragraph 9:

“10. (1) A person who holds or held the office of Commissioner or who is or was a member of the staff of the Commissioner shall not disclose to a person other than the Commissioner or such a member any information that is obtained by him or her in his capacity as Commissioner or as such a member that could reasonably be regarded as confidential without the consent of the person to whom it relates. 15 20

(2) A person who contravenes subparagraph (1) of this paragraph shall be guilty of an offence.”.

Journalism, literature and art.

18.—The following section is inserted into the Principal Act after section 22:

“22A. (1) Personal data that are processed only for journalistic, artistic or literary purposes shall be exempt from compliance with any provision of this Act specified in subsection (2) of this section if— 25

(a) the processing is undertaken solely with a view to the publication of any journalistic, literary or artistic material, 30

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, such publication would be in the public interest, and 35

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision would be incompatible with journalistic, artistic or literary purposes.

(2) The provisions referred to in subsection (1) of this section are— 40

(a) section 2 (as amended by the *Act of 2002*), other than subsection (1)(d),

(b) sections 2A, 2B and 2D (which sections were inserted by the *Act of 2002*), 45

(c) section 3,

(d) sections 4 and 6 (which sections were amended by the *Act of 2002*), and

(e) sections 6A and 6B (which sections were inserted by the *Act of 2002*).

5 (3) In considering for the purposes of subsection (1)(b) of this section whether publication of the material concerned would be in the public interest, regard may be had to any code of practice approved under subsections (1) or (2) of section 13 (as amended by the *Act of 2002*) of this Act.

10 (4) In this section ‘publication’, in relation to journalistic, artistic or literary material, means the act of making the material available to the public or any section of the public in any form or by any means.”.

15 **19.**—(1) Section 23 and subsections (3), (4) and (5) of section 24 and the *Third Schedule* of the Principal Act are repealed. Repeals and Revocation.

(2) The European Communities (Data Protection) Regulations 2001 (S.I. No. 626 of 2001) are hereby revoked.

20.—(1) This Act may be cited as the Data Protection (Amendment) Act, 2002. Short title, collective citation, construction and commencement.

20 (2) This Act and the Principal Act may be cited together as the Data Protection Acts, 1988 and 2002, and shall be construed together as one.

25 (3) Subject to the subsequent provisions of this section, this Act comes into operation on the day on which it is passed (referred to subsequently in this section as “the passing of this Act”).

(4) Subject to the subsequent provisions of this section, this Act comes into operation, as respects processing already under way on the passing of this Act, on the day that is two months from the date of such passing.

30 (5) This Act, in so far as it—
(a) amends section 2 of the Principal Act and applies it to manual data, and
(b) inserts sections 2A and 2B into that Act,

35 comes into operation on 24 October 2007 in respect of data held in manual filing systems on the passing of this Act.

(6) Notwithstanding *subsection (5)*, a data controller shall, if so requested in writing by a data subject at any time after one month from the date of the passing of this Act but, in particular, when making a request under section 4 of the Principal Act—

40 (a) rectify, erase, block or destroy any data relating to him or her which are incomplete or inaccurate, or

(b) cease holding manual data relating to him or her in a way incompatible with the legitimate purposes pursued by the data controller.



**AN BILLE UM CHOSAINT SONRAÍ (LEASÚ), 2002
DATA PROTECTION (AMENDMENT) BILL, 2002**

EXPLANATORY AND FINANCIAL MEMORANDUM

GENERAL

The primary purpose of the Bill is to give effect to the provisions of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Bill amends the Data Protection Act, 1988, by extending data protection rules to certain manual data relating to living individuals which is recorded as part of a relevant filing system. It sets out conditions for processing personal data, including more stringent conditions in relation to sensitive personal data, and strengthens data subjects' rights, in particular the right to be informed about the processing of data relating to them. The Bill also sets out new rules relating to transfers of data to countries outside the European Economic Area (EEA), i.e. EU Member States, Iceland, Norway and Liechtenstein. Finally, a number of amendments to provisions of the 1988 Act that are not directly related to the Directive, are intended to improve operation of the Act.

DEFINITIONS AND SCOPE

Section 1 is a standard provision which defines some of the terms used in the Bill.

Section 2 of the Bill extends the scope of the 1988 Act by adding new definitions, including "sensitive personal data", "automated data" and "manual data", and replacing certain existing definitions, including "personal data" and "processing", in section 1 of the Act.

This section also defines the scope of the Bill in accordance with the provisions of Article 4 of the Directive: the new *subsection (3B)(a)(i)* provides that the Act will apply to data controllers established in the State who process data in the context of that establishment, while *subsection (3B)(a)(ii)* provides that this Act will also apply to data controllers who are neither established in the State nor within the EEA, but who make use of equipment located in the State for processing purposes (unless that equipment is used solely for the purposes of transit through the State).

A new *subsection (3C)* provides for certain exemptions from data protection rules in the case of data processed solely for the purpose of historical research. In addition, while the 1988 Act did not apply to "personal data consisting of information that the person keeping the data is required by law to make available to the public", a new *subsection (5)* provides that where such data are processed for a purpose other than the purpose for which they were collected, the exemption will no longer apply.

The collection, processing, keeping, use and disclosure of personal data is dealt with in *section 3* of the Bill. It amends section 2 of the 1988 Act by adding certain provisions relating to the lawfulness of processing as required by Article 6 of the Directive. A new text to replace the existing subsection (7) extends existing provisions in relation to direct marketing by allowing a data subject, in accordance with Article 14(b) of the Directive, to request a data controller, prior to processing, not to process personal data for the purpose of direct marketing.

Processing is dealt with in *Section 4* of the Bill. It provides for the addition of four new sections — 2A to 2D — to the 1988 Act.

The new *Section 2A* deals with the processing of personal data and takes account of the provisions of Article 7 of the Directive. It provides that in addition to satisfying the conditions which must be complied with in *section 2*, at least one of the listed conditions must also be satisfied, i.e.

- where the data subject has given his/her consent to the processing or in cases where the data subject is under age or incompetent, consent has been obtained from an appropriate person (*subsection 2A(1)(a)*);
- where processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract or for compliance with a legal obligation to which the data controller is subject (*subsection 2A(1)(b)(i), (ii) and (iii)*);
- where processing is necessary to protect the vital interests of the data subject (*subsection 2A(1)(b)(iv)*);
- where the processing is necessary for the performance of a task carried out in the public interest (*subsection 2A(1)(c)*), or
- where processing is necessary for the purposes of the legitimate interests of the data controller or by the third party or parties to whom the data are disclosed (*subsection 2A(1)(d)*).

The new *Section 2B* relates to the processing of sensitive personal data and takes account of Article 8 of the Directive. It provides for a prohibition on the processing of sensitive personal data, unless in addition to satisfying the criteria set out in sections 2 and 2A, one of an additional set of listed conditions is also satisfied, i.e.

- where the data subject has given his/her consent to the processing unless prohibited by law (*subsection 2B(1)(b)(i)*);
- where processing is necessary for the carrying out of any right or obligation of the data controller in the area of employment law (*subsection 2B(1)(b)(ii)*);
- where processing is necessary to protect the vital interests of the data subject (*subsection 2B(1)(b)(iii)*);
- where processing is carried out by a non-profit making body with a political, philosophical, religious or trade union aim where such processing relates solely to its members (*subsection 2B(1)(b)(iv)*);
- where processing involves data which have already been made public by the data subject (*subsection 2B(1)(b)(v)*);
- where processing is necessary for the establishment, exercise or defence of legal claims (*subsection 2B(1)(b)(vi)*);

- where processing is necessary for medical purposes and is undertaken by a health professional or another person subject to an obligation of professional secrecy (*subsection 2B(1)(b)(vii)*);
- where processing is necessary for statistical purposes and subject to the Statistics Act, 1993 (*subsection 2B(1)(b)(viii)*);
- where processing is carried out in the course of electoral activities for the purpose of compiling data on people’s political opinions (*subsection 2B(1)(b)(ix)*);
- where processing is authorised by regulation for reasons of substantial public interest (*subsection 2B(1)(b)(x)*);
- where processing is necessary in connection with taxes or duties (*subsection 2B(1)(b)(xi)*), or
- where processing is necessary in connection with a benefit, pension, allowance etc. (*subsection 2B(1)(b)(xii)*).

Definitions of the terms “health professional” and “medical purposes” are provided in *subsection (3)*.

The new *Section 2C* deals with security of processing and it provides, in accordance with Article 17 of the Directive, that data controllers must implement the most appropriate measures to protect personal data and that having regard to the cost of their implementation, such measures must ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected. The data controller must also ensure that anyone in his/her employment or anyone else who has access to the workplace is aware of and complies with such security measures (*subsection (2)*). Where processing is carried out by a data processor on behalf of a data controller, such processing must be governed by a contract stating that the data processor must act only on the instructions of the data controller. The data controller must choose a data processor who provides sufficient guarantees in relation to technical security measures and must take reasonable steps to ensure compliance with those measures (*subsection (3)*).

Section 2D takes account of the provisions of Articles 10 and 11 of the Directive and provides that, for the purposes of subsection 2 (1)(a) of the Act, personal data will not be treated as processed fairly unless, when personal data are obtained, the data subject is provided with certain information. Where the data come from a source other than the data subject, such information should be given not later than the time when the data are first processed or, if disclosure to a third party is envisaged, not later than the time of first disclosure at the latest (*subsection (1)(b)*). The information to be given where data are obtained directly from the data subject is specified in *subsection (2)* and includes the identity of the data controller and the purposes for which the data will be processed. Where data are obtained from another source, the information to be given is specified in *subsection (3)* and includes the name of the original data controller. *Subsection (4)* states, however, that the obligation to inform does not apply when data are processed for statistical, historical or scientific purposes, where the provision of such information would involve disproportionate effort or where the information is required by law.

RIGHT OF ACCESS

Section 5 amends the right of access provisions set out in section 4 of the 1988 Act. The existing text of subsection (1) is replaced by a new text that extends the provisions of the 1988 Act, in line with the terms of Article 12 of the Directive, by providing that where an

access request is made under the Act, the data subject must be provided with certain additional information.

New *subsections (9), (10) and (11)* provide that the obligation to inform the data subject will not apply where the supply of such information is not possible or involves disproportionate effort or unless a reasonable interval has elapsed. The new *subsection (12)* provides that, in accordance with the terms of the Directive and having regard to a decision based solely on automatic processing, the obligation to inform will not apply where the provision of such information would adversely affect trade secrets or intellectual property.

New *subsection (13)* prohibits a person, in connection with the employment of another person, the continued employment of another person or a contract for the provision of services to him or her by another person, from requiring that person to make an access request under section 4 of the 1988 Act, or from supplying him or her with personal data obtained on foot of such an access request. This amendment is intended to prevent abuses relating to rights of access.

RIGHT OF RECTIFICATION OR ERASURE

Section 6 takes account of Article 12(c) of the Directive and amends section 6 of the 1988 Act in order to give data subjects the right to have incorrect or inaccurate data ‘blocked’, i.e. marked in such a way that it is not possible to process it for purposes in relation to which it is marked. This will supplement the existing rights to have data rectified or erased. The new text also provides that where data have been blocked, there is a requirement to notify any person to whom that data was disclosed in the previous 12 months unless such notification proves impossible or involves disproportionate effort.

CERTAIN RIGHTS OF DATA SUBJECTS

Section 7 of the Bill adds two new sections — 6A and 6B — to the 1988 Act in order to take account of the terms of Articles 14 and 15 of the Directive.

Section 6A extends the data subject’s right to object to the processing of personal data relating to him or her where the processing of such data is considered necessary for the performance of a task carried out in the public interest or where the processing is for the purposes of the legitimate interests of the controller. The objection must be on compelling legitimate grounds. The right to object does not apply in certain circumstances — where the data subject has given consent to the processing or where the processing is necessary in the course of entering into or performance of a contract, for compliance with a legal obligation, to protect the vital interests of the data subject, or in certain cases in the course of electoral activities, or where specified by regulation.

Section 6B provides for a general ban on decision making based solely on automated processing of data intended to evaluate certain personal aspects where such a decision significantly affects the data subject. However, a data subject may be subject to such a decision in circumstances where the data subject has given his or her consent, where the decision is taken in the course of entering into or in the performance of a contract at the request of a data subject, or where such a decision has been authorised by law and suitable safeguards to protect the legitimate interests of the data subject are in place.

ADDITIONAL FUNCTIONS OF DATA PROTECTION COMMISSIONER

Section 8 amends section 9 of the 1988 Act by the addition of four new subsections after *subsection (1)*. *Subsection (1A)* provides that

the Data Protection Commissioner will have a monitoring role for the purposes of Council Regulation 2725 of 2000 (Eurodac). *Subsection (1B)* provides for dissemination by the Data Protection Commissioner of a Community finding in relation to transfers of personal data outside the EEA, authorisations granted by the Commissioner in accordance with Article 26.2 of the Directive or of any Commission decision made in relation to an authorisation under Article 26.3 or in relation to standard contractual clauses under Article 26.4. *Subsection (1C)* provides that the Data Protection Commissioner will be the supervisory authority for the purposes of the Directive. *Subsection (1D)* allows the Data Protection Commissioner to perform any functions in relation to data protection that the Minister may confer on him or her and which would enable the Government to give effect to any international obligations of the State.

ENFORCEMENT OF DATA PROTECTION

Section 9 amends section 10 of the 1988 Act. A new text of *subsection (1)(b)(ii)*, replacing the existing text, recognises that an amicable resolution to a complaint between the parties concerned may necessitate no further action by the Data Protection Commissioner. A new *subsection (1A)* takes account of Article 28.1 of the Directive and allows the Data Protection Commissioner to monitor the application of the Directive. A revised text of subsection (7) provides that where a data controller amends data following receipt of an enforcement notice, the requirement to notify such amendment to any person to whom that data was disclosed in the previous 12 months must be complied with unless such notification proves impossible or involves disproportionate effort.

RESTRICTION ON TRANSFER OF PERSONAL DATA OUTSIDE STATE

Section 10 replaces the existing text of section 11 of the 1988 Act with a completely new text. It takes account of the provisions of Articles 25 and 26 of the Directive relating to the transfer of personal data to a country outside the EEA.

The revised text provides that a transfer of personal data to a country outside the EEA may only take place where an adequate level of protection is deemed to exist. The circumstances to be taken into account in any assessment of adequacy are listed (*subsection (1)*). These include the nature of the data, the purposes for which the data are processed, the country of origin, the country of final destination, the law in force in the country of destination, any relevant codes of conduct, any security measures taken and the international obligations of that country.

Where the European Commission makes a decision as to whether or not an adequate level of protection is provided by a country outside the European Economic Area, that decision will be complied with in relation to similar transfers (*subsection (2)*). The Data Protection Commissioner is required to inform the European Commission and other Member States of any case where he or she considers that a third country does not ensure an adequate level of protection (*subsection (3)*).

Subsection (4) lists the circumstances in which transfers of data to countries outside the European Economic Area can take place, i.e.

- where the transfer is provided for by law;
- where the data subject has given his or her consent;
- where the transfer is necessary for the performance of a contract or for the conclusion of a contract;

- for reasons of substantial public interest;
- for the establishment, exercise or defence of legal claims;
- to protect the vital interests of the data subject;
- where the transfer is from a register which is open to consultation by the public, or
- where the transfer has been authorised by the Data Protection Commissioner.

The Commissioner must inform the European Commission and other EEA States of any such authorisations (*subsection (4)(b)*) and must comply with any decision of the European Commission in relation to such authorisations and in relation to standard contractual clauses drawn up under Article 26.4 of the Directive (*subsection (4)(c)*).

Subsection (6) provides that, where a data controller considers that an adequate level of protection is provided by virtue of contractual clauses drawn up in accordance with Articles 26.2 or 26.4 of the Directive, a data subject can enforce the terms of that contract and have the same rights as if he or she were a party to it.

Subsections (7) to (15) are provisions of the existing text of section 11 of the 1988 Act and they allow the Data Protection Commissioner to prohibit a transfer of data to a place outside the State and set out the administrative procedures to be followed in such a situation.

PRIOR CHECKING OF PROCESSING BY COMMISSIONER

Section 11 inserts a new section 12A into the 1988 Act. It takes account of Article 20 of the Directive and provides for a system of 'prior checking' by the Data Protection Commissioner of processing operations likely to present specific risks to data subjects. Where the Commissioner is of the opinion that a request warrants prior checking, prior checking must take place within the time limits specified. A processing operation which is the subject of a prior check may not take place until the checking procedure has been completed and any processing before such checking has been completed will constitute an offence. An appeal can be made against the result of any such prior check.

CODES OF PRACTICE

Section 12 amends provisions in the 1988 Act relating to codes of practice. It takes account of Article 27 of the Directive by amending section 13 of the Act.

The revised text of *subsection (2)* allows the Data Protection Commissioner to consider draft codes of practice submitted to him or her, to approve the codes where appropriate and to provide for the dissemination of those codes following consultation, where relevant, with data subjects. A new *subsection (5)* allows the Commissioner to charge for services provided in relation to codes of practice while a new *subsection (6)* provides that approved codes may be taken into account by the courts in relation to the settlement of disputes.

Codes of practice approved under *subsection 12(2)* of the 1988 Act will continue in force as if approved under this Act.

Section 13 amends section 14 of the 1988 Act and provides that for the purpose of the law of defamation, the annual report of the Commissioner shall be privileged.

REGISTRATION REQUIREMENTS

Section 14 amends section 16 of the 1988 Act by substituting a revised text of subsection 1. This provides that registration requirements will apply, in accordance with Article 18 of the Directive, to *all* data controllers and data processors except

- those who carry out processing whose sole purpose is the keeping of a register which is open to consultation by the public;
- those who carry out processing of manual data unless provided for by regulation;
- processing by any non-profit making body in relation to the members of the body, and
- data controllers or data processors specifically excluded by regulation.

Section 15 amends section 17 of the 1988 Act in relation to applications for registration. It provides, *inter alia*, that separate registrations must be made where the data controller intends to process data for one or more unrelated purposes, in accordance with Article 18.1 of the Directive. *Subsection (3)* relates to the registration of data controllers keeping sensitive personal data.

Section 16 amends section 18 of the 1988 Act and provides that a second or subsequent registration will continue from the date of expiry of the previous registration.

Section 17 takes account of Article 28.7 of the Directive and places a duty of confidentiality on the Data Protection Commissioner, and on staff of the Office of the Commissioner, with regard to confidential information obtained in the course of their duties.

JOURNALISM, LITERATURE AND ART

Section 18 adds a new *section 22A* to the 1988 Act. It provides that data which is processed only for the purposes of journalism or artistic or literary purposes will be exempt from certain provisions of the Act once such processing is either undertaken solely with a view to the publication of any journalistic, literary or artistic material or the data controller believes that such publication would be in the public interest, and where the data controller believes that compliance with the particular provision would be incompatible with journalistic, artistic or literary purposes. The provisions referred to include those sections of the Act that deal with processing of personal data (*sections 2 and 2A*), processing of sensitive data (*section 2B*), fair processing of data (*section 2D*), the right of access (*sections 3 and 4*), the right to rectification (*section 6*), the right to object (*section 6A*) and restrictions on decisions based on automatic processing (*section 6B*). Codes of practice approved by the Data Protection Commissioner may be taken into account by data controllers with a view to determining whether publication would be in the public interest.

REPEALS AND REVOCATION

Section 19 provides for the repeal of section 23 and subsections (3), (4) and (5) of section 24, and the Third Schedule of the 1988 Act.

This section also revokes the European Communities (Data Protection) Regulations 2001 (S.I. No. 626 of 2001) which give effect to Articles 4, 17, 25 and 26 of the Directive, pending enactment of the Bill.

SHORT TITLE, COLLECTIVE CITATION, CONSTRUCTION AND COMMENCEMENT

Section 20 is standard and sets out the short title, commencement, collective citation and construction. The Act will come into operation on such day or days as may be appointed by the Minister.

In accordance with Article 32 of the Directive, automated data will be brought into conformity with the Act two months from the date of passing of the Act. Manual data will be brought into conformity with the Act at the same time, with the exception of manual data already held in filing systems which need not be brought into conformity with *sections 2, 2A and 2B* of the Act (Articles 6, 7 and 8 of the Directive) until 24 October 2007. However, the right of rectification, erasure or blocking of data which are incomplete, inaccurate or stored in a way which is incompatible with the legitimate purposes pursued by the data controller will apply progressively to such (manual) data as and when the files are used throughout that extended period, and in particular at the time of exercising the right of access.

FINANCIAL IMPLICATIONS

The enhanced role of the Office of the Data Protection Commissioner will have implications for staffing levels, but registration fees resulting from extended registration requirements will help offset these additional costs. It is not anticipated that additional costs will arise for other public bodies.