

Speech by Bailiwick Data Protection Commissioner Emma Martins at the CIISF Data Protection and Cyber Security Conference in Guernsey on 11 October 2022.

Why Regulation doesn't work and what we all need to do about it.

OK. I know it may seem odd and rather career limiting to say something like this, but bear with me, I will explain...

Before we start, I want us to do the opposite of 'move fast and break things' – this mantra which has followed tech and data around for years. These events are a fantastic opportunity to move a bit slower - for a change - and think about how we can maybe fix certain things.

Life is so busy. You are so busy. When we do give ourselves that time – good things can happen.

Now more than ever, we need to give ourselves that time.

Have you noticed that when you are asked a question or need to think carefully about something, you look away, even fleetingly. That's because we need a bit of escape from the usual visual noise – to allow ourselves to properly think, to process what we are thinking about without distraction. So here, today, let's give ourselves the gift of a little look away and think moment.

In doing that, we also need to shake off any sense of powerlessness we might feel. Just because we don't regulate Facebook, just because you may not work for the biggest companies in the world, just because we live and work in a small jurisdiction, doesn't mean that what we do, how we approach this doesn't matter.

Every change, good and bad, starts with one person, one idea, one decision, one action, one inaction. It is one of the joys of working in a small jurisdiction that we can effect genuine and meaningful change in our own community if we try.

These things can sound corny, but it doesn't mean they are not true.

First – let's start from the beginning.

How would you answer the question – what are laws, regulations for?

They are a human construct first and foremost.

We don't often reflect on that.

We also may think that they are - by definition - a good thing.

But we don't have to look back too far in history to see how law – even in democracies – was far from a good thing, far from moral...

Bans on homosexuality, women's votes, slavery, the Holocaust, apartheid, cannabis use banned – these were all lawful – these were all things permitted and supported by law.

Of course, all of us here today are extraordinarily lucky – we live at a time and in a place where laws – whilst we may not like some of them, are generally reflective of our values. At least, we have some redress with those in power who implement them. There is an inherent openness and accountability – again – it may not be perfect but compare it to some parts of the world.

What is your own view on laws that affect your life? There will be many of them.

There are probably laws that you are very conscious of and there are probably lots that you do not even think about.

What is going through your mind when you get in your car? Is it the Highway Code?

If you see your friend's wallet with cash in it dropped on the floor – what is stopping you from taking it? Is it law?

I am pretty sure it's not.

So, what is it? What is it that impacts our behaviours?

Have a think about those laws that you comply with without even thinking about. It's just what you do. And that is what we need to aspire to – for data and its protection.

I want to be clear that I am not talking about complying just because it's a box to tick – sure that's a form of compliance but – and this is a really important point – treating it as a tick box compliance exercise is unhelpful for a number of reasons – firstly it rarely delivers meaningful outcomes.

Data protection is principles-based legislation. It's not like speed limits – you know when you are within the law and when you are not. Data Protection is more complex - it needs us to actively and intelligently engage with the issues, with the considering and balancing and working out the interests of different parties. It can be challenging.

Secondly, a clinical approach to compliance often means we are looking back when we need to be looking forwards. This is not a static environment. It is moving at break-neck speed. We have to be honest and say that law often has a hard time catching up with this stuff. We need to be engaged with what has happened, what is happening and what is going to or is likely to happen – way beyond whether it is lawful.

Social media is a great example of why failure to look ahead can be a problem and also why just saying – “does the law allow me to do this” - is a problem. Facebook was not created to deliver what it is delivering now. Retrofitting – human values, ethics, whatever...that's proving very tough. Because once these things have a momentum, it is hard if not impossible to pivot them.

This exploitation of our personal data has become the business model, the very beating heart of these organisations. Why? Not because that was what was originally intended, but because the tech was built and the right people were not in the room to ask for a moment of pause, reflection, consideration of the human – that 'looking away moment'. It became

only about what technology CAN do, rather than what we WANT it to do, what it SHOULD do.

That in turn has led to exploitation of data has now becoming normalised. And there is sense of – “oh we don’t have control anymore, it’s all too big and we are all too powerless”.

That’s sort of ok when we are talking about selling more stuff (well, it actually isn’t ok at all) but it really is another level when we are talking about manipulating elections, feeding misinformation, supporting acts of war, supporting the oppression of minorities. And all that stuff is not just the stuff of fiction – it is happening now and in plain sight.

And we are not just bystanders.

Data does not exist in a separate compartment to our daily lives. It feeds into and from almost everything. Questions of data are, at every level, about human beings. About us. Not engaging, not properly engaging with that is dangerous and it’s irresponsible.

Of course, the answer is not one thing, it’s certainly not just law - it’s lots of things.

It’s our values, our relationships, what it is we care about, what we want to protect...I don’t speed when I drive because I care about my safety. I don’t steal my friend’s wallet because it would be entirely unthinkable morally. Forget laws!

Because we are so much more than laws and regulations, aren’t we?

There are some useful parallels in other areas of our lives.

Take the environment, climate change.

The conversations we are seeing and having now about the human impact of climate change, how often do you hear law being discussed? Not that much I suspect. Our conversations revolve largely around real-world impacts on us, our planet and future generations, the moral imperative for us all to take action.

Laws play a vital role, but they are largely reactive – in the face of harms that have been caused, of damage that has been done.

Surely we can do better than just waiting for the harms to manifest themselves, then wringing our hands in despair and looking to fines and enforcement as a response.

I think it’s useful here to have a bit of a think about the role of the regulator.

Regulators have a statutory duty to do a number of things – the one most commonly associated with regulators is the enforcement side of things. That is our job but again, looking at it exclusively through that lens is, I would suggest, deeply unhelpful. It’s like poring over the speeding fines and ignoring the safety measures and how well most of us drive. If we just look at it as a matter of enforcement, then our attitude towards it becomes adversarial – that it’s all about punishment and all about fines. It’s not.

Of course, enforcement matters, especially for those who look to the regulator for independent and impartial complaint investigation – but it matters in the context of other things that matter too –

I want to use a couple of personal experiences to help illustrate that if I can – to help illustrate how we respond to being required to comply with something.

I travel a fair amount. I remember when travel started opening up again after the worst of the pandemic – we were all still quite worried about getting the virus, spreading the virus, and masks were compulsory on flights.

We all used to file on and off the plane and through the airport all masked up. I can only speak from my personal perspective, but I complied because I understood what was being asked of me and why. I can't say I particularly enjoyed wearing a mask but I got it, and it pretty quickly became something I did without much thought.

One day there were two guys that walked up the steps to the plane: no masks.

The ground staff told them they needed to put masks on – their reply - 'whatever'

The steward told them they needed to put masks on – their reply - 'whatever'

The steward then gave them a mask each. They took them and put them on – around their chin – laughing and sat down behind me.

So, the rules at that time were – it was compulsory for passengers to wear masks on all planes.

If you were a passenger, like me, what would you expect to happen next?

I will tell you what happened next.

Nothing.

The plane took off and landed as scheduled. The two maskless guys remained maskless.

But I noticed something in myself in that moment. Annoyance and frustration and a little resentment. So, what? The rules absolutely apply, unless they don't?

My mind wondered not only to the idiocy of the two men, but also to the inability of the officials on the ground and the airline to ensure compliance with the rules and their inaction in the face of non-compliance.

Non-compliance without consequence itself has consequences – for everyone, but for me, as a compliant person, my confidence in the whole thing was undermined in a small but still very real way.

A further quick story about that if I may:

Later, when the airline said that they no longer mandated masks but would like to request passengers wear them to help protect their staff and other passengers - the first flight I

went on I wore a mask, really without giving it a second thought. I then realised that I was the only one.

Almost without thinking, I took it off. Again, I noticed something in that moment. I was instinctively responding to social pressure. If no-one else is doing it, why should I?

So, even if something is the right and sensible thing to do, people will follow others in doing something else.

The point of those two observations -

Laws and rules that align with us, our values, that we understand, are easier to comply with.

But even then, if we are serious about a law, we need to ensure it is enforced – people need to see that happening – we need an openness and accountability to that process. It can be uncomfortable for controllers at the receiving end – I get that. But there is a principle there. We want people to comply because they get it, but there will always be those that deliberately or unintentionally don't comply and there needs to be a clarity and consistency of response. There needs to be consequences.

Secondly, we need to understand human behaviour if we are going to deliver meaningful compliance. -

What makes people comply and what makes them not comply.

What can we do to encourage compliance and what can we do to discourage non compliance. If the majority are complying, others are much, much more likely to do the same.

How can we go about doing that? There are of course lots of responses to that:

It's about what we stand for as a jurisdiction.

It's about our common values as citizens, our government.

It's about the standards we set for ourselves and others.

It's about how the regulator functions.

It's all those things and more.

That means we are straying again into so much more than just a piece of law doesn't it?

Of course we are influenced by laws but there is something more fundamental about how we engage with and react to what we consider right and wrong.

This is absolutely a question of values, of culture – what we stand for, what we want. If we are lucky, our laws will align, but the conversation has to be wider.

Here in the Bailiwick, we are a community of pretty safe drivers. Why? I don't think we can say that it's because there is a policeman on every road or particularly aggressive enforcement approach...

We want that for data protection. For the community to understand it and to buy into it.

The regulatory reach and scope of data protection is worth taking a moment to think about. Most regulatory areas involve one particular group or sector.

Data protection is different. It covers businesses, government, not much doesn't involve personal data in one form or another whether you are a small coffee shop or a multi-national finance house. There are a lot of roads for us to regulate. We don't want, and cannot afford, to have a policeman on every road.

No-one wants a vast and expensive regulator – the costs come from our community, and we are so alive to that. So we want to use the resources we do have in a thoughtful way. We want to ensure that we are clear about what we want, why we want it and how we propose to go about it.

We are clear about all of that, and we have tried hard to translate that into our strategic plan and all the work that flows from it.

In summary, we want to prevent harms and we know that we need something more than a reactive, inward looking, backward looking, approach.

So, how do we reach people outside of this very lovely data protection community, and include people from the whole community, because this is not just an issue for us here today. We hear a lot about biases in data but if we don't strive for a more inclusive conversation, we are surely just as guilty.

There is no silver bullet - some people will never care, some people will be happy with the current situation – and that's ok, the point is we give people information, we encourage them to take an interest, to feel a sense of empowerment.

It's happened with the environment, with CSR, with lots of things. It just needs us to start that – to take responsibility for starting that – to realise the importance of starting that.

So, we sat down in our office to start to think about how to do that – how to encourage a culture of compliance around data. Around that time, I heard a rather amazing story about blue tits and milk bottles.

Most of you won't have had experience of milk bottles left on doorsteps. Quick shout out to Eleanor – one of the lovely panellists later - she is dialling in from Wales and I am reliably informed she still gets bottles on her doorsteps – just lovely!

You may well ask what on earth has milk bottles got to do with all this.

In the UK in the 1920s, when glass milk bottles were delivered to the doorsteps of houses people started noticing holes in milk bottle foil lids on their doorsteps. A small number of resourceful blue tits had made these holes because they had worked out that there was delicious cream beneath the foil.

By the 1950s, blue tits all over Britain had learned this. The birds had shared information that benefited their species by teaching each other how to reach the cream. Some robins were seen finding their way into the bottle, but they did not pass this on in the way that the

blue tits did. The blue tits, unlike other species, had gone through an extraordinary learning process.

Inspired by the blue tits' social learning: our [Project Bijou](#) was born. It is a social initiative that is incredibly simple as a concept – it recognises that human beings respond to and learn from other human beings. We are collecting stories, experiences, poetry, drama, books – things that feed into our culture. Its aim is to support and nurture positive, inclusive cultural change around how people and organisations view and treat people's data. It seeks to engage people on a human and cultural level as well as on a legal/compliance one.

It's building those human connections – reconfiguring language and engagement one person at a time. It's about a really powerful message - don't do this because someone else is trying to convince or force you to, or threatening you with legal action - but do it because it is in your interests, and your family's and your community's interests, to do it.

Project Bijou is all about encouraging

- inclusive and accessible conversations
- empowered individuals
- informed ethical decision-making;
- organisations focusing on human values,

Which in turn will lead to better protection of people's rights, and harm reduction.

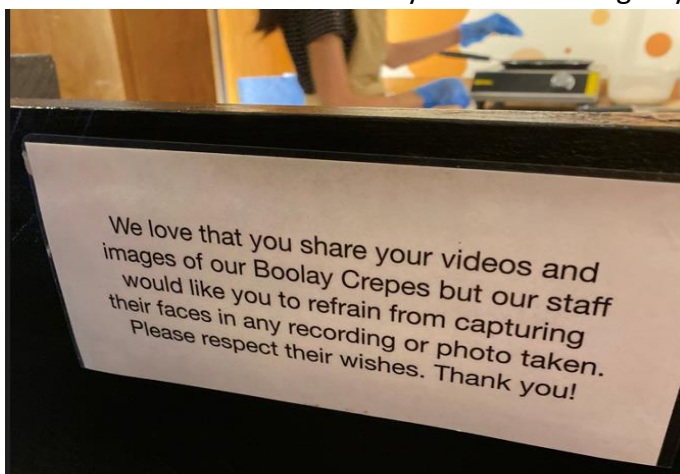
Which is the very thing, is it not, that the Data Protection legislation seeks to achieve?

Doesn't matter what you call it, the principles of Project Bijou can apply to us all. The material we have put out is not specific to the Bailiwick, it's specific to us as humans – so use it, share it, it's for all of us.

And things are changing. Real change rarely happens overnight and sometimes small changes can go unnoticed and unremarked on.

I will give you an example -

I was at Covent Garden recently and saw this sign by one of the food stalls:



This sign is about respect, dignity, what is right for the individual member of staff - of course we know that it's absolutely about law too, but that's arguably kind of irrelevant.

That's a bit of magic.

So when I say that regulation doesn't work, I need to complete that sentence.

Regulation ALONE doesn't work.

Individual and community engagement isn't just a nice to have, it has real world impacts. Engaged consumers will influence businesses that want to attract and keep them. Engaged consumers will not tolerate poor standards of data handling. This will influence behaviour.

If anyone is in any doubt about the potential for harm, I urge you to read up about the inquest into the death of 14-year-old Molly Russell in the UK. I was listening last week to Baroness Kidron (a long-time advocate for children's rights in the digital world) and she said two really powerful things -

1. (Aimed at social media) - if you can't run your business without doing this to a 14-year-old girl, perhaps it's time to rethink your business model.
2. They (social media) will respond to public pressure and public expectation and these things can often effect change more powerfully and effectively than law.

And we owe it to those who do not have a voice in this or who think that it's not an issue they care about much, or only find out it's an issue when something goes wrong.

Because we need to be clear, when we look at the tech mantra 'move fast and break things' – the 'things' being broken are us.

There is no-one, not a single person, not now affected by datafication of our lives. If we do not challenge the narrative of data being something to be exploited, profited from, something which we are not involved with or empowered in, we will simply allow that to be normalised – to be embedded into the culture, into *our* culture. Law – with the best will in the world – will be no good at fixing that. Not least because it's pretty slow to respond, especially relative to technological developments.

So, we need regulation of course. And we need that to be properly enforced. But we need something else too. We need to care, as individuals and as a community. That's when real change happens.

I know there are many of us that really kind of fell into this field and in doing so fell in love with it. It's more than a job, it's a passion. Our job is now to share that passion – to be a community and a jurisdiction that does this well just because it's just the right thing to do.

The community you are supporting in the Channel Islands and beyond matters a great deal and I want to wish the new Committee every success. It is a real privilege to be part of today.

Thank you.

- Emma Martins

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