



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

**The Rt Hon Michelle Donelan MP**

**Secretary of State for the Science, Innovation and Technology Department**

[BY EMAIL]

20 July 2023

Dear Secretary of State,

As you will be aware, part of the role of the Joint Committee on Human Rights is to carry out legislative scrutiny in respect of Bills that may raise human rights concerns. The Data Protection and Digital Information (No.2) Bill is of interest to the Committee because the protection of personal data is key to enjoyment of the right to respect for private life, as guaranteed by Article 8 of the European Convention on Human Rights, given effect in domestic law by the Human Rights Act 1998.<sup>1</sup> Furthermore, inadequate data protection can result in bias that violates Article 14 of the ECHR (which prohibits discrimination in the enjoyment of other Convention rights) and, particularly in the context of surveillance and policing, can impact on the exercise of other rights including the rights of free expression and free assembly, guaranteed by Articles 10 and 11 ECHR.<sup>2</sup>

To assist our scrutiny of the Bill, we launched a call for evidence on 27 April 2023 and received written evidence from experts in the field, from organisations representing the interests of data subjects and from organisations representing the interests of data controllers.<sup>3</sup> We also heard evidence from Professor Fraser Sampson, the Biometrics and Surveillance Camera Commissioner, which touched upon the likely impact of the Bill.<sup>4</sup> Some of the data protection issues raised by the Bill have also previously been considered by the Joint Committee on Human Rights in the 2019 inquiry into and report on *The Right to Privacy and the Digital Revolution*.<sup>5</sup>

---

<sup>1</sup> In respect of children, they also have a specific right to privacy guaranteed under Article 16 of the UN Convention on the Rights of the Child (UNCRC).

<sup>2</sup> Children have a specific right not to be discriminated against under Article 2 UNCRC, and rights to free expression and assembly under Articles 13 and 15 UNCRC

<sup>3</sup> [Written evidence received by the JCHR in response to the call for evidence on the Data Protection and Digital Information \(No.2\) Bill](#)

<sup>4</sup> [Oral evidence from the Biometrics and Surveillance Camera Commissioner, 22 February 2023](#)

<sup>5</sup> ["The Right to Privacy \(Article 8\) and the Digital Revolution", Third Report of Session 2019, HC 122/HL Paper 14, 3 November 2019](#)



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

## **General concerns**

According to the Explanatory Notes that accompany the Bill, its intention is “to update and simplify the UK’s data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards”. However, we have heard concerns that the Bill would in fact reduce burdens on organisations by diluting existing data protection standards, thereby diminishing protections for human rights.

In this regard, we would remind you that the JCHR’s 2019 report on *The Right to Privacy and the Digital Revolution* raised a number of issues about the existing data protection regime and its compliance with the right to privacy. For example, that report concluded that the consent model was broken and that consent should no longer be used as a blanket basis for processing;<sup>6</sup> that there was a lack of understanding among companies about reliance on ‘legitimate interests’ to process data without consent and a need for a rigorous process to test whether this basis was being used appropriately;<sup>7</sup> that evidence suggested people’s data was routinely being shared and used without consent and that it should be made much simpler for individuals to know about this and prevent it happening;<sup>8</sup> and that data was being processed in a manner that gave rise to a risk of discrimination, particularly in the field of advertising.<sup>9</sup> The Government response to that report recognised many of the Committee’s concerns, but largely maintained that the protections provided by the existing system were adequate to deal with them. It did not, however, suggest that existing protections could or should be reduced.

We also heard from Professor Fraser Sampson that, in the context of surveillance and biometrics, current legal requirements on the treatment of personal data are often not followed, particularly due to a “culture of non-deletion”.<sup>10</sup> Professor Sampson also highlighted the importance of public trust and confidence in data protection, an issue raised in written evidence to us by organisations including the Economic and Social Research Council of UK Research and Innovation and the National Data Guardian for Health and Social Care. They emphasised that without that trust and confidence, the public will be reluctant to submit their personal data for valuable and important processing. We anticipate that you will share this perspective, given that one of the changes proposed in the Bill is to give the Information Commissioner the additional objective of “[promoting] public trust and confidence in the processing of personal data.”

---

<sup>6</sup> Paras 26-27

<sup>7</sup> Para 43

<sup>8</sup> Paras 53-55

<sup>9</sup> Paras 86-90

<sup>10</sup> [Oral evidence from the Biometrics and Surveillance Camera Commissioner, 22 February 2023, Q5](#)



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

Against this background, we are troubled by the overall approach to data protection taken in the Bill. ***It is crucial that any reforms to data protection retain public trust and confidence in the processing of personal data. The best way to achieve this is to ensure compliance with human rights, with particular emphasis on Article 8 ECHR.***

In addition to these general concerns, a number of more specific issues with the Bill have been raised with us.

## ***Rights of data subjects***

Clause 8 proposes a change to the threshold at which data controllers can refuse to comply with, or charge a fee for, a person's request for access to data that is personal to them.<sup>11</sup> By moving from requests that are "manifestly unfounded or excessive" to requests that are "vexatious or excessive" the Bill appears to lower the threshold, allowing for subject access requests to be refused because a data controller thinks they are being made for inappropriate reasons or that they are (merely) "excessive". Reset and the Public Law Project both noted the criteria that the Bill would require a data controller to take into account when deciding whether a request is vexatious or excessive, which include "the resources available to the controller".<sup>12</sup> This appears to open up the possibility of less well-resourced data controllers being able to refuse access to personal data simply because the request is inconvenient or expensive. ***For the purposes of Article 8 ECHR, the law should provide an effective procedure by which applicants an access important information that concerns them. The threshold at which subject access requests can be refused must be sufficiently high to ensure that any such refusals are necessary and proportionate. While the change to the threshold proposed in Clause 8 of the Bill is relatively minor, we ask the Government to reconsider whether the threshold would still be sufficient to ensure that data controllers will comply with this standard.***

Clause 10 would disapply the requirement to provide information to data subjects when personal data that has been collected for one purpose is further processed for research purposes (including private commercial research) where doing so would involve "disproportionate effort". It would be down to the data controller to decide, in the first instance, what amounts to disproportionate effort.<sup>13</sup> The British Medical Association informed us that it was "deeply concerned" this clause would dilute transparency which "is essential to enable citizens to exercise their rights".<sup>14</sup> While we acknowledge the importance of much scientific and historical research, we agree with

---

<sup>11</sup> All references to clause numbers are to the Bill as amended in Committee

<sup>12</sup> [Reset \(DPDI0001\)](#) and [Public Law Project \(DPDI0005\)](#)

<sup>13</sup> The Bill gives examples of matters relevant to whether providing information would involve disproportionate effort: "the number of data subjects, the age of the personal data and any appropriate safeguards applied to the processing" (clause 10(1)(b)).

<sup>14</sup> [BMA \(DPDI0006\)](#)



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

evidence we received that noted that if data subjects are not made aware that their data is being processed, they will be unlikely to be able to establish whether their data is being dealt with in an Article 8 compliant manner. ***We ask the Government to reconsider whether clause 10 sufficiently respects transparency and its importance to the exercise of Article 8 rights.***

## *Recognised legitimate interests*

As noted above, the JCHR has previously raised concerns about whether the “legitimate interest” basis for processing data without consent, which requires the data controller to balance their legitimate interests against the interests and fundamental rights of the data subject, was being used appropriately. Clause 5 of the Bill would introduce a new lawful ground for processing, allowing data to be processed without consent and without any requirement to weigh up the countervailing interests or rights of the data subject. This would apply if the processing is necessary for a “recognised legitimate interest” listed in a new Annex 1 to the UK GDPR. This new lawful ground will apply only to data controllers that are not public authorities, which rules out much processing for the purposes of surveillance and law enforcement (discussed below) but also means that it can be relied upon by data controllers who are not bound to comply with Article 8 ECHR by the Human Rights Act 1998.

We recognise that the new Annex 1 lists purposes for processing that are in the public interest, including national security and response to a national emergency, and that processing for those purposes will only be permitted where ‘necessary’. Nevertheless, any provision that eliminates an existing requirement to assess the interests and rights of the person whose data is being processed is of real concern. While interference with Article 8 rights is lawful when that interference is necessary in a democratic society for a legitimate interest, compliance with Article 8 generally requires an assessment of the proportionality of the interference in any particular case. We heard particular concerns about the potential for sensitive health data and the personal data of children to be processed without any individual assessment of the data subject’s rights. ***We are concerned that the new “recognised legitimate interest” ground for processing allows for processing without an assessment of proportionality in the individual case. We would remind the Government that a data protection regime that allows processing that does not meet the requirement of necessity in a democratic society, as interpreted for the purposes of Article 8 ECHR, is unlikely to be consistent with the right to respect for private life.***

## *Automated decision-making*

Currently a person has the right not to be subjected to a decision that significantly affects them based solely on automated processing, other than in limited, narrow



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

circumstances.<sup>15</sup> Clause 12 of the Bill would allow for automated decision-making in wider circumstances, effectively reversing the presumption against automated decisions (except where those decisions concern “special category data”).<sup>16</sup>

Automated decision-making is already widely used and is likely to become more and more prevalent as reliance on artificial intelligence (AI) increases. Written evidence we received noted that automated decision-making has the potential to have serious and discriminatory effects on people’s lives, even when decisions may not concern special category data (for example, decisions about eligibility for financial products or state benefits).<sup>17</sup> We have heard in particular of the risk of bias being “baked in” to automated decision-making systems.<sup>18</sup> Professor Sampson also gave us an example of the fallibility of automated decision-making, in that case in respect of a traffic enforcement camera that falsely identified an individual as a vehicle.<sup>19</sup>

The Bill provides that data controllers relying on automated-decision-making must ensure that safeguards for the data subject’s rights, freedoms and legitimate interests are in place. ***It is vital that, if restrictions on automated decision-making are to be reduced, adequate safeguards are put in place which are effective at exposing and challenging errors and particularly discrimination within an automated decision-making system. Also, effective action must be taken against data controllers who fail to provide adequate safeguards. Greater protection for Article 8 and Article 14 rights could be provided by requiring any significant automated decision-making system proposed for use by a public authority to be trialled and subjected to independent scrutiny, including on human rights grounds, before introduction.***

## *Regulation making powers*

Also raised in the evidence we received were the powers reserved to the Secretary of State in the Bill to further alter the law using regulations.<sup>20</sup> This includes powers to make regulations altering the safeguards that apply under the Bill in respect of automated decision-making (clause 12) and regulations adding to the Annex 1 list of purposes that amount to a “recognised legitimate interest” (clause 5(4)). While we

---

<sup>15</sup> (i) Where necessary for entering into, or the performance of, a contract between a controller and a data subject; (ii) where such activity is required or authorised by law; or (iii) where a data subject has provided explicit consent (see Article 22 UK GDPR).

<sup>16</sup> I.e. personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

<sup>17</sup> [Equality and Human Rights Commission \(DPDI0007\)](#); [Public Law Project \(DPDI0005\)](#)

<sup>18</sup> [Public Law Project \(DPDI0005\)](#)

<sup>19</sup> [Oral evidence from the Biometrics and Surveillance Camera Commissioner, 22 February 2023, Q2](#)

<sup>20</sup> [British Medical Association \(DPDI0006\)](#); [Equality and Human Rights Commission \(DPDI0007\)](#); [Carnegie UK \(DPDI0003\)](#)



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

recognise that there may be a need for flexibility in respect of legislation concerning data protection – particularly in respect of automated decision-making, given the rapid advancement and adoption of related technologies – restrictions on the use and safeguards against misuse of personal data are vital to ensure compliance with the ECHR. Any expansion of the ability to process data without balancing against the rights of the data subject merits the most careful Parliamentary oversight. The same applies to any alteration to safeguards against the risks posed by automated decision-making, particularly in respect of automated decision-making within law enforcement functions, where the State’s Article 8 obligations are directly engaged. ***We encourage the Government to consider whether any future expansion of “recognised legitimate interests” should be by way of primary legislation rather than regulations. The Government should also consider whether the power to make regulations altering safeguards for data subject’s rights in respect of automated decision-making should be limited to a power to increase, and not reduce, the safeguards currently set out in the Bill.***

## *Abolition of the Surveillance Camera Code and the offices of Surveillance Camera and Biometrics Commissioner*

The explanatory notes to the Bill explain the Government considers that “the current oversight arrangements for police use of biometrics and surveillance cameras to help identify and eliminate suspects are complex and confusing for the police...and the wider public”. The Bill would, therefore, abolish the Surveillance Camera Code and the offices of Surveillance Camera and Biometrics Commissioner, transferring the Commissioner’s review functions to the Investigatory Powers Commissioner and wider responsibility for data processing within these areas to the Information Commissioner.<sup>21</sup>

We heard from Professor Sampson, the current Surveillance Camera and Biometrics Commissioner on the plan to abolish the Surveillance Camera Code. He explained that the Code “reinforces the relevant articles from the [ECHR] and underpins the general data protection principles” and is “an instrument that works.”<sup>22</sup> He also told us that he has not seen anything in the 10 years since the Code was introduced “to indicate that we need less regulation on state surveillance in public spaces or anywhere else.” He added: “We probably need better regulation. Scrapping the code will mean that the single instrument that directly regulates the police and local authority use of public space surveillance will go.”

Professor Sampson also raised concerns about the abolition of his roles and the possibility of them being treated as just another element of data protection: “...yes, biometric surveillance involves the processing of data, but so does almost every other meaningful activity in life, in the way that, if it involved electricity, we would give it all

---

<sup>21</sup> Clauses 111-113

<sup>22</sup> [Oral evidence from the Biometrics and Surveillance Camera Commissioner, 22 February 2023, Q8](#)



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

to Ofgem...In my view, live facial recognition, for example, is no more just data protection than DNA profiling is just chemistry.”<sup>23</sup>

Surveillance and biometrics are two areas in which personal data and privacy, as protected by Article 8 ECHR, are particularly at risk – and likely to be more at risk as technology advances. We agree with Professor Sampson that the abolition of the Code and his roles appears likely to reduce specific oversight of these areas. ***The Government need to answer the concerns of Professor Sampson and confirm that the abolition of the Surveillance Camera Code and the offices of Surveillance Camera and Biometrics Commissioner, will not diminish specific oversight and the protection of human rights in these contexts. If the Government is unable to do so, we would urge them to keep the existing framework in place and to offer additional guidance to police and public on their application and operation.***

## *Independence of the Information Commissioner’s Office*

The European Court of Human Rights has recognised that assessing the lawfulness of a Member State’s data processing under Article 8 ECHR may involve an assessment of the independent supervision provided by domestic data protection authorities.<sup>24</sup> In the UK that role is played by the Information Commissioner. The Bill would introduce changes to the Information Commissioner’s Office, including to its governance structure, duties, enforcement powers, reporting requirements, data protection complaints processes and its development of statutory codes of practice. Some of the evidence we received raised concerns about the impact these changes would have on the independence of the Information Commissioner.<sup>25</sup> In particular, concerns were raised about the Secretary of State being given the power to designate a statement of strategic priorities, to which the Information Commissioner must have regard when carrying out its functions under data protection legislation.

We note that the Bill has been welcomed by the Information Commissioner, who considers that changes made to the first DPDI Bill now “maintains our regulatory independence”.<sup>26</sup> We also note that the duty to have regard to the statement of strategic priorities “does not apply when the Commissioner is carrying out functions in relation a particular person, case or investigation.”<sup>27</sup> Nevertheless, it is important that the changes proposed in the Bill do not damage public confidence in the independence of the Information Commissioner. ***The Government should consider whether the Bill could be amended to include a more robust process of consultation and***

---

<sup>23</sup> Ibid, Q9

<sup>24</sup> [Breyer v. Germany](#) (application no. 50001/12)

<sup>25</sup> [Carnegie UK \(DPDI0003\)](#); [5Rights Foundation \(DPDI0009\)](#)

<sup>26</sup> [Information Commissioner’s Response to the Data Protection and Digital Information \(No 2\) Bill \(DPDI No 2 Bill\)](#), May 2023

<sup>27</sup> Clause 30, new s120F DPA 2018



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 4710 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

***Parliamentary approval for the statement of strategic priorities, to minimise concerns about Governmental influence over the Information Commissioner.***

The Committee would be grateful for a response to this letter by 22 September 2023. We will continue to monitor the progress of the Bill and keep under review its implications for human rights.

Yours sincerely,

**Rt Hon Harriet Harman MP**  
Chair of the Joint Committee on Human Rights