HOUSE OF LORDS

Select Committee on the Constitution

2nd Report of Session 2023–24

Data Protection and Digital Information Bill

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Select Committee on the Constitution

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Lord Anderson of Ipswich
Baroness Andrews
Baroness Drake (Chair)
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Lord Hope of Craighead
Lord Keen of Elie
Lord Strathclyde
Baroness Suttie
Lord Thomas of Gresford

Declaration of interests

See Appendix 1.

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Committee staff

The current staff of the committee are Rachel Borrell (Clerk) and Jackie Yu Hon Lam (Committee Operations Officer).

Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

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Data Protection and Digital Information Bill

Introduction

1. The Data Protection and Digital Information Bill was introduced in the House of Commons on 8 March 2023 and, having been carried over to the new session, was brought to the House of Lords on 6 December 2023. Second reading took place on 19 December 2023 and committee stage is yet to be scheduled.

2. In the Government's words, the purpose of the Bill 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".[1] At present, the Data Protection Act 2018 (DPA) supplements EU General Data Protection Regulations which have, since the UK's exit from the European Union, been incorporated into UK law as the UK General Data Protection Regulation (UK GDPR). The Bill introduces a new, bespoke regime for the UK,[2] significantly amending the DPA 2018 and the UK GDPR.

3. **Data protection is a matter of great importance in maintaining a relationship of trust between the state and the individual. Access to personal data is beneficial to the provision of services by the state and assists in protecting national security. However, the processing of personal data affects individual rights, including the right to respect for private life and the right to freedom of expression.[3] It is important that the power to process personal data does not become so broad as to unduly limit those rights.**

Data protection

4. The UK GDPR sets out the lawful basis on which personal data can be processed. Clause 5(2)(b) of the Bill extends this basis by allowing personal data to be processed where "necessary for the purposes of a recognised legitimate interest".[4] Clause 5(4) and Schedule 1 set out the conditions which must be met if processing is to be considered necessary for the purposes of a recognised legitimate interest. The Secretary of State may by regulations add to or vary those conditions.[5]

5. Clause 6(5) empowers the Secretary of State, by regulations, to add additional conditions under which further processing of personal data—beyond the original purpose for which the data was collected—is lawful.[6] In this way changes can be made to the UK GDPR Article 5(1)(b). Regulations made under clauses 5 and 6 are subject to the affirmative resolution procedure.[7]

6. **Under clauses 5 and 6 the Secretary of State is afforded discretion to determine and vary the conditions under which personal data can**

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1 Explanatory Notes to the Data Protection and Digital Information Bill, para 1
2 *Ibid.*, para 12
3 European Convention on Human Rights, Articles 8 and 10
4 Data Protection and Digital Information Bill, clause 5(2)(b)
5 *Ibid.*, clause 5(4)
6 *Ibid.*, clause 6(5)
7 *Ibid.*, clauses 5(4) and 6(5)

be processed. ***The House may wish to examine further the breadth of the Secretary of State's powers in clauses 5 and 6 and consider whether such changes to the regulation of personal data should be the subject of primary rather than secondary legislation.***

7. Clause 8 extends the right to process personal data revealing political opinions—currently limited to political parties—to elected candidates and permitted participants in referendums.[8] Members of Parliament, members of the devolved legislatures and permitted participants in referendums can process "special category data"[9] revealing someone's political opinions for 30 days after a general election or a referendum. They can only do so if it is necessary for discharging an elected representative's functions or for the purposes of the elected representative's "democratic engagement activities".[10]

8. Currently, if political parties or other campaigners, including candidates, use personal data for unsolicited campaigning material this is treated as direct marketing and is subject to regulations. Clause 114 empowers the Secretary of State—by regulations—to provide an exception from direct marketing provisions for communications conducted for the purposes of democratic engagement activities (or, in the case of registered political parties, election activities).[11] The Bill defines "democratic engagement" and "democratic engagement activities" in very broad terms.[12]

9. **We draw to the attention of the House that the terms "democratic engagement" and "democratic engagement activities" are broad and arguably not adequately defined by the Bill.** ***We recommend that these terms should be better defined to ensure the proper access to, and treatment of, highly sensitive information.***

10. Clause 9 amends Article 12 of the UK GDPR to broaden the basis for refusal of a data access request by providing more leeway to 'data controllers'.[13] The existing test allows data controllers to refuse or charge a reasonable fee for "manifestly unfounded or excessive" requests. The new test introduced by clause 9 permits a controller to charge a reasonable fee or refuse to act on a request which is "vexatious or excessive".[14]

11. Factors to be considered when determining whether a request is "vexatious or excessive" are set out in the Bill.[15] However, these are framed in broad, and arguably vague, terms.

12. ***The House may wish to seek further explanation as to how the new test provided for by clause 9 is to be applied. The Government should provide assurances that clause 9 will not significantly limit an individual's ability to access information about their personal data or information about how it is being collected and used.***

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8 Data Protection and Digital Information Bill, clause 8

9 Special categories of data are defined in Article 9(1) of the General Data Protection Regulation as "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 purposes of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation".

10 Data Protection and Digital Information Bill, clause 8

11 *Ibid.*, clause 114

12 *Ibid.*, clause 115

13 *Ibid.*, clause 9

14 *Ibid.*, clause 9(3)

15 *Ibid.*, clause 9

13. Currently, "high risk processing" (the processing of data that is likely to result in a high risk to the rights and freedoms of individuals) must be accompanied by an impact assessment containing an assessment of both "the necessity and proportionality" of the processing in relation to the permitted purposes.[16] Clause 20 alters this to a requirement to assess whether the process is "necessary" for those purposes.[17]

14. ***The House may wish to seek further information from the Government as to whether an assessment of proportionality is no longer required when undertaking high risk processing, and if so, why.***

Data privacy

15. Clause 128 and Schedule 11—added to the Bill during report stage in the House of Commons—empower the Secretary of State to require banks and financial organisations to provide data about accounts linked to benefit claimants via an "account information notice".[18] This power "may be exercised only for the purpose of assisting the Secretary of State in identifying cases which merit further consideration to establish whether relevant benefits are being paid or have been paid in accordance with the enactments and rules of law relating to those benefits".[19] The Government intends to use this information to identify possible benefit fraud or error.[20]

16. In *The Legislative Process: The Passage of Bills Through Parliament* we said:

> "It would assist members of the House of Lords in their scrutiny of bills to know where the consideration of bills may have been truncated in the Commons. This includes clauses of or schedules to a bill that were not debated during committee stage due to lack of time and parts of a bill that MPs had sought to amend at report stage but were unable to due to lack of time."[21]

17. **We draw it to the attention of the House that clause 128 and Schedule 11, which contain far-reaching powers, were added at report stage in the House of Commons and were therefore not debated there at committee stage.**

18. **We are concerned by the breadth of these provisions, which empower the Government to demand access to individual bank accounts without grounds for suspicion. *We recommend this power should be limited to circumstances in which the Secretary of State has reasonable grounds for inquiry.***

Henry VIII power

19. Clause 150 is a Henry VIII power. The Secretary of State can, by regulations, make amendments to existing legislation which are consequential to provisions in the Bill.[22] Consequential amendments can also be made to the

16 General Data Protection Regulation, Article 35
17 Data Protection and Digital Information Bill, clause 20
18 *Ibid.*, clause 128 and schedule 11
19 *Ibid.*, schedule 11
20 Explanatory Notes to the Data Protection and Digital Information Bill, para 98
21 Constitution Committee, *The Legislative Process: The Passage of Bills Through Parliament* (24th Report, Session 2017–19, HL Paper 393), para 27
22 Data Protection and Digital Information Bill, clause 150

current Bill where they are consequential to the abolition of the Information Commissioner and his replacement by the new Information Commission.[23] Regulations made under clause 150 which amend or repeal primary legislation are subject to the affirmative procedure. Any other regulations are subject to the negative procedure.[24]

20. The Delegated Powers and Regulatory Reform Committee has taken the view that powers which make consequential provision should be "restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister".[25]

21. In our report on the Strikes (Minimum Service Levels) Bill we said:

> "It is now common practice to include in bills a power to amend future Acts to make consequential provision (template wording is included in the Office of the Parliamentary Counsel Drafting Guidance).[26] However, as a matter of principle, it is unacceptable to include such a power in legislation unless a satisfactory explanation is provided by the Government."[27]

22. ***The House may wish to seek an explanation from the Government as to why clause 150 has been included in the Bill. If the clause is to remain in the Bill, we recommend that consequential changes, which could be broad in their scope, should be permitted only where necessary.***

Parliamentary sovereignty and interpretive presumptions

23. Parliamentary sovereignty dictates that a Parliament cannot bind itself or its successor and generally the courts interpret inconsistencies between two Acts in favour of the later passed—a principle known as "implied repeal". Clause 49 inserts a new section 183A into the DPA, which prevents any relevant enactment or rule of law from overriding the main data protection legislation.[28] It also allows for express legislative provision to amend clause 49 or the main data protection legislation. Insofar as devolved legislatures have the competence to legislate in the area of data protection, they can also override existing provisions by way of express intention.[29]

24. **Since Laws LJ's ruling in Thoburn in 2002 the courts have generally considered certain acts of Parliament to be of such constitutional significance that they should be treated as 'constitutional statutes' and protected from implied repeal.[30] Clause 49 in effect seeks to bestow a status equivalent to that of a 'constitutional statute' on the Data Protection Act 2018.** ***We invite the House to consider whether this is appropriate.***

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23 Data Protection and Digital Information Bill, clause 150(3)
24 *Ibid.*, Clause 150(4) and (5)
25 Delegated Powers and Regulatory Reform Committee, *Third Report* (Session 2017–19, HL Paper 22), para 74
26 The Office of the Parliamentary Counsel, 'Drafting Guidance' (June 2020), p 91: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf [accessed 18 January 2024]
27 Constitution Committee, *Strikes (Minimum Service Levels) Bill* (14th Report, Session 2022–23, HL Paper 162), para 17
28 Data Protection and Digital Information Bill, clause 49
29 Explanatory Notes to the Data Protection and Digital Information Bill, para 498
30 *Thoburn v Sunderland County Council* [2002] EWHC 195 (Admin)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
Lord Anderson of Ipswich
Baroness Andrews
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Lord Hope of Craighead
Lord Keen of Elie
Lord Strathclyde
Baroness Suttie
Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
Lord Anderson of Ipswich
No interests declared
Baroness Andrews
No interests declared
Lord Falconer of Thoroton
No interests declared
Baroness Finn
No interests declared
Lord Foulkes of Cumnock
No interests declared
Lord Hope of Craighead
No interests declared
Lord Keen of Elie
No interests declared
Lord Strathclyde
No interests declared
Baroness Suttie
No interests declared
Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.