HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

10th Report of Session 2023–24

Data Protection and Digital Information Bill

Pedicabs (London) Bill [HL]

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session, most recently on 8 November 2023, and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

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Committee Staff

The staff of the Committee are Jen Mills (Clerk) and Kiran Kaur (Committee Operations Officer).

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk to the Delegated Powers and Regulatory Reform Committee, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelegatedpowers@parliament.uk.

Tenth Report

DATA PROTECTION AND DIGITAL INFORMATION BILL

1. This Bill was introduced on 6 December 2023 and had its second reading on 19 December. The Bill is split into six Parts:

   - amendments to the existing data protection regime contained in the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018;
   - provisions relating to digital verification services;
   - the establishment of smart data schemes for customer and business data;
   - other provisions about digital information;
   - provisions for the establishment of the Information Commission and oversight of biometric data; and
   - supplementary provisions such as those relating to interpretation, extent and commencement.

2. The Bill contains a wide range of delegated powers and the Department for Science, Innovation and Technology has provided a delegated powers memorandum ("the memorandum"). We draw the following provisions to the attention of the House.

Clause 5–Power to amend the grounds for lawful processing of personal data

3. Clause 5 amends Article 6 of the UK GDPR which sets out the only circumstances in which the processing of personal data is lawful. he amendments include adding a new ground for lawful processing, namely processing which is necessary for the purposes of a recognised legitimate interest. Under the new ground, processing will only be treated as being for a recognised legitimate interest if it meets one of the conditions set out in a new Annex 1 to the UK GDPR (inserted by Schedule 1 to the Bill).

4. The new provisions inserted into Article 6 also include a power to amend Annex 1. This will enable the Secretary of State by regulations to change the conditions which underpin the new processing ground. The power is contained in new paragraph 6 of Article 6 inserted by clause 5(4). Regulations made in exercise of the power are subject to the affirmative resolution procedure.

5. The memorandum indicates that the approach adopted in the Bill has been to start with a limited list of conditions in the new Annex 1, and for this reason it is argued that further changes may be required:[1]

   "… the government is concerned that difficulties applying the balancing test in Article 6(1)(f) for other processing activities may come to light in

1 See paragraph 26 of the memorandum.

> the future, interfering with important processing, particularly in light of wider changes made to the lawful ground for processing in the Bill."

The memorandum also mentions that the conditions in Appendix 1 might need to be varied if it became apparent that they were being relied on inappropriately by data controllers. The Department goes on to say that the need to act swiftly in both these circumstances justifies the need for the regulation making power.

6. The grounds for lawful processing of personal data go to the heart of the data protection legislation, and therefore in our view should not be capable of being changed by subordinate legislation. This on its own in our view makes the power inappropriate. But we are also not convinced that the Department has provided strong reasons for needing the power. Those reasons are based on the possibility that new difficulties might emerge with the application of the balancing test in Article 6(1)(f) of the UK GDPR. We do not find that convincing given that the relevant test has been present in the legislation since the UK GDPR first had effect. Unforeseen consequences arising from changes to legislation is an issue which is capable of applying to most, if not all, new pieces of legislation; and therefore it is not a convincing reason for having a power in this particular case. The onus is on the Government to ensure that the legislation is effective as enacted, without relying on delegated powers to make corrections in the future. This applies with even greater force since the power is not limited to dealing with perceived problems arising from the changes in the legislation, but would be capable of being exercised more broadly to give effect to changes in policy.

7. **Accordingly, we consider the delegated power conferred by clause 5(4) to be inappropriate and recommend that it is removed from the Bill**.

Clause 6–Power to amend conditions under which processing is treated as compatible with the original purpose

8. Clause 6 amends the provisions of the UK GDPR which relate to whether or not further processing of personal data is compatible with the original purposes for which it was collected. The main purpose of clause 6 is to clarify the circumstances in which further processing is to be treated as being compatible. New Article 8A(3) of the UK GDPR (inserted by clause 6(5)) sets out specific circumstances in which the processing of personal data for a new purpose is to be treated as being compatible with the original purpose. The matters specified in new Article 8A(3) include where the processing meets a condition in Annex 2. Annex 2, which is inserted by Schedule 2 to the Bill, contains a list of conditions which relate to public interest objectives such as public security, emergencies, crime, and the safeguarding of vulnerable individuals.

9. Paragraph 5 of new Article 8A confers power on the Secretary of State by regulations to amend Annex 2. Regulations under paragraph 5 are subject to the affirmative resolution procedure. In the memorandum, the Department suggests that this power is needed to ensure there is a mechanism to correct any adverse consequences which flow from the clarifications made by new Article 8A. The Department states:

> "There is a risk that in clarifying those rules for the first time, certain important public interest processing activities are inadvertently affected, given that the current rules allow for a degree of ambiguity

> in interpretation …. It is important that the government is able to deal with any such situations swiftly and on a case by case basis in case the codification of these rules leads to the impediment of important processing for an important objective of public interest, for example."[2]

10. The Department acknowledges in the memorandum that the rules governing further processing "relate to a fundamental principle in the UK GDPR that processing in a manner incompatible with the original purpose is not permitted".[3] Given the fundamental nature of this principle, we do not consider it is appropriate to use subordinate legislation to make changes to the matters which are automatically to be treated as being compatible with the original purpose. The Department rely on unforeseen consequences arising from changes to legislation as the primary reason for the power. Again, we do not find this convincing. We also note again that the power is not limited to being used to make corrections but is available generally to give effect to changes in policy.

11. **Accordingly, we consider the delegated power conferred by clause 6(5) to be inappropriate and recommend that it is removed from the Bill.**

Clause 14–Power to vary safeguards applying to automated decision making

12. Clause 14 is concerned with automated decision making. Under the existing provisions of the UK GDPR and the Data Protection Act 2018, there is a prohibition on automated decision making where it produces legal effects, or where it has a similarly significant effect on the person concerned. The Bill will alter the scope of this prohibition and, in so doing, the Bill is replacing the provisions on automated decision making in the UK GDPR and the Data Protection Act 2018. The new provisions will be contained in new Articles 22A to 22D of the UK GDPR.

13. Article 22C(1) requires a data controller which makes a significant decision using automated processing of personal data to ensure that safeguards for the data subject's rights, freedoms and legitimate interests are in place. Those safeguards must include the following measures:

- providing the data subject with information about the decision;
- enabling the data subject to make representations;
- enabling the data subject to obtain human intervention in the decision;
- enabling the data subject to contest the decision.

14. Article 22D(4) enables the Secretary of State by regulations to make further provision about safeguards. This includes the power to amend Article 22C to add or vary safeguards. The delegated power conferred by Article 22D(4) is subject to the affirmative resolution procedure. The Department explains that the power is necessary to ensure that the safeguards remain appropriate and effective in light of the advances in and the adoption of technologies relevant to automated decision-making. The Department also states that:

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2 See paragraphs 31 to 33 of the memorandum for the justification for taking the power.
3 See paragraph 30 of the memorandum.

> " … importantly it does not include a power to remove safeguards provided in new Article 22C and therefore cannot be exercised to weaken the protections that [Article 22C] affords to data subjects".[4]

15. We are not convinced the Department is right in suggesting that the power could not be used to weaken the protections in Article 22C. The power includes the power to "vary" the safeguards set out on the face of Article 22C, and we consider that this aspect of the power could be used to make changes which in some way limit the scope of a particular safeguard; for example, by limiting a particular safeguard so that it only applies to a limited range of decisions or in a limited range of circumstances.

16. **Accordingly, we consider that the power conferred by new Article 22D(4) should explicitly be made subject to the condition that it may only be exercised where doing so would not have the effect of reducing the protection afforded by Article 22C to a data subject who is subject to automated decision-making.**

Provisions relating to law enforcement

17. Clause 14 also includes amendments to sections 49 and 50 of the Data Protection Act 2018 ("the 2018 Act"). Those sections make specific provision about the use of automated decision making in the context of law enforcement processing. The new provisions (inserted as sections 50A to 50D of the 2018 Act) parallel Articles 22A to 22D and include an equivalent power to make provision by subordinate legislation about safeguards. **We consider that that power, which is contained in section 50D(4), should also explicitly be made subject to the condition that it may only be exercised where doing so would not have the effect of reducing the protection afforded by section 50C.**

Clause 53–Power to set rules for providers of digital verification services

18. Clause 53 requires the Secretary of State to prepare and publish a document which sets out the rules concerning the provision of digital verification services ("the main code"). While there is no legal requirement for a person providing digital verification services to comply with the rules set out in the main code, there are legal consequences which flow from compliance or non-compliance. Clause 63 requires the Secretary of State to establish and maintain a register of persons providing digital verification services, and a person may only be included on the register if they have been certified as providing services which comply with the main code. The Secretary of State has the power to remove a person from the register if satisfied that they are failing to comply with the main code and must do so if the provider is no longer certified as doing so. The most important effect of registration is that it enables access to information held by public authorities. By virtue of clause 74, it is only registered providers of digital verification services who can access information about an individual from a public authority under that clause for the purposes of providing digital verification services to that individual.

4 The justification for taking the power is set out in paragraphs 57 to 60 of the memorandum.

19. The main code is not subject to parliamentary scrutiny. The Department in substance gives two reasons for this:[5]

- The need to be able to make changes rapidly, for example to combat risks to data security or privacy.
- The need to ensure that the governance of digital verification services can be transferred to a private sector body for whom parliamentary scrutiny would be inappropriate.

In relation to this last point, clause 81 confers a power on the Secretary of State to transfer the Secretary of State's functions under the Bill relating to digital verification services to another person, with no restrictions on who that person may be so that it could be a private sector body.

20. Despite compliance with the rules in the main code not being a legal requirement, we consider the delegation of the power to set the rules constitutes a delegation of legislative power given the legal consequences which flow from compliance or non-compliance.

21. We have made clear in the past our concerns about Bills conferring powers to make provision having legislative effect, where it is not contained in legislation and therefore not subject to parliamentary scrutiny. We draw attention, in particular, to what we said in our *Democracy Denied?* report:[6]

> "102. The number of occasions on which the Government have sought to acquire legislative powers under the guise of various devices not subject to parliamentary scrutiny is perhaps the most striking and disturbing of recent developments that have had the effect of shifting the balance of legislative power from Parliament to the executive.
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> …
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> 105. In the absence of convincing reasons to the contrary, therefore, we recommend that they should not be used. Where the Government take the view that they have convincing reasons, then the use of these devices—and the level of scrutiny applied to them—should be clearly identified in the delegated powers memorandum and fully justified."

22. We do not consider that the reasons given by the Department meet this high threshold:

- Parliamentary scrutiny is not incompatible with allowing changes to be made in a speedy fashion. Procedures exist under which instruments can be made and come into force immediately with parliamentary scrutiny taking place subsequently.
- The fact that parliamentary scrutiny will make it more difficult for the Secretary of State to transfer the governance functions relating to digital verification services to a private sector body, is not relevant to whether the nature of the provisions is such that they ought to be subject to parliamentary scrutiny. The context here is the specific rules governing the processing and handling of personal data by organisations providing

5 See paragraph 111 of the memorandum.

6 *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report, Session 2021–22, HL Paper 106).

digital verification services. We take the view that this is a matter which should be subject to parliamentary scrutiny.

23. **Accordingly, we consider that the exercise of the powers conferred by clause 53 should be made subject to parliamentary scrutiny, with the affirmative procedure providing the appropriate level of scrutiny**.

Part 2–Powers to determine fees

24. Part 2 of the Bill contains provisions which allow the Secretary of State to charge fees in respect of various functions carried out by the Secretary of State under that Part. The relevant provisions are:

- clause 60, which relates to the payment of a fee by a person in connection with the approval or re-approval of a supplementary code under clause 54;
- clause 63, which is concerned with applications to be included on the register of providers of digital verification services;
- clauses 64 to 66, which relate to various types of application to modify a person's entry on the register;
- clause 68(3), which relates to the charging of periodic fees relating to a person's continued inclusion on the register.

25. In each case, there is a power for the Secretary of State to determine whether a fee should be paid, and if so what the amount of the fee should be. Also, in each case, provision is made to allow the fee to exceed the administrative costs of exercising the function concerned. There is no requirement for the determination as to whether a fee should be paid, or the amount of the fee payable, to be set out in subordinate legislation, nor any requirement for parliamentary scrutiny.

26. In explaining the absence of subordinate legislation and any parliamentary scrutiny of fees, the Department rely on the fact that the provision of digital verification services under the statutory structure set up by Part 2 is voluntary. The Department believes that this justifies taking the determination of fees outside of legislation. The Department also refers to the fact that transparency on fees is achieved by a requirement on the Secretary of State to publish determinations on fees.[7]

27. The Department also relies on the Secretary of State's power under clause 81 to transfer the Secretary of State's functions relating to digital verification services to another person. Again, in the view of the Department, the desire potentially to transfer functions, including the setting of fees, to a private sector body makes it inappropriate to require the functions relating to fees to be exercisable by subordinate legislation.

28. We are not convinced by the Department's reasons. Although the regime established by Part 2 is not obligatory, it would not have been created had it not been expected in practice to underpin the provision of digital verification services. And it seems reasonable to suppose that the intention behind allowing only registered providers to have access under Part 2 to information held by public authorities is to secure that most, if not all, providers are

7 See paragraphs 115 to 116 and paragraphs 121 to 122 for the justification for the procedure.

registered. We consider that the power to set fees at levels which exceed those required for cost recovery means that the powers ought to be subject to parliamentary scrutiny. In our view, this applies with even greater force were the fees to be chargeable by a private sector body exercising the relevant statutory functions in place of the Secretary of State.

29. **Accordingly, we consider that the powers conferred by Part 2 in relation to the setting of fees should be exercisable by the Secretary of State by means of regulations, with the negative procedure offering an appropriate level of parliamentary scrutiny**.

PEDICABS (LONDON) BILL [HL]

30. The Pedicabs (London) Bill had its Third Reading in the House of Lords on 6 February 2024. The Bill confers on Transport for London ("TfL") a delegated power to make pedicab regulations by statutory instrument. When we originally considered this Bill in our 1st Report of this session we did not draw it to the attention of the House.[8]

31. Clause 6(2) of the Bill as introduced said that a statutory instrument containing regulations made by TfL was subject to annulment in pursuance of a resolution of either House of Parliament; in other words, the applicable parliamentary procedure was the negative procedure. We agreed with the Government (paragraph 5 of their original delegated powers memorandum[9]) that it was right that regulations made under a framework Bill should have a parliamentary procedure.

32. However, the Government tabled an amendment at report stage (accompanied by a supplementary delegated powers memorandum[10]) removing clause 6(2) from the Bill. The amendment was carried, meaning that regulations made by TfL will not be subject to any parliamentary procedure at all.

33. It is highly unusual for the Government to table an amendment to remove a parliamentary procedure that the Government had originally commended in their Explanatory Notes and delegated powers memorandum. We expect very good reasons for such a course of action. The Government's supplementary delegated powers memorandum (paragraphs 3 and 4) offers two reasons.

- Having no parliamentary procedure for pedicab regulations will correspond to the current position under which TfL's statutory regulation of taxis and private hire vehicles is also unencumbered with any parliamentary procedure.

- The Government had heard arguments from across the House at Second Reading that the delegated powers in the bill "should rest solely with TfL". The implication appears to be that, unless parliamentary scrutiny is removed, the delegated powers in the Bill would not rest solely with TfL.

34. Whatever the merits of the first reason, the second reason is unsound. The second reading debate discloses that some peers may have thought that (under the Bill as introduced) the decision regarding whether pedicab regulations should be imposed would be taken by the Minister rather than by TfL. The true position is that, whether or not Parliament is able to scrutinise TfL's regulations, the power to make regulations under this Bill rests solely with TfL. Ministers have no say at all. This was the case under the Bill as introduced and as subsequently amended. Meanwhile, parliamentary scrutiny of the regulations has disappeared altogether. **Accordingly, we draw the matter to the attention of the House.**

8 *1st Report* (Session 2023–24, HL Paper 6).
9 Memorandum by the Department for Transport, dated 9 November 2023
10 Memorandum by the Department for Transport, dated 29 January 2024

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://www.parliament.uk/hlregister. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 7 February 2024, Members declared no interests.

Attendance

The meeting was attended by Lord McLoughlin, Baroness Bakewell of Hardington Mandeville, Lord Rooker, Baroness Chakrabarti and Baroness Finlay of Llandaff.