

Legislative Consent Memorandum

Data Protection and Digital Information (No. 2) Bill

Background

1. This memorandum has been lodged by Neil Gray, Cabinet Secretary for Wellbeing, Economy, Fair Work and Energy, under Rule 9.B.3.1(a) of the Parliament's standing orders, and is supported by Richard Lochhead, Minister for Small Business, Innovation and Trade. The Data Protection and Digital Information Bill (DPDI Bill) was introduced in the House of Commons on 18 July 2022, and re-introduced as the Data Protection and Digital Information Bill (No. 2) on 8 March 2023. The Bill can be found [here](#).

Content of the data protection and digital information Bill

2. The DPDI Bill was published following the [outcome of a UK Government \(UKG\) consultation](#), 'Data: a new direction', to which the Scottish Government (SG) provided views. The Bill covers a wide range of policy areas, including: data protection, smart data, digital verification and law enforcement data sharing.
3. The Bill was laid in parliament in Westminster on 18 July 2022 then paused before second reading on 5 September 2022. It was brought back on 8 March 2023 as the Data Protection and Digital Information (no. 2) Bill by the new [UKG Department for Science, Innovation and Technology](#), (DSIT) whose officials have informed Scottish Government that it moved to second reading on 17 April.
4. Data protection is reserved and all the general data protection provisions in the Bill extend to Scotland. The UKG has framed the recalibration of new privacy frameworks within the Bill as necessary, pro-growth reforms to enable data-driven innovation, reduce data protection-associated burdens on businesses, and empower people to take control of their data, within a trusted data regime. The proposed changes to data protection law are not as comprehensive as suggested in the UKG's recent response to its consultation, and represent a dilution rather than a radical change. Nevertheless, the dilution of accountability of organisations may be enough to prompt the EU to re-examine the UK adequacy decision which allows the free-flow of data.
5. The UKG has also published an [impact assessment](#) of the Bill.

Provisions which relate to Scotland and require legislative consent

Part 2 – Digital verification services

Clause 54(3) - Power of public authority to disclose information to registered persons

6. This sub-clause allows public authorities to disregard any statutory or other restrictions on disclosure when disclosing information about individuals to regulated digital verification service providers. This includes disclosure provisions in statute for devolved areas which means that it is a provision applying to Scotland which is for devolved purposes.

Part 3 – Customer data and business data

Clauses 61-77 – Smart data

7. These clauses provide for the secure sharing of customer data at the customer's request with authorised third party providers (TPP) of services such as automated account switching and management. These provisions are mainly about consumer protection which is reserved, but elements of the clauses concern business-to-business information transfer and are not caught by the consumer protection reservation. The provisions confer new duties on the Scottish Ministers where they are acting as a 'data holder', meaning a supplier of goods, services and digital content specified in the regulations.

Part 4 – Other provision about digital information – sharing of data

Clause 92 - Disclosure of information to improve public service delivery to undertakings

8. This clause amends the UK Digital Economy Act 2017 (the Act) Part 5 section 35, to extend the public service delivery data sharing powers in the Act to improve outcomes for "undertakings" which is defined to include any business, whether or not run for profit, along with any organisation established for charitable purposes.
9. The public service delivery powers in section 35 of the Act provide a legal gateway to enable specified public authorities, listed in Schedule 4 of the Act, to share information in relation to specified objectives. Such objectives must be set out in Regulations and, currently, must be for the improvement or targeting of a public service or the provision of a benefit (financial or otherwise) to individuals or households. The amendments made by clause 92 would extend the scope of the data sharing powers under section 35 so as to enable data sharing to improve public service delivery not just for individuals and households, but also

for undertakings. The purpose of the proposed amendments is therefore to support personal data sharing within the public sector to improve public services for businesses. The amendments do not facilitate personal data sharing for other reasons.

10. The Act allows the “appropriate national authority” to make regulations to add “specified persons” and “specified objectives”. The “appropriate national authority”, as defined in the Act is the Secretary of State or Minister for the Cabinet Office, Scottish Ministers, Welsh Ministers or the Department of Finance in Northern Ireland. The amendments therefore alter the scope of the Scottish Ministers’ power to specify, in regulations, objectives for which data may be shared to improve or target public services not only for individuals or households, but also undertakings. They also affect the purposes for which data related to devolved matters and functions could be shared, namely to improve outcomes for undertakings as well as individuals and households. As such, the amendments make provisions applying to Scotland, which are for devolved purposes and which alter the executive competence of the Scottish Ministers.

Clause 93 – Implementation of agreements on sharing information for law enforcement purposes

11. This clause confers on the Secretary of State the power to make regulations in secondary legislation to implement future international agreements as they relate to the sharing of information for law enforcement purposes. The implementation of international agreements in devolved areas is a devolved function. Note that the [explanatory notes](#) to the Bill contain an error at page 125 in relation to this clause, and should state that the LCM process has been engaged. This discrepancy has been raised with the UK Government.

Reasons for seeking a legislative consent motion

Clause 54(3) - Power of public authority to disclose information to registered persons

12. Public authorities only have the power to use this legal gateway following a request by an individual to make a check against their data. The powers are permissive and public bodies are under no obligation to disclose information or to enter into data sharing agreements. By agreeing to this, Scottish citizens would not be disadvantaged as data held by the Scottish Ministers, equivalent to that held by UK bodies in England and Wales, would also be available for digital identity verification purposes.

13. Consent is recommended

Part 3 – Customer Data and Business Data

Clauses 61-77 – Smart data

14. The relevant sections of the Bill are highly technical and there is no administrative efficiency or benefit in seeking a legislative vehicle to make these provisions in Scotland. There would also be a requirement, if the powers are not enabled via a UK Bill, to regulate these matters via a devolved body.

15. Consent is recommended

Part 4 – Other provision about digital information – sharing of data

Clause 92 - Disclosure of information to improve public service delivery to undertakings

16. Legislative consent is needed as the amendments will extend regulation-making powers which could be exercised by the Scottish Ministers and relate to sharing of data related to devolved matters and functions.

17. While the data sharing powers are permissive and dependent on secondary legislation being taken forward, the Scottish Ministers are of the view that the proposed amendments could potentially provide benefits to business, which could further SG's agenda for the post-pandemic recovery and in particular support the implementation of a commitment in the National Strategy for Economic Transformation to introduce common data sets and systems to transform the way the public sector offers services and support to businesses and workers.

18. Consent is recommended.

Clause 93 – Implementation of agreements on sharing information for law enforcement purposes

19. This clause confers on the Secretary of State the power to make regulations in secondary legislation to implement future international agreements as they relate to the sharing of information for law enforcement purposes. The implementation of international agreements in devolved areas is a devolved function.

20. Consent is not recommended. If either parallel enabling powers were granted to the Scottish Ministers, or some form of a twin-track approach which gives the Scottish Ministers the option to either implement differently where they see fit, or

to allow the Secretary of State to implement in consultation with the Scottish Ministers, this would likely produce better future regulations for Crown Office and Police Scotland. The Scottish Ministers currently recommend that consent to this provision be withheld, with the caveat that the Scottish Ministers will lodge a supplementary LCM if a suggested amendment is agreed. If such an amendment were secured, the Scottish Ministers would retain policy control in a devolved area. The Scottish Ministers are currently in discussion with the Home Office regarding these amendments.

Consultation

21. The UKG digital identity and attributes consultation was published on 19 July 2021 as a route to seek views and feedback on their proposed approach to enabling the use of digital identities and attribute services in the UK economy.
22. In relation to Digital Verification Services, the Scottish Government welcomed the development of standards based approach, which would allow citizens to use services from the UK and Scottish Government. The response highlighted the importance of the citizen being a primary participant in the trust framework, recognising their rights over the use of their personal data.
23. The UKG response to the consultation was published on 10 March 2022 and set out legislative measures which include:
 - creating a governance framework to oversee a robust accreditation and certification process by which organisations can prove their adherence to the rules of the UK digital identity and attributes trust framework
 - enabling a permissive legal gateway so that trusted private sector organisations can check data held by public bodies for the purpose of identity and eligibility verification. The LCM relates to these provisions of the Bill.
 - establishing that digital identities and attributes have the same validity as physical proofs of ID, such as a passport
24. The Bill, of which the above provisions form a part, was published following the outcome of a UKG consultation, '[Data: a new direction](#)'. The SG provided a response to the consultation.
25. The Scottish Government's response focused on a commitment to retain high data protection standards and protections for individuals via continued alignment with the EU data protection standards. In particular, there was a view, including from public sector stakeholders who contributed as well, that the move away from these standards would endanger data adequacy agreements reached following Brexit, creating a unwelcome burden on public and private sector organisations who transfer data to and from the EU.
26. The UKG's response to this consultation was published on 10 September 2021 and has informed the development of this Bill. In its consultation response, the UKG said:

“The government will work to ensure any regulations establishing and setting out the framework for future Smart Data schemes are appropriately scoped to maximise the benefits of data intermediaries while mitigating any risks they pose.”

“Any personal data sharing regulations made under the new provisions would be subject to further public consultation and parliamentary scrutiny.”

27. There is no mention of the power contained in the clause regarding implementation of agreements on sharing information for law enforcement purposes in UKG’s consultation summary.

Financial Implications

Clause 54(3) - Power of public authority to disclose information to registered persons & Clauses 61-77 – Smart data

28. There are no cost or financial issues arising as a consequence of legislative consent to these provisions.

Clause 92 - Disclosure of information to improve public service delivery to undertakings

29. Cabinet Office officials intend to put secondary legislation in place as soon as possible after the Bill is passed which will involve engagement with SG officials. Any regulations made under the new provisions would be subject to public consultation and also consultation with the Scottish Ministers. There may be a need for Scottish secondary legislation to ensure Scottish bodies have the same access to any new data sharing powers as those in England and Wales. Other impacts will be experienced should public authorities wish to utilise these powers for devolved data shares. In which case, there would be staffing costs associated with encouraging use of the powers, creating new objectives and the affirmative regulations to create the legal framework, as well as with talking to businesses to ensure the impact of any new regulations that may be laid under the proposed powers are understood. Costs would be factored into overall resource planning and agreed priorities

Clause 93 – Implementation of agreements on sharing information for law enforcement purposes

30. The Scottish Government Legal Directorate (SGLD) resource would be required to implement SSIs for future international agreements that relate to information sharing in connection with law enforcement.
31. Should the SG’s amendments be accepted, the Scottish Ministers would require to implement SSIs for future international agreements that relate to information exchange in connection with law enforcement, unless they relate to reserved

matters (such as terrorism) or agreement is reached with UKG to implement for Scotland. This would require SGLD resource, however SGLD have advised that they do not foresee resourcing issues for this.

Conclusion

Clause 54(3) - Power of public authority to disclose information to registered persons

Clauses 61-77 - Smart data

Clause 92 - Disclosure of information to improve public service delivery to undertakings

32. We recommend consent for these provisions.

Clause 93 - Implementation of agreements on sharing information for law enforcement purposes

33. We recommend that consent for this provision is withheld.

Draft Legislative Consent Motion

34. The draft motion, which will be lodged by the Cabinet Secretary for Wellbeing, Economy, Fair Work and Energy, is:

“That the Parliament agrees that the relevant provisions of the Data Protection and Digital Information (No. 2) Bill, introduced in the House of Commons on 18 July 2022, relating to Clauses 54(3), 61-77 and 92, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government
May 2023

This Legislative Consent Memorandum relates to the Data Protection and Digital Information (No. 2) Bill (UK legislation) and was lodged with the Scottish Parliament on 15 May 2023

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