

medConfidential briefing on clauses 175-178 in the Data Protection Bill

The “framework for data processing by Government”, 23 subclauses added in committee:¹

1. covers all data held by any public body including the NHS (175(1)),
2. outside of ICO jurisdiction (178(5)),
3. outside of any tribunal (178(2)),
4. outside of Judicial Review (175(4),176(7)),
5. outside of wider human rights law (178(2,3,4)),
6. outside of international jurisdictions (177(4)),
7. changeable on a whim of Ministers (175(4)),
8. no effective Parliamentary oversight (175(6)),
9. applies retroactively (178(3)),
10. provides an automatic statutory defence for any data processing in any Government decision² taken to any tribunal/court 178(4)).

Clauses 175-178 should be removed,³ justified by a white paper and formal consultation, subject to a public debate, and full Parliamentary process. Other than exempting Government data handling from any oversight or scrutiny at all, it is unclear why this structured so differently to anything else in the Bill. Citizens will have no way to know, or appeal, how their data is used by Government or contractors.

This framework is not a template for trustworthiness or the rule of law. If the goal is a single document for Government to follow, that can be achieved with a statutory Code of Practice written by the ICO, as it is for every other field. Civil society was not consulted, and some bits of Government have been in touch to strenuously deny it was anything to do with them. This framework is the epitome of [secretive, invasive, and nasty](#).⁴

If this “framework” remains,⁵ we expect that there will be similar loopholes created to exempt “AI” and “health data” from any form of oversight, scrutiny, or debate. That is not the basis for a world leading data protection regime - it is the model of a tax haven that predates on citizens in the interests of the state. Comments in the House of Commons⁶ last week show the dangers of such powers, outside the rule of law, resulting from a change of Government priorities and principles.

In a world increasingly determined by data processing, this is a Henry VIII power to undermine the checks previously placed on many other powers.

¹ clauses 175-178, [page 99](#): <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0074/18074.pdf>

² e.g. DWP, Home Office, et al...

³ alongside Schedule 2 paragraph 4

⁴ <https://medconfidential.org/2017/the-home-office-secretive-invasive-and-nasty/>

⁵ The most likely “Framework” will be a renamed (so it’s not the same), updated (which is in progress), version of the “one page privacy impact assessment” “Data Science Ethics Framework” from the Cabinet Office, written about extensively here:

<https://medconfidential.org/tag/datascienceethicsframework/>

⁶ <http://hansard.parliament.uk/commons/2017-11-29/debates/BACE6118-3ACA-4FC5-96F4-26895C91BCC1/PointsOfOrder> - members of political parties may wish to consider the choices of a Prime Minister Corbyn, PM Rees-Mogg, or PM Farage or Clarke.

Details

It is unclear why this “framework” is not a “Code of Practice for data processing in Government”.⁷ A consolidated code would be a useful document, and there is no objection to it being statutory as other ICO written codes are.

The Home Office threatens to deport people based on a civil service typo,⁸ and the NHS is sending threatening letters to 8 day old babies⁹ - this Framework makes the reasons for those data processing failures entirely impossible to challenge or scrutiny. Schedule 2 paragraph 4 shows how Clause 15 can also be used to deny citizen rights over data processing. The reassurances given to the House during second reading and committee are entirely nullified by the subsequent amendments that added clauses 175-178.

Concern comes from Whitehall wishing to sneak through a Data Controller in Chief without public consultation or debate, and set them up not just as a data processor, but being able to rewrite data controllerships (in a manner which is deemed outside of the ICO's remit), and also cover up any mistakes.

The Framework exempts data controllers and processors from respecting rights, Clause 15 is the matching clause to remove from the citizen the ability to enforce those rights when the controller/processor does not). That every statutory bar imaginable is added to prevent oversight simply demonstrates how dangerous Clause 15 is, as exemplified by Schedule 2 paragraph 4.

This framework is not the equivalent of an opposing player in a match committing a foul by mistake, it is the equivalent of some players excusing any fouls, deciding red/yellow cards don't apply to them, acting as the referee, running any video replay through photoshop, and also getting to retroactively rewrite the rulebook for all past games at the end of the season when calculating the league table.

The entire principle of dissent from data processing within the NHS is predicated upon the data protection rights that the Framework allows Government to waive at will.

Clauses 175-178 and 15 are not the acts of institutions willing to respect data law and confident that every act they take will be lawful; they are acts of institutions who know the opposite is true and wish to cover it up.¹⁰

⁷ <http://amberhawk.typepad.com/amberhawk/2017/11/a-framework-to-undermine-the-icos-ability-to-enforce-the-new-data-protection-bill-across-the-public-.html>

⁸ <https://www.theguardian.com/uk-news/2017/sep/26/leave-uk-immediately-scientist-is-latest-victim-of-home-office-blunder>

⁹ <http://www.independent.co.uk/news/uk/home-news/nhs-letter-newborn-baby-eight-day-old-identity-documents-free-healthcare-right-violet-nik-horne-a7955211.html>

¹⁰ See pages 14 and 15 of our 2017 annual report: <http://medconfidential.org/wp-content/uploads/2017/09/annual-report.pdf> and a proposal for an alternate way forward on data processing in Government: <http://medconfidential.org/wp-content/uploads/2017/09/government-supplement.pdf>

Draft amendment:

Delete clauses 175, 176, 177, 178, and Schedule 2, paragraph 4.

If Government wishes to offer it as a Statutory Code of Practice that the ICO must produce, compliant with all laws and oversight, they are welcome to amend that back in during passage in the other place.

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