

medConfidential briefing on the Data Protection Bill - Lords Report stage. (10/12/17)

If you have interest in transparent or accountable government, due process and rule of law, or technology and privacy of medical records (or beyond), and you are in the House for Lords Report stage of the Data Protection Bill, medConfidential asks you to:

1. Support Lords Stevenson, Kennedy, & Clement-Jones' amendment to clause 175,
2. Support Lord Paddick & Lord Clement-Jones' amendments to clauses 176-178 (and support the ethics panel to be inserted after clause 178)
3. Express support for all amendments to clause 15 (including the HMG amendment), and Baroness Hamwee & Lord Paddick's amendment to remove Schedule 2 para 4 (which solves a problem created by the HMG amendment to c15).

This is why:

1&2) Clauses 175 and 176-178: the 'Framework for Data Processing by Government'

Without amendment, these clauses are a Henry VIII power to undermine the limits on data processing that Parliamentary process has placed on many other powers and programmes.

Government IT projects such as Universal Credit are often entirely based on data processing - and it is a lack of understanding of the nuances and details of data processing that causes them to fail. The clauses cover any data held by any public body - including medical records.

This 'framework'¹ allows the Secretary of State to exclude their decisions from the normal Data Protection rules governing data processing, in the naïve belief that this will make the projects they are responsible for go less badly...² Clause 178 (3,4,5) also exempt processing from regular scrutiny, and bind the choices of tribunals and oversight to reflect what Government may wish had happened, rather than what actually happened.

The amendment to clause 175 requires this framework to be written by the ICO. As laid, the "framework" need not meet any process requirements for a "code of practice", and any future Secretary of State can lay changes.

The amendments to clauses 176-178 remove exceptions and special cases for the framework compared with data processing by any others - the deletions add oversight back in.

We welcomed³ the Spring 2017 Conservative Manifesto statement that: "We will set out a strategy to rationalise the use of personal data within government, reducing data duplication across all systems, so that we automatically comply with the 'Once-Only' principle in central government services by 2022 and wider public services by 2025." This clause does not deliver on that commitment.

¹ We have more detail at <https://medconfidential.org/2017/framework-for-data-processing-by-government/>

² It won't.

³ <https://medconfidential.org/2017/a-first-look-at-the-manifestos/>

No promised strategy has yet been published or consulted upon. Instead, the “framework for data processing by Government”, as the ICO notes in her briefing,⁴ is far, far wider, and with no meaningful oversight. Working being done by the Cabinet Office under the ‘better use of data’ banner is entirely negated by this approach which undermines public trust and confidence in government services, almost all of which involve some degree of data processing.

In practice, the Home Office threatens to deport people based on a civil service typo,⁵ and the NHS is sending threatening letters to 8 day old babies.⁶ That is possible today under existing powers; this Framework makes public sector data processing more prone to such failures, and less open to scrutiny.

‘Tell us once’ requires a template for trustworthiness, the rule of law, and public confidence in competence - the current clauses provide none of those things. If the goal is a single process for all of 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 on this approach, and relevant bits of Government have been in touch to strenuously deny it was anything to do with them. This framework is not something upon which confidence in Government data processing - Government IT projects - can be built.

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 are not the acts of an institution that understands data protection, confident that every act they choose to make will be lawful; they are acts of institutions who know the opposite is true and wish to cover it up.

3) Clause 15 and Schedule 2, paragraph 4.

The Government amendment to clause 15 means that nothing in Schedule 2 at the time of passage can be removed other than by primary legislation: *only changes added by Regulation can be removed by Regulation*. While the changes proposed by the Government are welcome, this appears to be an unstated side-effect.

Immigration law is subject to its own range of statutes and processes - the Data Protection Bill is not the place to hardcode changes to immigration processes which will require primary legislation to remove. As such, the Hamwee/Paddick amendment to remove paragraph 4 of Schedule 2 should be supported, and if the Government wishes to continue with that proposal, it can be added by Regulation to the same effect with no loss of flexibility.

As drafted, the current Schedule 2 paragraph 4 text is unlikely to survive Brexit or the EU harmonisation process for the General Data Protection Regulation, given how it will relate to

⁴ <https://ico.org.uk/about-the-ico/what-we-do/ico-policy-views/>

⁵ <https://www.theguardian.com/uk-news/2017/sep/26/leave-uk-immediately-scientist-is-latest-victim-of-home-office-blunder>

⁶ <http://www.independent.co.uk/news/uk/home-news/nhs-letter-newborn-baby-eight-day-old-identity-documents-free-healthcare-right-violet-nik-home-a7955211.html>

citizens of EU countries over coming years. Requiring additional primary legislation to resolve that lack of foresight seems an unwise choice by Government or Parliament when it can be entirely avoided. With Government's choice of amendment to clause 15, Schedule 2 paragraph 4 should only be passed by Regulation under the super-affirmative procedure as proposed by the amendment from Lords Clement-Jones and Paddick, which is also in line with the Delegated Powers and Regulatory Reform Committee report.

Schedule 2 paragraph 4 also shows how Clause 15 can be used to deny citizen rights over visibility into data processing by choice of Ministers. Elsewhere (clause 7), the Bill removes the requirement for processing to be 'necessary' for the functions of a Government Department.

The reassurances on this clause given to the House during second reading and committee are entirely nullified by the exemptions added by subsequent amendments that added clauses 175-178 - the 'Framework for Data Processing by Government'. At the time of discussion of Schedule 2, clauses 175-178 will not have been debated at Report, so the only information available to Peers is the lack of amendments from the Government to those clauses - suggesting they see no problem with the status quo, which undermines all their reassurances.

Under the data processing framework of clauses 175-178 and rights removals of clause 15, Government will have Henry VIII powers to process personal data in any way it wishes, with no meaningful oversight from the ICO or citizens, let alone Parliament.

medConfidential

coordinator@medConfidential.org

10 December 2017