

## Flaws in the 'Framework for Data Processing by Government' (c185-188 of the Data Protection Bill) - with probing amendments

The 'Framework for Data Processing by Government' covers all data held by the NHS, HMRC, DWP and the Home Office, and all their contractors. Taken together, the flaws in the framework and the wide definition of public function allow departments to process data on citizens as they wish, outside of the oversight of Parliament. [As originally laid](#), the Framework was dangerous; now it's just neglectfully harmful.

Clauses 185-188 of the Data Protection Bill are a statutory base for a 'Framework for Data Processing by Government', which covers all functions of Government (c185(2)), and all "personal data" (c185(5)), including sensitive personal data held by any part of Government including the Intelligence Services (c185(1)). Clause 8 of the Bill [removes the GDPR requirement](#) that processing be "necessary" for a public function as approved by Parliament. A new framework can also be issued which has a binding retroactive effect on tribunals and courts (c188(4)). Clause 15 removes rights from data subjects by Regulation.

In the same way that Henry VIII clauses allow Ministers to do what they like in policy terms, this Framework would allow Ministers to do the same in data processing terms. The Bill was introduced with a recognition that the Data Protection Act will underpin our digital society for [a few years](#). In that time, AI will become more prevalent, as will whatever comes after AI. Ministers are taking for themselves alone the power to decide the details of how Government, whether this one or those that follow it, will get to use such technologies. Data processing under the Bill includes retrieval, consultation, use, disclosure, combination, restriction or erasure. Ministers will be able to determine the rules and safeguards that apply to Government use of data, and Government decisions made by an operation performed on personal data.

As Government decision-making increasingly relies on databases and data processing, it is essential for the rule of law that the rules governing data processing by Government promote transparent and accountable decision-making. Individuals and businesses need to be able to understand the basis on which Government exercises its power and makes decisions that affect their lives. Yet, the Government will be able to set for itself the rules on its use of data through the Framework.

That the Bill still needs amending to exclude sensitive processing and secret/classified data from the Framework is down to the flawed way that the framework was snuck out by DCMS - a department that does little data processing. The clauses for the Framework were added late in Lords Committee, and no draft Framework has been published (at this time<sup>1</sup>). While most of the worst aspects of the Framework were excised by the House of Lords, the proposal is still flawed in ways which would have been obvious had there been any consultation prior to the clauses being snuck into the Bill.

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<sup>1</sup> After initial circulation, news emerged from the Cabinet Office that DCMS would take over the ['data science ethics framework'](#), which will likely be watered down still further to be the new framework.

## The future of data processing - AI and analytics

Many MPs will be aware from casework that Government Departments are not necessarily the most accurate of data processors, often making decisions at odds with stated policy and the evidence citizens believe they provided. ATOS/Capita are the Carillion of the data processing world, and the Framework will place new barriers to achieving accountability for their failures.

All data processing is covered by the Framework; with only the outline of the Framework being offered to Parliament subject to a negative resolution - many of the most controversial decisions will be implementation choices of Departments and not subject to Parliamentary oversight. For example, the Framework would govern the decision on whether the NCC1 'rape form' should be processed by an AI?

In [written evidence](#) to the Home Affairs Select Committee's Delivery of Brexit: immigration inquiry, one data processing company widely used by Government offers a way to use analytics and data processing by 'by de-risking Home Office immigration decision-making by increasing objectivity', 'improving the Home Office's ability to be thorough at speed', and 'improving the Home Office's ability to use multiple sources of its data concurrently' which 'can mean incorporating more varied analyses for checks, such as social media analysis'.

The framework may also be written in a way which allows Departments to adopt AI for processing forms in a way which leaves Parliament and the public blind. There is no doubt that novel forms of data processing, such as analytics and AI, would improve data processing in the public sector; but they could also damage public confidence in the entire technology if used badly.

An ICO authored "Code of Practice on Data Processing by Government" would be a welcome step forward - following the pattern of the "Code of Practice on Age Appropriate Design" introduced by Baroness Kidron to make progress on the debate around children and social media. However, the Framework as currently drafted is not equivalent to such a Code, and as a Framework, it is not bound by any of the normal consultation processes for a Code (such as consulting with 'data subjects or their representatives').

Our amendments place the Information Commissioner as author, and turn the Framework into a Code of Practice for non-sensitive processing. We also require data processing to be for a purpose stated by Parliament, rather than any others chosen by a department. However, Government has also not yet made the case for a statutory framework being necessary, or even useful - it may be that the clauses should be removed in their entirety. Government admits that that should not change the processing that public bodies can do.

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## **medConfidential Amendments:**

If clauses 185-188 can't be removed from the Bill until they get properly thought through,

1. In clause 8, remove "includes" and insert in place "is"

*Explanation: the purposes of Government data processing is determined by Parliament.*

1. In c185(1), delete 'a document', and insert in place 'a Code of Practice',
1. In c185(5), after 'consult', insert 'treating the document as a Code of Practice, including with'

*Explanation: require this document to be a Code of Practice, requiring consultation and normal processes.*

- 4) In c185 (2)

At end insert ", but may not make provision related to sensitive processing."

*Explanation: exclude sensitive personal data from the framework unless Government can explain what the framework will allow to be done with it.*

- 5) In 185(1), 185(4), 185(5), and 187(1), 187(2), 187(3), and 187(4), delete 'the Secretary of State, and insert in place 'the Commissioner'

*Explanation: places the Bill under the authorship of the ICO, not Ministers.*

## **Additional likely drafting error:**

In clause Clause 172(2)(b), delete "a person" and insert in place "any data subject"

*Explanation: this looks like a drafting error, as while intended to apply to data subjects, "a person" may be an organisation who was involved in performing the "de-identifying" which then might be able argue that re-identification was intended to cause them significant financial loss (i.e. damage) with implications for liability.*

We also fully support the removal of paragraph 4 from schedule 2.

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