

**Written evidence submitted by Michael Veale, UCL; Dr Reuben Binns, University of Oxford and Professor Lilian Edwards, University of Strathclyde (DPB03)**

**INTRODUCTION**

1. We write as researchers in the area of technology, data protection, internet law and human–computer interaction. We wish to highlight important areas in this complex Bill which give the opportunity for the UK to lead the way in the area of digital governance.
2. Our research (Edwards and Veale) on the interaction between GDPR and artificial intelligence has been cited by many relevant governance bodies, such as the ICO, the Council of Europe and the Article 29 Working Party. Research in this area by Veale and Binns is pointed to in the upcoming Government Data Science Ethical Framework 2.0. Veale was consultant drafting author on the Royal Society and British Academy Report Data Management and Use: Governance in the 21st Century. Edwards was previously Specialist Advisor to the House of Lords Communications Select Committee in their report “Social media and criminal offences”.

**IMMIGRATION EXEMPTION**

3. It is our view that as currently proposed, the immigration exemption (Sch 2(4)) endangers an adequacy agreement (or similar) with the European Union.
4. Evidence is required on why such a provision is needed now when it has not been required before, as access rights are very similar to those in the Data Protection Act 1998.
5. Evidence is also required as to why this exemption should restrict the principle of purpose limitation, and be the only exemption to restrict this principle. The Government should provide an example of the consequences of the restriction of purpose limitation, why this restriction is practically useful and why it is proportionate.

**AUTOMATED DECISION-MAKING AUTHORISED BY LAW**

6. Clause 14 deals with the particular case in Article 22 where decisions based solely on automated processing with significant or legal effect on data subjects are not authorised by consent or contract, but by Member State law.
7. In some cases, this ground might be applicable to private companies, but primarily will be used by public actors. This is because contract and consent are both broadly inaccessible as grounds for public bodies when carrying out their functions.
8. This part of the Bill is not new (s 15, Data Protection Act 1998), and is relatively unchanged from the previous law. Yet it is being turned to govern AI and machine learning, which it was not initially designed to do. As a result, amending it is a priority.
9. The GDPR provides that member states can provide additional safeguards for these types of legally authorised decisions, as they can be highly impactful on people’s lives. Putting in place additional safeguards is wholly in line with European law.

## **Algorithmic accountability, transparency and explanations**

10. Recital 71 notes that an individual can request an explanation of an authorised decision that is significant or has legal effect, and is based solely on automated processing. Yet recital 71 is not binding in UK law. As the Government has noted, it does not believe that the ban on children being the subject of solely automated, significant decisions written in recital 71 is legally binding.<sup>1</sup>
11. This is concerning as, Recital 71 contains an inconsistent list of necessary safeguards compared to Article 22.<sup>2</sup> In particular, there is a “right to an explanation” of an automated decision which is consequently omitted from the binding text. Well specified algorithmic explanation rights for automated administrative decisions are found in the laws of other countries, such as in the French Digital Republic Act 2016, and are very feasible.<sup>3</sup>
12. The following simple amendment would insert such a right explicitly. It would not apply to decisions authorised by consent or contract, but only by decisions authorised by Member State law. Consequently, it would not impose a strengthened right on SMEs or burden businesses, but heighten accountability of public decision-making.

*Page 8, line 5, at end insert—*

*“ ( ) provide an explanation of the decision reached in relation to the data subject, or ”*

13. If, further to that, the Committee are interested in clarifying that explanation rights apply to automated decision-making on the basis of any ground, including consent and contract, the following amendment would do that. It moves the safeguard from recital 71 into the text of the applied GDPR.

*Page 174, line 33, leave out paragraph 20 and insert—*

*“In Article 22 (automated individual decision-making, including profiling)—  
(a) in paragraph 1—*

*(i) for “decision” substitute “significant decision for the purposes of section 13 of the 2017 Act”;*

*(ii) omit “which produces legal effects concerning him or her or similarly significantly affects him or her”;*

*(b) for paragraph 2(b) substitute “(b) is a “qualifying significant decision” for the purposes of section 13 of the 2017 Act; or”;*

*(c) in paragraph 3, after “point of view” insert “, to obtain an explanation of the decision reached after such assessment”.”*

## **Algorithmic transparency and law enforcement**

14. The *Intelligence services processing* part of the Bill (Part 4) contains a provision (Clause 98) providing a “right to information about decision-making”. This is based on the revised draft Council of Europe Convention 108.

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<sup>1</sup> HL Deb 13 November 2017, vol 785, col 1870 (Lord Ashton of Hyde).

<sup>2</sup> Sandra Wachter and others, ‘Why a right to explanation does not exist in the General Data Protection Regulation’ (2017) *International Data Privacy Law* 7(2).

<sup>3</sup> Lilian Edwards and Michael Veale, ‘Enslaving the Algorithm: From a ‘right to an explanation’ to a ‘right to better decisions’ (forthcoming) *IEEE Security & Privacy*.

15. The *Law enforcement processing* part (Part 3) does not contain such a provision. In particular, it also omits the relevant equivalents to the GDPR algorithmic transparency provisions.
16. We believe that the transparency requirements the Government has drafted into the intelligence part of the Bill should be placed into the Law enforcement processing part as well. This amendment would do this.

To move the following Clause (in Part 3)—

( ) *Right to information about decision-making*

(1) *Where—*

(a) *the controller processes personal data relating to a data subject, and*

(b) *results produced by the processing are applied to the data subject,*

*the data subject is entitled to obtain from the controller, on request, knowledge of the reasoning underlying the processing.*

(2) *Where the data subject makes a request under subsection (1), the controller must comply with the request without undue delay.”*

**Clarifying the human involvement needed to make a decision not “solely” automated**

17. There is high concern in the legal scholarship that a decision might be not considered “solely” automated, and thus trigger *none of the protections under Article 22 or Clause 14*, if this decision has a token human in the loop.
18. The Article 29 Working Party, in their guidance, have clarified that this is not the case. But courts do not have to listen to the Working Party, and their position is made less clear by Brexit.<sup>4</sup>
19. The Government have agreed with the interpretation of the Working Party. In debate, Lord Ashton of Hyde noted that

*“Indeed, I think that [a lack of meaningful input] is precisely the meaning that that phrase [based solely upon] already has. The test here is what type of processing the decision having legal or significant effects is based on. Mere human presence or token human involvement will not be enough. The purported human involvement has to be meaningful; it has to address the basis for the decision. If a decision was based solely on automated processing, it could not have meaningful input by a natural person. On that basis, I am confident that there is no need to amend the Bill to clarify this definition further.”*<sup>5</sup>

20. The phrase “meaningful input” does not appear in the Bill, nor in the GDPR. It is subject to considerable debate in the academic literature, regardless of the Government view.<sup>6</sup> If the Government agrees, then the following amendment would put the legal inclarity and concerns to rest, simply and without fanfare.

<sup>4</sup> Michael Veale and Lilian Edwards, ‘Clarity, surprises, and further questions in the Article 29 Working Party draft guidance on automated decision-making and profiling’ (2018) Computer Law & Security Review <https://doi.org/10.1016/j.clsr.2017.12.002>

<sup>5</sup> HL Deb 13 November 2017, vol 785, col 1869–70 (Lord Ashton of Hyde).

<sup>6</sup> Wachter et al *supra*; Edwards and Veale *supra*; Lee Bygrave ‘Minding the Machine’ (2001) Computer Law and Security Report.

Page 7, line 40, at end insert—

*“( ) A decision is “based solely on automated processing” for the purposes of this section and in relation to Article 22 of the GDPR if, in relation to a data subject, there is no meaningful input by a natural person in the decision-making process.”*

### **Algorithmic fairness and Equality Impact Assessments**

21. There is increasing concern in the research community that algorithmic systems can cause and perpetuate societal biases, even when they do not explicitly use sensitive data such as categories protected by the Equality Act 2010. For example, a system which tries to detect child abuse suffers from the best data only concerning children in state education, or with extensive contact with local councils, and therefore does not learn much about children in independent schooling, or who do not receive welfare, or who are in private healthcare systems. A system attempting to anticipate crime will have more data about certain crimes, in certain postcodes, which may be correlated with factors such as race.<sup>7</sup>
22. Public sector decisions are subject to the Public Sector Equality Duty in the Equality Act 2010. Yet there is no current requirement to document the efforts to meet this.<sup>8</sup> It seems appropriate that any system expected to have a chance of making significant, fully automated decisions authorised by law should have had to have carried out an Equality Impact Assessment before it was deployed. The following amendment would do that.

Page 7, line 40, at end insert—

*“( ) Before a controller takes a qualifying significant decision in relation to a data subject based solely on automated processing, the controller must carry out and publish an Equality Impact Assessment as means of documenting fulfilment of the public sector equality duty, in accordance with section 149(1) of the Equality Act 2010.”*

23. Further to this, it is problematic that significant decisions are only triggered when they affect individuals significantly. In particular, decisions might be discriminatory to an entire group, even if they do not deny people a certain service or render something unaffordable in that particular moment. Systemic discrimination must not be allowed under this law, yet scholars have noted that the individual focus of “significant” is problematic here.<sup>9</sup> Individuals who are subject to a system that discriminates on the basis of race should have the right to the safeguards provided for under the law even when they are in a strong enough societal position for it to be argued that it did not “significantly” affect them.

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<sup>7</sup> Solon Barocas and Andrew Selbst, ‘Big Data’s Disparate Impact’ (2016) California Law Review; Michael Veale and Reuben Binns, ‘Fairer Machine Learning in the Real World: Mitigating Discrimination without Collecting Sensitive Data’ (2017) Big Data & Society 4(2). See also the research at venues such as [www.fatml.org](http://www.fatml.org), [www.fatconference.org](http://www.fatconference.org), and the calls for research on algorithmic fairness from the UK Engineering & Physical Science Research Council in “TIPS 2”.

<sup>8</sup> See *R (Brown) v Sec of State for Work and Pensions* 2008 EWHC 3158 (Admin).

<sup>9</sup> Lilian Edwards and Michael Veale, ‘Slave to the Algorithm? Why a ‘right to an explanation’ is probably not the remedy you are looking for’ (2017) 16 Duke Law and Technology Review 18.

Page 7, line 34, at end insert—

*"or a group sharing a protected characteristic, within the meaning of the Equality Act 2010, to which the data subject belongs."*

### **Automated decisions and children**

24. Recital 71 of the GDPR notes that

*"The data subject should have the right not to be subject to a decision, which may include a measure, evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her, such as automatic refusal of an online credit application or e-recruiting practices without any human intervention. [...] **Such measure should not concern a child.**"*

25. The Article 29 Working Party have noted that because this is a non-binding recital, it is not clear how this should be interpreted. They caution that decisions should broadly not involve children, although there may be cases where they will.<sup>10</sup>
26. The Government has expressed a wish not to implement a hard ban on automated decisions concerning children. Yet there are no protections on the face of the Data Protection Bill that reflect recital 71's concern about children and automated decision-making. We therefore propose that all controllers engaging in those rare cases where qualifying significant decisions based solely on automated processing that may concern children must consult the Information Commissioner *regardless* of any efforts they make to mitigate risk. As it stands, if they claim they have mitigated risks, they do not need to consult with the Commissioner.

*To move the following Clause (in Part 2)–*

*"Automated decision-making concerning a child*

*(1) Where a data controller expects to take a significant decision based solely on automated processing which may concern a child, the controller must, before such processing is undertaken—*

*(a) deposit a data protection impact assessment with the Commissioner, and*

*(b) consult the Commissioner (within the meaning of Article 36 of the applied GDPR), regardless of measures taken by the controller to mitigate any risk.*

*(2) Where, following prior consultation, the Commissioner does not choose to prevent processing on the basis of Article 58(2)(f) of the applied GDPR, the Commissioner must publish the part(s) of the data protection impact assessment provided referring to qualifying significant decisions which may concern a child.*

*(3) The Commissioner must produce and publish a list of safeguards expected of any significant decisions based solely on automated processing which may concern a child.*

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<sup>10</sup> Michael Veale and Lilian Edwards, 'Clarity, surprises, and further questions in the Article 29 Working Party draft guidance on automated decision-making and profiling' (2018) Computer Law & Security Review <https://doi.org/10.1016/j.clsr.2017.12.002>

*(4) For the purposes of this section, the meaning of “child” is determined by the age of lawful processing under Article 8 of the applied GDPR.”*

**Biennial report on algorithmic decision-making**

27. Given this is a fast-moving technological area, and Article 22 has its origins in French law in the 1970s, and has remained largely unchanged since the 1995 Data Protection Directive, there is a dire need to keep these provisions under review. Consequently, the following amendment proposes a biennial report to Parliament on the functioning of Article 22. Such as report might be prepared by the new Centre for Data Ethics and Innovation, in collaboration with the Information Commissioner.

*To move the following Clause—*

*“Biennial report on automated decision-making*

*(1) After the end of each second calendar year the Secretary of State must prepare a report on any exercise of automated decision-making authorised by law under clause 14 since the preparation of the previous report under this section;*

*(2) A report under subsection (1) must (in particular) contain—*

*(a) details of the automated decision-making systems in question;*

*(b) details of safeguards applied to these automated decision-making systems, at least including those under recital 71 of the GDPR, Article 22 of the GDPR, and section 14 of this Act;*

*(c) the efficacy of the safeguards described in paragraph (b), in particular within the context of the public sector equality duty in 149(1) of the Equality Act 2010.*

*(3) The Secretary of State must lay before Parliament each report prepared under this section.”*

*March 2018*