

HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2017–19

Data Protection Bill

[HL]

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Committee staff

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Data Protection Bill [HL]

CHAPTER 1: INTRODUCTION

1. The Data Protection Bill was introduced in the House of Lords on 13 September 2017. It received its second reading on 10 October and is expected to begin its committee stage on 30 October.
2. The Bill repeals and replaces the Data Protection Act 1998 (the 1998 Act). It creates a new, comprehensive regime of data protection designed to safeguard the personal data of individuals. A key aim is to meet the need for enhanced data protection in the digital age. To this end the Bill responds to recent and ongoing changes in European Union and Council of Europe data protection law.
3. UK data protection law already closely dovetails with European law. The 1998 Act implemented the European Data Protection Directive.¹ This will be replaced by the General Data Protection Regulation (GDPR)² which comes into force on 25 May 2018. The Bill will operate alongside, and be supplemented by, the GDPR until that time. The GDPR is a major overhaul of data protection law in the EU and the UK Government is keen to reform domestic law to maintain compatibility with European standards. The Government's intention is that the GDPR will be incorporated into law in the UK as the UK withdraws from the EU, becoming part of "retained EU law" as a consequence of clause 3 of the European Union (Withdrawal) Bill. To this end the Data Protection Bill implements the exemption and derogation powers in the GDPR.
4. The Bill also gives effect to the Law Enforcement Directive,³ another EU measure designed specifically to deal with matters of law enforcement and obligations on public authorities engaged in the administration of justice.⁴ In addition, the Council of Europe is preparing to update the Convention for the Protection of Individuals with Regard to the Processing of Personal Data (Convention 108);⁵ the Bill seeks to reflect the terms of this updated convention. The close attention paid to the GDPR, the Law Enforcement Directive and the Council of Europe Convention suggests that the

1 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [OJ L 281](#) (23 November 1995)

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation), [OJ L 119/1](#) (4 May 2016)

3 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016, [OJ L 119/89](#) (4 May 2016). This instrument replaced the 2008 Framework Decision for the police and criminal justice sector, which was transposed into UK law via part 4 of the Criminal Justice and Data Protection (Protocol No 36) Regulations 2014 ([SI 2014/3141](#)).

4 Extensive parliamentary scrutiny of both the GDPR and the Law Enforcement Directive has already taken place: 'Data Protection Bill [HL] (HL Bill 66 of 2017-19)', House of Lords Library Briefing [LLN-2017-0065](#), 5 October 2017, pp 3-4. The proposals for the Bill were also subject to consultation by the Government: Department for Digital, Culture, Media and Sport, 'General Data Protection Regulation: Call for Views', updated 7 August 2017: <https://www.gov.uk/government/consultations/general-data-protection-regulation-call-for-views> [accessed 25 October 2017]

5 Council of Europe (CoE) Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data ([Convention 108](#)), opened for signature in 1981 and signed by the UK on 14 May 1981.

Government is keen for data protection law in the UK to continue to mirror European laws after Brexit in order to maintain the flow of data across borders.

5. The Bill also goes further than the various European instruments. The GDPR for example, although fairly comprehensive, is restricted to those areas in which the EU has competence. The Bill seeks to apply similar data processing rules to all areas of personal data processing, including areas not covered by the GDPR. In particular, it goes beyond the European area of regulation in creating a distinct national security regime and by creating new criminal offences.
6. **We draw attention to the interlocking relationship between the powers in this Bill and current EU law, which after Brexit will become “retained EU law” under the European Union (Withdrawal) Bill. Bills such as this will need careful scrutiny to ensure, so far as possible, that their provisions will continue to function post-Brexit without needing significant amendment.**

CHAPTER 2: MINISTERIAL CERTIFICATIONS AND APPEALS

7. Clauses 24–26 provide for exemptions from certain provisions of the GDPR scheme if required for the purpose of safeguarding national security or for defence purposes. An extensive range of measures may be disapplied in this way. According to clause 25, a certificate signed by a Minister of the Crown is “conclusive evidence of [the] fact” that exemption is required for the purpose of safeguarding national security. No equivalent certification process is provided for in respect of exemptions on defence-related grounds.⁶ Analogous provisions on the processing of data by the intelligence services are found in clauses 108–109, albeit that such exemptions apply only on national security (and not defence) grounds.
8. It is possible to appeal to the First-tier Tribunal against a certificate issued under clause 25. The Tribunal may quash the certificate if, applying the principles applicable in judicial review cases, the Tribunal finds that the Minister did not have reasonable grounds for issuing the certificate. It is not clear from this formulation whether the courts are excluded from considering other grounds such as procedural fairness. **We recommend that the Government clarifies the grounds of appeal for proceedings relating to ministerial certifications made under clause 25 or 109.**

⁶ It is noteworthy that “defence purposes”, which is used in relation to exemptions in clauses 24–26, is not defined in the Bill. Defence is a ground upon which EU Member States are permitted to restrict obligations under the GDPR (article 23). It is however unclear what exemptions will be created by the Bill for “defence purposes”.

CHAPTER 3: DELEGATED POWERS

9. The Bill creates many delegated powers, including Henry VIII powers, which although subject to affirmative procedure are very broad. For example:
- Article 9 of the GDPR prohibits the processing of “special categories of data” but permits states to create exemptions in certain circumstances. Clause 9 gives effect to these exemptions and the conditions permitting the processing of exempt data are set out in schedule 1. Clause 9(6) gives the Secretary of State regulation-making powers to amend schedule 1 by adding, varying or omitting processing conditions or safeguards. This is a very broad Henry VIII power, potentially affecting all of the conditions and safeguards in schedule 1. The Secretary of State also has power to make consequential amendments to the clause.
 - Clause 15 provides that the Secretary of State may, by regulations, alter exemptions in relation to data protection principles and rights beyond those provided for by the GDPR. This is a potentially extensive power, as it would allow the Secretary of State to alter the application of the GDPR, creating new legal bases for the performance of tasks in the public interest or in the exercise of official authority, and to alter significantly the range of data that are exempt from the protections in the Bill.
 - Schedule 11 sets out a range of exemptions to the data protection principles and the rights of data subjects, covering matters such as parliamentary privilege and legal professional privilege. Clause 111 creates a Henry VIII power enabling the Secretary of State by regulations to add to, amend or repeal the exemptions prescribed by schedule 11. The power is as potentially expansive as the equivalent power in clause 15.
 - Clauses 142 and 148 provide the Secretary of State with regulation-making powers to confer powers on the Information Commissioner to issue enforcement and penalty notices respectively. Penalties under the Bill and the GDPR are potentially very high and the discretion provided by both provisions is broad, including a Henry VIII power to amend provisions of the Bill itself.
 - Clause 170 gives the Secretary of State power by regulations to make such provision as the Secretary of State considers necessary or appropriate in connection with an amendment or replacement of the Council of Europe Data Protection Convention 108. This includes amending the Bill itself. This is a very extensive power granting broad discretion.
10. The foregoing represents a sample of some of the more extensive delegated powers in the Bill. The Delegated Powers and Regulatory Reform Committee has reported on the powers in the Bill in detail.⁷
11. **We draw attention to the number and breadth of the delegated powers in this Bill. This is an increasingly common feature of legislation which, as we have repeatedly stated, causes considerable concern. The Government’s desire to future-proof legislation, both in light of Brexit and the rapidly changing nature of digital technologies, must be balanced against the need for Parliament to scrutinise and, where necessary, constrain executive power.**

7 Delegated Powers and Regulatory Reform Committee, *6th Report* (Session 2017–19, HL Paper 29)