CLAUSES 70 AND 71 OF THE NEW DATA (USE AND ACCESS) BILL: WILL WE SEE A DIFFERENT APPROACH TO DELEGATED POWERS IN THE NEW PARLIAMENT?

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Introduction

This piece considers whether the delegation of legislative power is being appropriately circumscribed in the new Parliament. The question has arisen once again, this time in relation to the re-introduction of delegated powers that were first proposed by the previous government. Clauses 70(4) and 71(5) of the new Data (Use and Access) Bill reproduce, with some changes, Clauses 5(4) and 6(5) of the previous government's Data Protection and Digital Information Bill, which fell when the general election was announced. This piece focuses on the risks posed to the rule of law by excessive delegated powers. It has been recognised (see e.g., the Rule of Law Checklist adopted by the Council of Europe's Venice Commission) that the scope of executive law-making powers, whether law-making procedures allow sufficient scrutiny of proposed legislation, and whether the resulting legal frameworks provide legal certainty, all impact on the rule of law.

A Digital Information and Smart Data Bill was trailed in the King's Speech background briefing notes in July 2024. The Data (Use and Access) Bill [HL] was introduced in the House of Lords on 23 October and had its second reading on 19 November. Committee stage is scheduled from 3 December. A press release states that the Bill will "unlock the secure and effective use of data for the public interest". It has been noted that many provisions in the new Bill are "similar or identical" to provisions in the previous government's Data Protection and Digital Information Bill which fell when Parliament was dissolved ahead of the general election. Therefore, we also highlight below some responses to the previous Bill that remain relevant to consideration of the new Bill.

The Data (Use and Access) Bill is over 250 pages long and, among other things, makes provision about access to customer data and business data, digital verification services, national underground asset register, registers of births and deaths, data protection and privacy, and the information commission. This comment piece does not consider the bill in its entirety and instead focuses on delegated powers in Clauses 70 and 71 relating to data protection principles. For an overview of the Bill and the other delegated powers it contains, see the House of Lords Library Briefing here and the Explanatory Notes accompanying the Bill.

Will we see a different approach to delegated powers in the new Parliament?

There have been growing concerns about excessive delegated powers particularly in the wake of Brexit and the Covid-19 pandemic. For example, in a recent report co-authored by Bingham Centre researchers, 'Delivery vs Deliberation: Lessons in Law-Making from the Last Parliament', the IPPR highlighted that "concerns about the appropriate use of delegated

powers increased in the post-referendum period as the government introduced sweeping provisions in acts of parliament empowering ministers to make delegated legislation in a range of critical policy areas" and noted that "[m]ost prominently, ministers made heavy use of delegated legislation in relation to Brexit and the Covid-19 pandemic". Similar concerns were expressed in the UK Governance Project's final report which noted that "[s]econdary legislation is an appropriate, indeed indispensable, form of law-making … However, secondary legislation has progressively come to be used much more extensively and inappropriately". The Hansard Society, which is conducting a review of delegated legislation, has observed that "[o]ver the last century, but increasingly in the last few decades, more and more extensive powers to make law have been delegated to Ministers while parliamentary control over the exercise of those powers has eroded, to the extent that it now undermines the constitutional balance between the executive and the legislature".

It is in this wider context that we question whether the new government will take a different approach to delegated powers in this new Parliament.

As we have previously noted, the Attorney General Lord Hermer KC signalled a new approach to the use of delegated legislation during his swearing-in speech when he stated that the new government would "seek to promote the highest standards in how we legislate – seeking to increase accessibility and certainty in how we make law, including not abusing the use of secondary legislation". In the 2024 Bingham Lecture on the Rule of Law, Lord Hermer spoke of a "reset" including "a much sharper focus on whether taking delegated powers is justified in a given case, and more careful consideration of appropriate safeguards".

However, the Data (Use and Access) Bill is not the first bill this session to raise concerns about the use of delegated powers. In a comment piece on the Employment Rights Bill, we noted the extensive use of delegated powers in the Bill, with the delegated powers memorandum considering over 80 delegated powers, including 7 Henry VIII powers. The approach in the Product Regulation and Metrology Bill has been criticised, with the House of Lords Delegated Powers and Regulatory Reform Committee expressing deep concern that "so little of the policy is included in this skeleton Bill and so much is instead left to delegated legislation which will be subject to a much lower level of Parliamentary scrutiny" and finding that "the delegation to Ministers of law-making powers in this Bill involves legislative power shifting to an unacceptable extent from the democratically appointed legislature to the Executive".

It is against this backdrop that we consider Clauses 70 and 71 of the new Data (Use and Access) Bill.

Clauses 70 and 71 of the new Data (Use and Access) Bill

The House of Lords Constitution Committee considers all public bills for constitutional implications and we note at the outset that in a recent report on the new Data (Use and Access) Bill, it noted that "Clauses 70(4) and 71(5) give the Secretary of State discretion to determine and vary the conditions under which personal data can be processed" and concluded that "[w]e are not satisfied that the case has been sufficiently made to entrust the powers in these clauses to secondary legislation". This echoes comments made by the Constitution Committee in a January 2024 report on the previous government's Data

Protection and Digital Information Bill, where it stated that "[u]nder clauses 5 and 6 the Secretary of State is afforded discretion to determine and vary the conditions under which personal data can be processed" and recommended that "[t]he House may wish to examine further the breadth of the Secretary of State's powers in clauses 5 and 6 and consider whether such changes to the regulation of personal data should be the subject of primary rather than secondary legislation". In addition, the Delegated Powers and Regulatory Reform Committee (DPRRC), which examines whether the delegations in bills are appropriate, has now reported on the new Data (Use and Access) Bill and we discuss its findings in more detail below.

Clause 70 (lawfulness of processing) and Clause 71 (the purpose limitation) are contained in Part 5 of the new Data (Use and Access) Bill which relates to data protection and privacy. The current framework for data protection includes the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA 2018), as well as the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PEC Regulations).

Clause 70 of the new Bill would, among other things, amend Article 6 of the UK GDPR, which concerns the lawfulness of processing, to insert a new ground for lawful processing where "processing is necessary for the purposes of a recognised legitimate interest". Processing would be necessary for the purposes of a recognised legitimate interest only if it meets a condition in Annex 1. Schedule 4 would insert this new Annex 1 into the UK GDPR. The recognised legitimate interests set out in Schedule 4 relate to disclosure for purposes of processing described in Article 6(1)(e); national security, public security and defence; emergencies; crime; and safeguarding vulnerable individuals. Clause 70 provides that the "Secretary of State may by regulations amend Annex 1". See the table below for more details about this delegated power. The new recognised legitimate interest ground would not apply to processing carried out by public authorities in the performance of their tasks (Clause 70(2)(c)). (As set out in the Explanatory Notes, this is consistent with the existing restriction in respect of Article 6(1)(f) of the UK GDPR, which is explained in Recital 47 to the UK GDPR.)

Clause 71 of the new Bill would, among other things, amend Article 5 UK GDPR, which concerns principles relating to processing of personal data, and Article 6 UK GDPR. It would omit the current paragraph 4 from Article 6 UK GDPR and insert a new Article 8A about "the determination, for the purposes of Article 5(1)(b) (purpose limitation), of whether processing of personal data by or on behalf of a controller for a purpose (a "new purpose") other than the purpose for which the controller collected the data ("the original purpose") is processing in a manner compatible with the original purpose". Processing of personal data for a new purpose is to be treated as processing in a manner compatible with the original purpose where one of the circumstances set out in new Article 8A paragraph 3 applies. These include that "the processing meets a condition in Annex 2". Schedule 5 would insert this new Annex 2 into the UK GDPR. Clause 71 provides that the "Secretary of State may by regulations amend Annex 2". See the table below for more details about this delegated power.

Have we been here before? Looking back at the DPRRC's response to comparable powers in the previous government's Data Protection and Digital Information Bill and its new report on the Data (Use and Access) Bill

Clause 70(4) of the new Data (Use and Access) Bill finds its equivalent in Clause 5(4) of the previous government's Data Protection and Digital Information Bill (looking at the version brought from the Commons dated 6 December 2023). There are some differences between Clause 70(4) of the new Bill and Clause 5(4) of the DPDI Bill. These include, for example, differences between paragraphs 7-9 in the new Bill as compared to their equivalent in paragraph 7 of the DPDI Bill.

Data Protection and Digital Information Bill as brought from the Commons	Data (Use and Access) Bill as introduced
Clause 5(4) paragraphs 6-8 6. The Secretary of State may by regulations amend Annex 1 by— (a) adding or varying provisions, or (b) omitting provisions added by regulations made under this paragraph. 7. The Secretary of State may only make regulations under paragraph 6 where the Secretary of State considers it appropriate to do so having regard to, among other things— (a) the interests and fundamental rights and freedoms of data subjects which require protection of personal data, and (b) where relevant, the need to provide children with special protection with regard to their personal data. 8. Regulations under paragraph 6 are subject to the affirmative resolution procedure.	Clause 70(4) paragraphs 6-10 6. The Secretary of State may by regulations amend Annex 1 by— (a) adding or varying provisions, or (b) omitting provisions added by regulations made under this paragraph. 7. The Secretary of State may only make regulations under paragraph 6 where— (a) the requirement in paragraph 8 is satisfied, and (b) if the regulations add a case to Annex 1, the requirement in paragraph 9 is also satisfied. 8. The requirement in this paragraph is that the Secretary of State considers it appropriate to make the regulations having regard to, among other things— (a) the interests and fundamental rights and freedoms of data subjects which require protection of personal data, and (b) where relevant, the fact that children may be less aware of the risks and consequences associated with processing of personal data and of their rights in relation to such processing. 9. The requirement in this paragraph is that the Secretary of State considers that processing in the case to be added to Annex 1 is necessary to safeguard an objective listed in Article 23(1)(c) to (j). 10. Regulations under paragraph 6 are subject to the affirmative resolution procedure.

At the time, in a report published on 14 February 2024 looking at the DPDI Bill, the Delegated Powers and Regulatory Reform Committee (DPRRC) recommended removal of the delegated power conferred by Clause 5(4), emphasising that the grounds for lawful processing of personal data should not be capable of being changed by secondary legislation and that they were not convinced that the government had provided strong reasons for needing the power:

> *"The grounds for lawful processing of personal data go to the heart of the data protection legislation, and therefore in our view should not be capable of being changed by subordinate legislation. This on its own in our view makes the power inappropriate. But we are also not*

convinced that the Department has provided strong reasons for needing the power. Those reasons are based on the possibility that new difficulties might emerge with the application of the balancing test in Article 6(1)(f) of the UK GDPR. We do not find that convincing given that the relevant test has been present in the legislation since the UK GDPR first had effect. Unforeseen consequences arising from changes to legislation is an issue which is capable of applying to most, if not all, new pieces of legislation; and therefore it is not a convincing reason for having a power in this particular case. The onus is on the Government to ensure that the legislation is effective as enacted, without relying on delegated powers to make corrections in the future. This applies with even greater force since the power is not limited to dealing with perceived problems arising from the changes in the legislation, but would be capable of being exercised more broadly to give effect to changes in policy.

Accordingly, we consider the delegated power conferred by clause 5(4) to be inappropriate and recommend that it is removed from the Bill."

The new government has produced a delegated powers memorandum to accompany the Data (Use and Access) Bill and to assist the DPRRC in its scrutiny. Looking at the explanation under Clause 70 (power to amend new lawful ground for processing) starting at page 63, the justification for taking the power is very similar to the justification given by the previous government under Clause 5(4) starting at page 3 in the delegated powers memorandum accompanying the DPDI Bill (looking at the memorandum dated 6 December 2023). The differences between the justifications mainly relate to the differences in the paragraphs in the table above, including that Clause 70 provides that "the Secretary of State may only exercise the power to add conditions to new Annex 1 where the Secretary of State considers that processing in the case to be added to Annex 1 is *necessary* to safeguard an objective listed in Article 23(1)(c) to (j) UK GDPR" [italics added]. Are these changes sufficient to justify the delegated power in its new form?

In its recent report on the new Data (Use and Access) Bill, the DPRRC addresses this question and considers the changes made to the delegated power in Clause 70(4) as compared to Clause 5(4) of the DPDI Bill. Ultimately, the Committee "remain of the view that the power conferred by clause 70 is inappropriate and recommend that it is removed from the Bill". In particular, the Committee "do not consider that the condition which has been added to the Bill is sufficient to meet our objection", explaining that "[i]t seems to us that the requirement that the processing must be necessary to meet one of the public interest objectives listed in Article 23(1)(c) to (j) still leaves a wide margin of discretion, with the meaning of Article 23(1)(g) (which relates to the regulation of professions) in particular being unclear".

Clause 71(5) of the new Data (Use and Access) Bill finds its equivalent in Clause 6(5) of the previous government's DPDI Bill. There are some differences between Clause 71(5) of the new Bill and Clause 6(5) of the DPDI Bill (see for example the wording in paragraph 2(c)),* but not in paragraphs 5-8 which relate to the delegated powers.

Data Protection and Digital Information Bill as brought from the Commons	Data (Use and Access) Bill as introduced
Clause 6(5) paragraphs 5-8 5. The Secretary of State may by regulations amend Annex 2 by—	Clause 71(5) paragraphs 5-8 5. The Secretary of State may by regulations amend Annex 2 by—

(a) adding or varying provisions, or (b) omitting provisions added by regulations made under this paragraph. 6. The Secretary of State may only make regulations under paragraph 5 adding a case to Annex 2 where the Secretary of State considers that processing in that case is necessary to safeguard an objective listed in Article 23(1)(c) to (j). 7. Regulations under paragraph 5 may make provision identifying processing by any means, including by reference to the controller, the data subject, the personal data or the provision of Article 6(1) relied on for the purposes of the processing. 8. Regulations under paragraph 5 are subject to the affirmative resolution procedure.	(a) adding or varying provisions, or (b) omitting provisions added by regulations made under this paragraph. 6. The Secretary of State may only make regulations under paragraph 5 adding a case to Annex 2 where the Secretary of State considers that processing in that case is necessary to safeguard an objective listed in Article 23(1)(c) to (j). 7. Regulations under paragraph 5 may make provision identifying processing by any means, including by reference to the controller, the data subject, the personal data or the provision of Article 6(1) relied on for the purposes of the processing. 8. Regulations under paragraph 5 are subject to the affirmative resolution procedure.

Again, at the time the DPPRC recommended removal:

> *"The Department acknowledges in the memorandum that the rules governing further processing "relate to a fundamental principle in the UK GDPR that processing in a manner incompatible with the original purpose is not permitted". Given the fundamental nature of this principle, we do not consider it is appropriate to use subordinate legislation to make changes to the matters which are automatically to be treated as being compatible with the original purpose. The Department rely on unforeseen consequences arising from changes to legislation as the primary reason for the power. Again, we do not find this convincing. We also note again that the power is not limited to being used to make corrections but is available generally to give effect to changes in policy.*
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> *Accordingly, we consider the delegated power conferred by clause 6(5) to be inappropriate and recommend that it is removed from the Bill."*

The justification for taking the power given by the new government in the delegated powers memorandum accompanying the Data (Use and Access) Bill, looking at the explanation under Clause 71 starting at page 65, is almost identical to the justification under Clause 6(5) starting at page 4 given by the previous government in the delegated powers memorandum accompanying the DPDI Bill.

In its new report on the Data (Use and Access) Bill, the DPRRC refers back to its earlier report on the DPDI Bill, explaining that "we agreed with the statement made by the Department in its memorandum that the rules governing further processing 'relate to a fundamental principle in the UK GDPR that processing in a manner incompatible with the original purpose is not permitted'" and "[g]iven the fundamental nature of that principle and the fact that we found the Department's reasons for needing the power unconvincing, we took the view in our report that the delegated power was inappropriate". As regards the new Bill, the Committee "still remain of that view and accordingly recommend that the delegated power conferred by clause 71 is removed from the Bill".

In light of the conclusions of the DPRRC and the Constitution Committee, it will be important for Parliament to closely scrutinise the government's stated justifications for the delegated powers in Clauses 70(4) and 71(5) of the Bill, as well as the government's response to the Committees' reports.

In this respect, the Cabinet Office Guide to Making Legislation (2022) contains some guidance. It states that the "DPRRC's recommendations must be considered seriously to see whether it is possible to accept them" (para 15.31) and that the "Government can expect to be challenged on its response to any of the DPRRC's recommendations which falls short of full implementation" (para 15.29). In particular, "[c]areful handling will be required if the Government chooses not to accept the recommendations of the DPRRC" and "[t]he bill minister must provide a full justification for not accepting recommendations in their written response to the DPRRC" (para. 15.32). In its November 2021 report 'Democracy Denied? The urgent need to rebalance power between Parliament and the Executive', the DPRRC reflected on recent changes in this regard to the Cabinet Office Guide to Making Legislation. We note here some of its comments which remain relevant today (paras 145-146):

> *"This shift away from an assumption that the Committee's recommendations will usually be accepted by the government is reflected in a revision to the Guide between July 2015 and July 2017. In 2015, it stated that 'it is usual for the Government to accept most, if not all, of the DPRRC's recommendations'. In the current, 2017 edition, those words do not appear. It states: 'The Government can expect to be challenged on its response to any of the DPRRC's recommendations', and 'DPRRC's recommendations must be considered seriously to see whether it is possible to accept them'.*
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> *This change in the Guide is disappointing. It appears to suggest a cultural shift in the Government's approach to the Committee's recommendations. We urge the Government to amend the Guide so that it introduces an expectation that the Government will accept most, if not all, of the DPRRC's recommendations and, where any recommendation is not accepted, a full justification should be provided for not doing so in the Government's response."*

Finally, it is important to emphasise that scrutiny of the delegated powers in question is all the more important given the fundamental rights at stake. In the European Convention on Human Rights memorandum accompanying the Bill, the government recognises that some of the changes to data protection laws are likely to engage Article 8 ECHR (right to respect for private and family life) but states that "[h]aving assessed the changes to data protection laws, the Department has not identified any unlawful interferences with Article 8 rights arising from them".**

* In this comment piece, we have referenced the version of the DPDI Bill as brought from the Commons dated 6 December 2023, given the dates of the Constitution Committee and the DPRRC reports in January and February 2024 respectively. There is a later version of the DPDI Bill as amended in Grand Committee dated 25 April 2024. It is worth noting that Clause 71(5) paragraph 2(c) of the new Data (Use and Access) Bill adopts the wording of Clause 6(5) paragraph 2(c) of the DPDI Bill as amended in Grand Committee. In all other respects, Clauses 5 and 6 of the DPDI Bill are the same in the version as brought from the Commons and in the version as amended in Grand Committee.

** The government does recognise that "there is a possibility that certain changes in particular warrant additional analysis" and goes on to consider the amendments to Article 6 UK GPDR in more detail at paragraphs 52 to 57.

Conclusion

In conclusion, we would repeat that excessive use of delegated legislation is a threat to the rule of law and to democratic law-making. It is concerning that the new Data (Use and Access) Bill seeks delegated powers in Clauses 70(4) and 71(5) despite the DPRRC recommending the removal of comparable powers from its predecessor, the DPDI Bill. The DPRRC's previous recommendations were again highlighted during the new Bill's second reading debate on 19 November by Viscount Colville of Culross (Crossbench). As noted above, the DPRRC has now reported on the new Data (Use and Access) Bill and recommends that the powers be removed. Therefore, we look forward to seeing whether the government will heed the DPRRC's recommendations and whether we will see a new approach to delegated powers in this new Parliament.

It is also important to highlight at this stage that the new Bill may have implications for UK-EU data adequacy. In a 22 October 2024 letter to the Secretary of State for Science, Innovation and Technology, the House of Lords European Affairs Committee set out the key conclusions and recommendations which it draws from its recent inquiry into UK-EU data adequacy. The new Data (Use and Access) Bill was introduced in Parliament the following day, on 23 October. However, the Committee noted that the new government "plans a Digital Information and Smart Data Bill covering some of the same issues as its predecessor's DPDI Bill" and judged that its "key conclusions and recommendations … remain relevant, and could usefully inform the Government's new Bill and its engagement with the European Commission on the adequacy renewal process". Of particular relevance for present purposes, the Committee drew attention to several risks to the UK's adequacy status and recommended that "[t]he Government should engage with the Commission and other EU stakeholders, in good time, in order to explain and provide reassurance with respect to any planned data protection reforms, in particular in areas such as the independence of the Information Commissioner's Office and any new role for Ministers to add new grounds of 'legitimate interest' for data processing". More recently, during the new Bill's second reading debate, Lord Clement-Jones (Liberal Democrat) commented on the new ground of recognised legitimate interest in Clause 70 and stressed that "[c]rucially, there is no requirement for the controller to make any balancing test … taking the data subject's interests into account" and "[i]t just needs to meet the grounds in the annex". He concluded that "[t]hese provisions diminish data protection and represent a threat to data adequacy, and should be dropped".

Through the Rule of Law Monitoring of Legislation project, the Bingham Centre will continue to monitor the new Bill as it progresses through Parliament, focusing on scrutiny of delegated powers in the Bill.