Law Society of Scotland

Briefing for Second Reading

Data (Use and Access) Bill

November 2024

Photo: River Clyde and Dumbarton Rock

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Privacy Law Sub-Committee (**Sub-Committee**) welcomes the opportunity to consider and respond to the Data (Use and Access) Bill (**DUAB**) ahead of its Second Reading in the House of Lords on 19th November 2024. This replaces the previous Data Protection and Digital Information Bill (**DPDI**) that was introduced by the Conservative Government in 2023, and which fell upon the dissolution of Parliament prior to the 2024 General Election.

The Sub-Committee has the following comments to put forward for consideration.

General Remarks

We note the Government's stated aim of DUAB to harness the power of data for economic growth, to support a modern digital government and to improve people's lives. As part of this, the DUAB seeks to update and simplify the United Kingdom's General Data Protection Regulation (**UK GDPR**) and Data Protection Act 2018 (**DPA**), which are both designed to regulate and control data protection standards.

We note that much of the DUAB replicates what was contained in the DPDI albeit some of the proposed reforms are not present. However, we would re-iterate our previous concerns that the DUAB will mean that data protection law in the UK remains detailed over three main sources, namely the DUAB, UK GDPR and the DPA. We believe that the provisions contained within each of these three sources may lead to confusion or misunderstanding for different parties and organisations.

We further note the powers afforded to the Secretary of State (**Secretary**) in terms of personal data and the way it is controlled and regulated. We would urge that the Secretary does not overreach these powers and that a separation is maintained between the chief regulator (that being the newly proposed Information Commission) and the Government of the day.

In terms of the DPDI omissions from DUAB, we welcome the fact that some of the changes that were arguably not required have been removed. Changing the name in relation to certain obligations seems sensible as organisations would have found this confusing given that the obligations have only existed for a few years.

However we are disappointed to note that the provisions in relation to the use of the soft opt-in being extended to third sector bodies has been removed. In our view this change has been long overdue and should be re-introduced.

Specific Comments on the DUAB

The DUAB is divided into eight parts with sixteen schedules.

Part 1 (Access to Customer Data and Business Data)

This Part contains provisions relating to the access of customer and business data. It defines key terms and concepts for the regulation-making powers of this part.

Building on the concept of Smart Data, we note the powers that have been afforded to the Secretary under Clause 2 & 3 of the DUAB to set regulations requiring data holders to provide customer data to an authorised third party provider. We further note the stated intention of these powers is to facilitate competition in consumer services and provide better choice in particular markets, such as the increasing use of this data within the finance and communications sectors. On this point, we also note the powers afforded to the Treasury under Clauses 14 – 17 to make regulations requiring the Financial Conduct Authority (**FCA**) to facilitate in the governance of how data is shared within the finance sector.

We welcome these provisions and see it as beneficial that the use of regulators such as the FCA are being used to facilitate and strengthen the protection of the sharing of data within the UK.

Part 2 (Digital Verification Services)

This Part contains provisions relating to Digital Verification Services (**DVS**) which builds on technological advances in this area. We welcome this and believe that the switch to paperless documents (in the right circumstances) can be beneficial to both the legal profession and wider public in Scotland. However, we consider it as important that the use of such technology is subject to certain constraints.

In consideration of this, we note and welcome the proposed provision of a "trust framework" at Clause 28 – 29 of the DUAB that enables the Secretary (alongside the Information Commission) to prepare and publish the rules, standards and supplementary codes concerning the provision of DVS. Such measures will include the establishment of a DVS register under Clause 32 of the DUAB that will ensure that providers of DVS are subject to certain criteria and thus achieve accreditation to provide such services to the public.

We welcome this safeguard and hope the provisions will better enable commerce and the wider public to enjoy improved services through the expediency of data verification. For example, the buying and selling of age-restricted goods will be vastly improved, along with enhanced processes relating to pre-employment

screening. From a regulatory perspective, certain compliance measures that the legal profession in Scotland is subject to, such as Know-Your Customer and Anti-Money Laundering Requirements, will also be greatly improved.

However, given the importance of the information being shared, DVS needs to operate within strict parameters and it is crucial that users of such systems are well informed as to how the data is being held or retained (or shared with 3rd parties). As part of this, we consider that the duty of confidentiality must be respected and that the risks associated with a data breaches as to a person's identity are avoided. In particular we would like to ensure that any 3rd party providers are not permitted to use the data provided in any other way, for example to train AI.

Part 3 (National Underground Asset Register) and Schedules 1 & 2

This Part contains provisions relating to the National Underground Asset Register. We note that the territorial extent of these provisions to not apply to Scotland and therefore have no comments to make.

Part 4 (Registers of Births and Deaths) and Schedules 3

This Part contains provisions relating to the Registers of Births and Deaths. We note that the territorial extent of these provisions to not apply to Scotland and therefore have no comments to make.

Part 5 (Data Protection and Privacy)

This Part contains provisions relating to Data Protection and Privacy. We note that the amendments to the UK GDPR and DPA extend to the whole of the UK (save for one provision relating to the Information Commission's seal not being applicable to Scotland). We also note that much of what was contained in the DPDI in relation to this Part remains in the proposed DUAB.

Scientific Research

In reference to Clause 67, we note the broadening of the term "scientific research" so as to include *"any research that can reasonably be described as scientific, whether publicly or privately funded and whether carried out as a commercial or non-commercial activity".* Whilst supportive on advances in the area of science and research, we would welcome further clarity on what constitutes "*reasonable*" for the purposes of *"scientific research"* . This is in consideration of the new Article 4 (4) (a) UK GDPR) which we believe only provides limited clarity on this point. We would therefore ask that further guidance or working examples are issued so as to ensure that parameters are set to protect against the unnecessary disclosure of a person's data. We do note, however, that provisions have been strengthened in terms of data controllers to obtain consent for the processing of personal data for such purposes and welcome this approach.

Automated Decision Making

With reference to Clause 80 of the DUAB relating to automated decision making, we note that the Bill will remove the right for an individual not to be subject to automated decision making and replaces it with a right to human intervention in relation to "significant decisions" affecting them. Clause 80 amends Article 22 of the UK GDPR with a new Article 22A-D. We consider that this provides important and essential safeguards for individuals subjected to automated decision making which has a direct (legal or "significant") impact upon their lives. We believe that individuals must be able to understand the direct impacts that data processing has upon their lives and that they must be able to challenge this to ensure public trust.

On this point, we note that the Equalities and Human Rights Commission published a paper[1] in September 2022 outlining concerns about AI and discrimination in the public sector. We are of the view that these protections should be strengthened not weakened, and this is likely to depend on the definition of "significant decisions". This could threaten the UK's adequacy with the EU.

We also wish to highlight the article from the ICO investigation into the use of AI and automated decision-making in benefits administration by local authorities[2]. We note that the restrictions remain in place when special category data is used which was an amendment made in relation to the equivalent provision in the DPDI. We are uncertain as to the logic of this amendment as what is important about the protection currently contained in Art 22 is the impact that the decision has, not necessarily the data used. It is clear that the use of AI is increasing and that it will exponentially increase the use of automated decision making. We are therefore of the view that there has to be robust protection in place to ensure trust and to protect against discrimination and resultant unfair decisions.

Introduction of Special Category Personal Data Classes

We note that the DUAB includes a new mechanism through the new Article 11A for the introduction of more classes of special category personal data via secondary legislation. We are concerned that such a mechanism will provide the Government with significant power to affect data protection law in the UK with limited legislative oversight. For example, the previous DPDI proposed that all children's data should be treated as special category data. However following legislative scrutiny of this proposal, the classification was dropped as a result of the strength of objections which pointed to the significant impact such classification would have on schools, healthcare and the private sector. We are therefore concerned that this new Article 11A mechanism will undermine such safeguards and mean that significant changes to UK data protection law can be made without such legislative scrutiny and oversight.

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[1] Artificial Intelligence in Public Services

[2] Addressing Concerns on the Use of AI by Local Authorities

Changes to the Assessment of Adequacy of Third Countries

We further note the changes being proposed under Schedule 7 (thereby amending Chapter 5 UK GDPR) to the process for the Secretary of State to assess adequacy of third countries through the creation of a new "data protection test" under Article 45B. Whilst the simplification of this process is arguably a welcome step, we do have concerns that this will further depart the UK from the detailed scrutiny that is undertaken at a European level of adequacy, giving rise to a likelihood of divergence between the UK making adequacy regulations in respect of third countries which are not comparatively granted adequacy in Europe. Given the UK's own adequacy decision from Europe is due to be reviewed in 2025 (which would likely coincide with when this Bill would come into force), we are concerned that a risk exists in this change in approach which will impact the UK's own adequacy decision. Whilst the reforms were inherited from the previous DPDI, this is of heightened concern given the timing of the DUAB.

Data Subject Access Requests

We note that the DPDI's proposals to amend the exemption contained at clause 53 DPA to allow for refusing to respond to a data subject access request when *"manifestly unfounded or excessive"* to *"vexatious or excessive"* has been dropped. Whilst we viewed this previous proposal as having certain issues in itself, we did feel that it attempted to address a current issue that many organisations face with unreasonable DSARs or DSARs which are, for example, often used as a tactic to circumvent disclosure processes in litigation. We therefore see that the DUAB offers an opportunity to introduce more valuable reforms in this area. However, the DSAR reforms as are currently proposed in the DUAB broadly reflect ICO guidance and what is currently seen in practice in any event. Therefore, we are of the view that DUAB has failed to go one step further to help those organisations that struggle with unreasonable DSARs and that this is a missed opportunity for valuable reform to such data requests.

Part 6 (The Information Commission) and Schedule 14

This Part contains provisions to establish a body corporate (the Information Commission) to replace the existing regulator (the Information Commissioner) which is structured as a corporation sole.

In relation to the concerns we expressed on the DPDI allowing the Secretary's ability to set strategic priorities, we welcome the removal of the imposition on the Information Commissioner's Office to follow any such priorities. This is alongside the removal of the Secretary's influence over the ICO's preparation of certain codes of practice.

We believe that both provisions would have fundamentally undermined the independence of the Information Commission by influencing the way that data protection is enforced in the UK and risked aligning its principles with the Government of the day. We saw this as being of significant concern given the

importance of a regulator performing its functions in an impartial and objective way. The removal of these provisions is therefore a welcome step.

We further note that certain enforcement powers provided under the DPDI have been re-iterated in the DUAB. For example, we note Clause 102 of the DUAB inserts new sections 164A and 164B into the DPA. This requires that data controllers have mechanisms in place in dealing with complaints from data subjects and that they take appropriate steps to deal with any such complaints. We welcome these measures given that data controllers will be given the opportunity to resolve complaints in the first instance and take measures to remedy any breach without undue delay. At the same time, we believe that this will free up the time of the Information Commission to enable them to focus on other areas of its regulatory governance and data protection. We also believe this approach best reflects what is happening in practice throughout the UK, albeit protects this by placing it on a statutory footing.

Part 7 (Other Provision About Use Of, Or Access to, Data)

This Part contains, amongst other items, information standards for health and social care in England. We have no comments to make in relation to this part.

Part 8 (Final Provisions)

This Part contains further provisions relating to certain powers granted to the Secretary. We have no comments in relation to this part.

For further information, please contact:

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