



Ein cyf/Our ref MA/FM/0609/24

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair of the Legislation, Justice and Constitution Committee

8 March 2024

Dear Huw

I am writing in response to the Legislation, Justice and Constitution Committee's (LJCC) report on the Supplementary Legislative Consent Memorandum (Memorandum No.3), laid in respect of the Data Protection and Digital Information Bill ('the Bill') on the 26 January.

I have reflected on the conclusions in your report and my response is set out below. To note, where I have used clause references from the Bill, these are consistent with the latest version, as brought from the Commons, dated 6 December.

Legislative consent

I am pleased that the Committee is of the view that the majority of the provisions within LCM No.3 fall within the legislative competence of the Senedd under Standing Order 29, and therefore require the consent of the Senedd.

I note that the Committee remains of the view that clauses 74 and 78 (clauses 54 and 56 as introduced), and also amendments 79 and 80 which related to those clauses, do not make provision for any purpose within the legislative competence of the Senedd. However, I remain of the view that these provisions are within legislative competence, in so far as these clauses relate to devolved matters of public services, economy and business.

Indeed, on 6 February Julia Lopez MP, Minister of State for Data and Digital Infrastructure, wrote to update me on their own devolution analysis on this Part of the Bill. Previously their position had been that provisions within this Part of the Bill were reserved under the internet services reservation and therefore did not require consent of the Senedd. Her letter noted that under the Welsh Devolution Guidance Note consent should be sought when conferring or imposing reserved functions on a devolved Welsh authority. She added that as a result, whilst UKG maintain that these functions are reserved, UKG are now of the view that agreement should be sought for clause 74 and clause 78(3).

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

I also note the Committee's view that the amendments to the Bill relating to the National Underground Asset Register will modify the legislative competence of the Senedd. I agree with this conclusion, and you will have seen that I highlighted constitutional policy concerns in paragraph 22 within LCM No.3 around regulation making powers under section 79 of the New Roads and Street Works Act 1991 (so far as exercisable in relation to Wales) being transferred from Welsh Ministers back to the Secretary of State.

Quality of the LCM

The supplementary LCM was laid as near as possible to the two week period required by Standing Order 29.2, which involved analysis of a significant number of amendments in a short period with a view to enabling timely scrutiny. I note the Committee's concerns and remain committed to enabling efficient discharge of the legislative consent process.

There is a clear tension between a two-week period and the ability to provide detailed information. I am aware of the Committee's critical view of these occasions when the Welsh Government has exceeded the two-week period to develop a more detailed response.

Specific clauses of the Bill, outstanding matters and the UK-EU dynamic

I note that the remainder of the Committee's report provides comments regarding specific clauses of the Bill, matters the Committee consider to be outstanding from first report, as well as the UK-EU dynamic. The report also sets out a series of related recommendations and my response to each of these is below:

Recommendation 1 - In line with recommendation 1 in our first report, the First Minister should provide to us, as soon as possible, the Welsh Government's assessment of the devolved implications of a UK-wide Code of Practice about the disclosure of information and the powers being provided to the Secretary of State in the Bill.

Response:

Clause 74 establishes a new information gateway and creates a permissive power for public authorities to share information with registered providers for the purpose of providing digital verification services. Clause 78 gives powers to the Secretary of State to publish a Code of Practice to which public authorities who decide to share information under clause 74 must have due regard.

According to UK Government, this Code will provide information about the necessary steps public authorities should undertake when sharing data through the information gateway. It will signpost relevant legislation and set out best practices for public authorities, including practical guidance on the process public authorities should follow when sharing information.

A UK-wide Code of Practice would apply to all UK public bodies, including those in Wales.

My officials continue to be in discussions with UK Government counterparts with regard to the devolved implications of these provisions.

Once these discussions have concluded, an update of the outcome will be provided through the LCM process.

Recommendation 2. In line with recommendation 2 in our first report, the First Minister should provide to us, as soon as possible, the Welsh Government's assessment of the devolved implications of the regulation-making powers in Part 3 of the Bill.

Response:

Part 3, clauses 85-107 (clauses 61-77 as introduced) makes provision about sharing customer and business information to improve data portability (Smart Data). These clauses allow for the secure sharing of data, upon the customer's request, with authorised third-party providers (ATPs), who would then use the data to provide services to the customer, including automatic account switching, personalised market comparisons and account management services. The customer can be a consumer or a business.

The clauses in Part 3 contain regulation-making powers which will enable the Secretary of State or Treasury to require suppliers (as specified in the regulations), and other relevant persons, to share customer data and business data, to introduce Smart Data schemes in markets across the economy.

As currently drafted, provisions in Part 3 would enable the Secretary of State to make regulations which would apply to the provision of Smart Data schemes within Wales. This is an area where both UK Government and Welsh Government agree devolved subject matter is involved.

Recommendation 3. Given the "constitutional policy concerns" regarding the National Underground Asset Register provisions in the Bill and specifically the return of powers under section 79 of the 1991 Act (so far as exercisable in relation to Wales), the First Minister should escalate this issue to Ministerial level discussions, up to and including the formal dispute resolution procedures, as opposed to discussion at official level.

Response:

I wrote to Julia Lopez MP, Minister of State for Data and Digital Infrastructure, on 23 January setting out our concerns around the UK Government's proposed legislative approach and the impact of the National Underground Asset Register provisions on Welsh Ministers' powers.

Recommendation 4. The First Minister should keep this Committee up-to-date on the discussions between the Welsh Government and the UK Government – at both official and Ministerial level – relating to the National Underground Asset Register provisions.

Response:

An update on the outcome of these discussions will be provided through the LCM process.

Recommendation 5. The First Minister should provide us with details about any action the Welsh Government considers it could take to remedy the transfer to the Secretary of State through amendment NC42 of existing delegated powers in section 79 of the 1991 Act, which are currently exercisable by the Welsh Ministers (so far as exercisable in relation to Wales). Such details should include whether the Welsh Government considers that it would be within the legislative competence of the Senedd to bring forward provisions in a Bill that would re-delegate to the Welsh Ministers the regulation-making powers under section 79 of the 1991 Act which are being transferred to the Secretary of State.

Response:

Legislative competence for the subject matter of Part 3 of the New Roads and Street Works Act 1991 is devolved to Wales. As the Senedd is aware, the current version of

the Bill will (under clause 141, previously amendment NC42) transfer existing executive functions of the Welsh Ministers in this area so as to be solely exercisable by the Secretary of State in relation to England and Wales.

The Welsh Government considers that it would be within the legislative competence of the Senedd to bring forward provisions in a Bill that would re-delegate to the Welsh Ministers the regulation-making powers under section 79 of the 1991 Act (which are being transferred to the Secretary of State). In that scenario, as such a provision would modify a function of a Minister of the Crown, the Welsh Ministers would need to consult the appropriate UK Minister (under paragraph 11(2) of Schedule 7B to the Government of Wales Act 2006).

Recommendation 6. In line with recommendation 3 in our first report, we would welcome a commitment from the First Minister that, where the Welsh Ministers do not make regulations to implement international agreements, and powers in the Bill to do so are instead exercised by the Secretary of State, in any update to the Senedd the Welsh Ministers must provide a detailed explanation in advance of such regulations being made by the Secretary of State.

Response:

Should this occur, the Senedd will be updated of any powers being exercised in devolved areas through the usual process.

Recommendation 7. In line with recommendation 4 in our first report, the First Minister should provide to us, as soon as possible, the Welsh Government's assessment of the Bill's provisions relating to interview notices.

Response:

Clause 41 Interview Notices (clause 38 as introduced) inserts new provisions into the Data Protection Act (DPA) 2018 which confer powers on the Information Commissioner to require certain persons to attend an interview, where non-compliance with particular requirements of the DPA 2018 are suspected.

The provision contains an exemption for the Office for Standards in Education, Children's Services and Skills (OfSTED). However, a similar exemption has not been provided for Welsh Ministers, as the regulator for the equivalent services here in Wales. This means that, as currently drafted, the Information Commissioner would be able to issue an interview notice on these matters in Wales, but not in England. This is still the subject of ongoing discussions.

An update on the outcome of discussions with UK Government in relation to this clause will be provided in due course through the LCM process.

Recommendation 8. The First Minister should confirm if the Welsh Government has received from the UK Government its risk assessment on the Bill and the loss of the UK's current adequacy decision. If it has been received and if the terms of sharing permit, the risk assessment should be shared with the Senedd.

Response:

Welsh Government has not received a copy of the UK Government's risk assessment on the potential impact of the DPDI Bill on the EU's data adequacy decision. On 1 March, the Minister of State for Data and Digital Infrastructure wrote to me, again declining our request for a copy of the UK Government risk assessment, stating that it is important for UKG officials to be able to conduct candid discussions during the policy making process.

Recommendation 9. The First Minister should clarify if there are circumstances in which the Welsh Government would recommend that the Senedd gives its consent to the relevant provisions in the Bill in spite of its concerns about the implications for the UK's current adequacy decision.

Response:

As the Committee will be aware, our recommendations are based on principles which recognise there may be sensible and advantageous circumstances for provision to be made in a UK Bill for Wales. Our final position typically involves consideration of a range of constitutional, policy, political and other factors. Our principles are applied in the context of often complex and fluid negotiations. Different factors have to be weighed up in the effort to secure our policy objectives.

Recommendation 10. The First Minister should confirm whether the Welsh Government is aware of any UK-EU level discussions about the Bill, in particular in relation to the UK's current adequacy decision.

Response:

In her letter of 1 March, the Minister of State for Data and Digital Infrastructure stated that UK Government have been engaging with the European Commission since the commencement of the Bill's consultation process. However, as adequacy is not devolved, Welsh Government has not been party to these discussions.

I am copying this letter to the Minister for Economy, Minister for Finance and Local Government, Minister for Social Justice, and the Counsel General. A copy will also be sent to the Chair of the Culture, Communications, Welsh Language, Sport, and International Relations Committee.

Yours sincerely



MARK DRAKEFORD