Jeremy Miles AS/MS
Ysgrifennydd y Cabinet dros yr Economi, Ynni a'r Gymraeg
Cabinet Secretary for Economy, Energy and Welsh Language

Llywodraeth Cymru
Welsh Government

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

Chair of the Legislation, Justice and Constitution Committee

16 April 2024

Dear Chair

I am responding to the 15 March letter from the Committee to the former First Minister relating to his 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').

I have considered the questions posed and my response to these are at Annex 1.

As the Committee is already aware, since the Bill's introduction the Welsh Government has been in discussions with the UK Government, at both Ministerial and Official level, regarding the devolved implications of a number of provisions within the Bill. Through these discussions, the Welsh Government sought powers for Welsh Ministers, as well as an exemption, across four separate parts of the Bill as follows:

- Part 1, Data Protection – clause 41 Interview Notices;
- Part 2, Digital Verification Services (DVS) Information Gateway - clause 78 Code of practice about the disclosure of information;
- Part 3, Customer Data and Business Data - clauses 85-107;
- Part 4, Other provision about Digital Information - clause 126 Implementation of law enforcement information sharing agreements, clause 127 Meaning of "appropriate national authority", and clause 151 Regulations; and,
- Part 4, Other provision about Digital Information - clauses 138-141 National Underground Asset Register.

Our position, as set out in the Legislative Consent Memoranda laid on the Bill to date, has been that consent could not be recommended for several of the Bill's provisions whilst these discussions were ongoing.

Our discussions have now concluded. We received a 'final package' of proposed amendments from the UK Government which it states it would be willing to make should Welsh Ministers deem them sufficient to recommend consent to the Bill in the Senedd. Following careful consideration of the package, we informed the UK Government on 9 April

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Jeremy.Miles@llyw.cymru
Correspondence.Jeremy.Miles@gov.wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

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.

that the proposed package of amendments was not sufficient and, therefore, the Welsh Government would not be recommending consent for the Bill.

Whilst the Welsh Government is supportive of the policy intent behind much of the Bill, the proposed amendments represent a significant lack of movement from the UK Government beyond the offer of consultation provisions. This was despite the Welsh Government being clear throughout the Bill's passage that the inclusion of any form of consultation provision in areas we consider to be devolved, or the creation of concurrent powers without a consent mechanism, is contrary to both our principles on UK Bills, as well as the Senedd's consistent opposition to similar approaches.

In respect of the new National Underground Asset Register (NUAR) provisions, we reiterated that the removal of a devolved executive function from the Welsh Ministers is completely inappropriate. Furthermore, we emphasised that the amendment proposed by the UK Government, which would ensure Welsh Ministers retain their existing regulation making powers under section 79 of the New Roads and Street Works Act 1991, should not be conditional upon us agreeing to any of the other amendments proposed and therefore should be tabled.

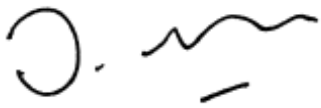
Annex 2 sets out more details of the provisions in question, detailing the requests we made to the UK Government and the amendments it proposed in response.

We have asked the UK Government to reconsider its position on the concerns we have raised on the Bill in order for us to reach a satisfactory resolution which would enable a recommendation to the Senedd for consent to the Bill. For the purposes of clarity though, the Welsh Government will not be recommending the Senedd consent to this Bill as it is currently drafted.

We will be laying a further Supplementary Legislative Consent Memorandum (Memorandum No.4) in respect of amendments tabled on the Bill by the UK Government on 13 March. This Memorandum will also state that Welsh Government will not be recommending the Senedd consent to this Bill as it is currently drafted.

I am copying this letter to the Chair of the Culture, Communications, Welsh Language, Sport, and International Relations Committee.

Yours sincerely



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Annex 1

Question 1 a) Please would you share with us the correspondence received on 6 February 2024 from Julia Lopez MP, the Minister of State for Data and Digital Infrastructure. **Response:** We have sought agreement from UKG to share a copy of this correspondence and are awaiting a reply.
Question 1 b) We would welcome your views on the different criteria and approaches that appear to be applied by the UK Government, the Welsh Government and the Senedd's Standing Orders when assessing whether a Bill's provisions require the Senedd's legislative consent. **Response:** The Welsh Government is committed to the Sewel convention as reflected in s107(6) of the Government of Wales Act 2006. In securing the legislative consent of the Senedd, we will continue to comply with the Senedd's Standing Orders.
Question 2) Please would you provide details of any devolved implications of the regulation-making powers given to the Secretary of State and the Treasury in Part 3 of the Bill. **Response:** A summary of the devolved implications of Part 3 of the Bill can be found in Annex 2.
Question 3 a) Please would you share with us the correspondence sent on 23 January 2024 to the Minister of State for Data and Digital Infrastructure. **Response:** We have sought agreement from UKG to share a copy of this correspondence and are awaiting a reply.
Question 3 b) In her letter on 6 February 2024, did the Minister of State address the Welsh Government's concerns regarding the NUAR provisions? If not, have the concerns been addressed in subsequent correspondence (i.e. the 1 March 2024 letter referred to in the responses to recommendations 8 and 10) or is the Welsh Government still awaiting a response on this matter? **Response:** The Minister of State did not address our concerns regarding the NUAR provisions in her correspondence of 6 February or 1 March. A number of suggested amendments to the NUAR provisions were included within the package of proposed amendments received from the UK Government in February. Please see Annex 2 for further detail.
Question 4) In response to recommendation 8 and recommendation 10 in our report on Memorandum No. 3, you refer to correspondence received from the Minister of State on 1 March 2024 in respect of the UK Government declining to share with the Welsh Government a copy of its risk assessment on the potential impact of the Bill on the UK's EU data adequacy decision, and in respect of the UK Government's engagement with the European Commission on the Bill. Please would you share with us the correspondence received on 1 March 2024.

Response:
We have sought agreement from UKG to share a copy of this correspondence and are awaiting a reply.

Annex 2

Part 1, Data Protection – clause 41 Interview Notices

In Part 1 of the Bill, 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. This provision currently includes an exemption for the Office for Standards in Education, Children's Services and Skills (OfSTED), in so far as it is a controller or processor in respect of information processed for the purposes of functions exercisable by His Majesty's Chief Inspector of Education, Children's Services and Skills by virtue of section 5(1)(a) of the Care Standards Act 2000.

Amendments sought by Welsh Government
Welsh Government requested that a similar exemption be granted to Welsh Ministers as the Regulator for the equivalent services in Wales.

Amendments proposed by UK Government
UK Government proposed to remove OfSTED's exemption to the Information Commissioner's interview notice powers under clause 41. Further, that OfSTED's existing exemption to the Information Commissioner's assessment notices powers under section 147(6) of the DPA 2018 would also be removed. The Information Commissioner's Office, the Department for Education and OfSTED are understood to be in agreement that the exemption is not needed and are content for it be removed.

Welsh Government position
Welsh Government are content with this proposed amendment as it addresses our concerns around ensuring parity in our policy for Wales.

Part 2, Digital Verification Services: Information Gateway - clause 78 Code of practice about the disclosure of information

Part 2 of the Bill makes provision for Digital Verification Services (DVS). Together these clauses make provision about the sharing of information for the purpose of providing DVS, conferring a permissive power on public authorities to provide personal information about individuals (subject to consent) to organisations providing DVS. This includes:

- a 'DVS trust framework' of rules concerning the provision of DVS (clause 53),
- a register of organisations providing DVS (clauses 63-73);
- a trust mark for use by registered organisations (clause 79); and,
- an information gateway to enable public authorities to disclose personal information to registered organisations (clause 74) and associated statutory Code of Practice (clause 78).

Clause 74 (clause 54 as introduced), which establishes a new information gateway, confers a permissive power on public authorities to provide personal information about individuals (subject to consent) to identity service providers providing trust-marked DVS. This permissive power would be applicable to Public Authorities in Wales.

Clause 78 (clause 56 as introduced) gives powers to the Secretary of State to publish a Code of Practice regarding the disclosure of information under clause 74. The clause sets out that the Code must be consistent with, and issued under, section 125(4) of the DPA 2018 and that Public Authorities sharing data for DVS must have regard to the Code. Public Authorities in Wales would have to have regard to this Code of Practice when sharing data using the permissive power under clause 74.

Welsh Government are of the view that the purpose of Part 2 is to facilitate the provision of DVS and improve the service offered to the user and that these clauses relate to devolved matters of public services, economy and business and therefore fall within the legislative competence of the Senedd.

UK Government's updated devolution analysis on Part 2 is that they consider consent should be sought for clause 74 and clause 78(3).

Amendments sought by Welsh Government
Welsh Government sought concurrent plus powers with a carve out in relation to clause 78. This would place a requirement on UK Ministers to obtain consent from Welsh Ministers for any UK wide Code of Practice to apply to Wales, while also giving Welsh Ministers the power to prepare and publish a Wales specific Code of Practice, should we wish to do so in the future.

This approach was adopted in line with our constitutional principles, and recognising the merits of UK alignment.

Welsh Government is supportive of UKG policy in this area and it is highly likely that the UK Code of Practice would align with Welsh policy in this area. However, concurrent plus powers with a carve out would enable Welsh Ministers to prepare and publish a Wales specific Code of Practice, if this was considered to be necessary in the future.
Amendments proposed by UK Government

UK Government proposed to amend Clause 78 of the Bill to require the Secretary of State to consult Welsh Ministers whilst preparing or revising the Code of Practice.

Welsh Government position
Welsh Government do not consider the above approach to suitably reflect the principles of devolution, and remain of the view that our request for concurrent plus powers is appropriate.

Part 3, Customer Data and Business Data - clauses 85-107
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.

We remain of the view that the clauses within Part 3 of the Bill make provision about the sharing of information to improve data portability to improve the quality of service provided to the customer and to businesses. The purpose therefore relates to business and economy and so falls within the legislative competence of the Senedd, with none of the reserved matters in Schedule 7A to the Government of Wales Act 2006 (GoWA) engaged.

UK Government's view is that whilst legislative consent is required for these clauses, these clauses are devolved in so far as the customer is a business and not an individual, and therefore legislative consent is required but limited in this respect. In UKG's view, the reserved matter of regulation of the sale and supply of goods and services to consumers applies (paragraph 72(a) of Schedule 7A to GoWA).

Amendments sought by Welsh Government
Concurrent plus powers have been sought in relation to Part 3 to provide Welsh Ministers with regulation making powers in order to enable them to establish sector specific Smart Data Schemes here in Wales.

Welsh Government see practical benefit to a UK-wide regulatory alignment in this area and are of the view that access to UK-wide schemes would be of benefit to both individuals living in Wales and also Wales based businesses. UK Government's initial focus is understood to be on large sectors including cross-sector ideas covering financial services, energy, retail, transport and home buying.

Having concurrent regulation making powers would enable Welsh Government to influence how Smart Data schemes are delivered in Wales. It would also enable Welsh Ministers to introduce schemes in sectors where UK Government have no plans, or in sectors which are being considered by UK Government but which are of low priority.

Amendments proposed by UK Government
The amendments proposed by UK Government are to provide Welsh Ministers with concurrent powers to create regulations in relation to business customers only, with sectors considered reserved and Consumer Data (as defined in clause 85(2)) being out of scope.

As part of this, an amendment would be introduced which would provide UK Ministers with powers to prevent Welsh regulations in an area or sector where UK Government has already introduced Smart Data regulations and also powers to amend or repeal Welsh regulations that have been created using these powers. This would mean that where a Welsh scheme is in place and UK Government plans to implement a similar scheme UK-wide, UK Government would have the power to amend the Welsh regulations to reflect the UK-wide regulations. Further, where a UK scheme is in place, UK Government regulations may set restrictions on the Welsh Government's ability to introduce a similar scheme.

A consult mechanism would also be placed on both Welsh Ministers and UK Ministers, requiring them to consult with their Ministerial counterparts before implementing Smart Data regulations.

Welsh Government position
Whilst there is the potential for Welsh Government to establish meaningful Smart Data schemes within the parameters set out within the proposed amendments, to realise the full benefits such schemes can bring, Welsh Ministers should be provided powers to establish schemes which cover the sharing of both business data and consumer data.

The creation of concurrent powers (without consent mechanisms) is contrary to our principles and fails to respect devolution .

The ability for UKG to amend or repeal WG regulations created using the Smart Data powers could be problematic, as this could in effect 'shut down' a scheme that has been established by WG. However, it is considered likely that any Wales regulations would closely align with those of the UKG, lowering the risk that a complete shut down would occur.

Part 4, Other provision about Digital Information - clause 126 Implementation of law enforcement information sharing agreements, clause 127 Meaning of "appropriate national authority", and clause 151 Regulations

Clause 126 confers powers on the 'appropriate national authority' to make regulations for the purpose of implementing an international agreement relating to sharing information for law enforcement purposes (I-LEAP). New international law enforcement information-sharing agreements are subject to usual treaty ratification procedures and would be made by way of the negative resolution procedure.

Clause 127 defines the "appropriate national authority" by which regulations may be made under clause 126 of this Bill as the Secretary of State or, where a provision falls within devolved competence, Scottish Ministers or Welsh Ministers. It also sets out that Regulations made by Welsh Ministers must contain only provision which would be within the legislative competence of the Senedd.

Clause 151 defines the regulation-making power conferred by clause 126.

The Senedd has legislative competence to make provision for the prosecution of criminal offences and execution of criminal penalties on a wide range of devolved matters, for example, environmental or wildlife crime.

UK Government agree that legislative consent is required for these clauses.

Amendments sought by Welsh Government
Concurrent plus powers were originally sought in relation to clause 126 Implementation of law enforcement information-sharing agreements (clause 93 as introduced). As a result, the Bill was amended to enable Welsh Ministers and Scottish Ministers to make regulations where a provision falls within devolved competence. This also included a 'carve out' to amend Schedule 7B to GoWA, enabling the Senedd to amend the provision in the future.

However, the amendment made only provides Welsh Ministers with a concurrent power, not concurrent plus power. This means there is no requirement for Welsh Ministers to give consent before the Secretary of State can exercise their regulation making power under clause 151, even in areas where Welsh Ministers could exercise it.

Welsh Government requested that a consent mechanism also be included in order to ensure the provision respected devolution.

Amendments proposed by UK Government
The amendment proposed by UK Government would provide a consult mechanism. This would require the Secretary of State to consult Welsh Ministers prior to making regulations under clause 126, so far as those regulations included provision within the legislative competence of the Senedd.

Welsh Government position
Welsh Government is supportive of the policy intention behind clause 126 as engaging in international data sharing agreements plays an important role in preventing criminality, especially in terms of organised crime. However, law enforcement also includes the prosecution of criminal offences and execution of criminal penalties in which the Senedd has legislative competence in a variety of devolved areas.

The use of concurrent powers without a consent mechanism has been consistently opposed by both Welsh Government and the Senedd.

Part 4, Other provision about Digital Information - clauses 138-141 National Underground Asset Register
Amendments tabled at Report Stage introduce new clauses in the Bill which make amendments to, and insert a new Part and Schedule into, the New Roads and Street Works Act 1991 (NRSWA 1991). These require, and make provision in connection with, the keeping of a register of information relating to apparatus in streets, to be called the National Underground Asset Register.

The National Underground Asset Register (NUAR), developed by the Geospatial Commission (part of the Department for Science, Innovation and Technology), is a digital map of underground pipes and cables that will significantly improve the way bodies across the UK and industry install, maintain, operate and repair the buried infrastructure.

The relevant provisions are:

- *clause 138: National Underground Asset Register* - introduces a new Part 3A of the NRSWA 1991 which deals with the details of the proposed register. It includes the making available of information contained in it, the form of the register, fees and the provision of information by undertakers. The regulations to be made under Part 3A are to be made by the Secretary of State, who before making them must consult the Welsh Ministers.
- *Schedule 13: National Underground Asset Register: monetary penalties* - inserts a new Schedule 5A into the NRSWA 1991 which makes provision about the imposition of monetary penalties in relation to requirements contained in new Part 3A of that Act.
- *Clause 139: Information in relation to apparatus* - amends the NRSWA 1991 to impose new duties on undertakers to keep records of, and share information relating to, apparatus in streets; and makes amendments consequential on those changes. This also provides the Secretary of State with regulation making powers under amended sections 79 and 80 of the NRSWA 1991 and sets out that Welsh Ministers must be consulted before such regulations are made.
- *Clause 140: Pre-commencement consultation* – establishes that the requirement for the Secretary of State to consult under a provision inserted into the NRSWA 1991 (by the new clauses above) can be satisfied by consultation undertaken before or after the provision comes into force.
- *Clause 141: Transfer of certain functions to Secretary of State* – provides that certain powers to make regulations under section 79 of the NRSWA 1991, so far as exercisable in relation to Wales, are transferred from the Welsh Ministers to the Secretary of State; and makes provision in relation to regulations already made under those powers.

The Welsh Ministers have executive competence in relation to the NRSWA 1991 (except section 167(3)) by virtue of article 2 and Schedule 1 to the
National Assembly for Wales (Transfer of Functions) Order 1999/672.

No relevant reserved matters in Schedule 7A to GoWA have been identified, and Welsh Government view's is that the UK Government is legislating with regard to devolved matters. UKG agree that legislative consent is required.

Amendments sought by Welsh Government
Welsh Government has raised a number of concerns around the new NUAR provisions, at both a Ministerial and official level, since their introduction in November.

In particular, concerns were highlighted around the impact upon existing powers of the Senedd whereby, under clause 141, certain powers to make regulations under section 79 of the NRSWA 1991 would be transferred from the Welsh Ministers to the Secretary of State. Welsh Ministers have exercised their powers under section 79 of the NRSWA 1991 and the form of records prescribed, and the exceptions prescribed for the recording of location, are consistent with those set out in the regulations applicable to England.

In addition, the amendments to section 79 of the NRSWA 1991 within the Bill do not set out that the 'record of information' is to be used or recorded solely for the purposes of the NUAR. Nor is there anything to indicate that these records cannot be used for other purposes beyond the remit of the NUAR. This means that whilst the record of information is crucial for the NUAR, any regulations made by Welsh Ministers under their existing powers could have a purpose beyond that of the NUAR. This, again, suggests that the removal of Welsh Ministers' powers would be a disproportionate approach.

Whilst a ‘consult’ mechanism is included within the NUAR provisions, this places no binding commitment on the UK Government to take our views into account following consultation and does not suitably reflect devolution. This is not considered to be constitutionally acceptable and cannot compensate for the removal of powers which Welsh Ministers already hold.

Concerns were also raised around whether the ability to control our own data in Wales would be negatively impacted by these provisions, where they provide for the Secretary of State to hold the data contained within the register of information. Bodies in Wales currently have access to such data and it is important that the right to access the data and make changes to it, as and when required, is retained.

Amendments proposed by UK Government
UK Government proposed an amendment to clause 141 to allow regulation making powers under section 79 and the non-NUAR aspects of section 80 of the NRSWA 1991 to be concurrently exercisable by Welsh Ministers and UK Ministers. This would mean Welsh Ministers retain their existing powers under NRSWA 1991 and would be able to make regulations under the existing provisions should they wish to do so. Additionally, should Welsh Ministers wish to replace the NUAR service in the future by establishing a funded service of their own, they would be able to do so if the Senedd were to pass primary legislation.

Under the proposed amendments the new regulation making powers relating to the NUAR service would (still) only be exercisable by the Secretary of State as they relate solely to the NUAR service. The Secretary of State would be required to consult Welsh Minsters and Northern Ireland Ministers prior to regulations being laid.

Welsh Government view
The removal of a devolved executive function from the Welsh Ministers represents a completely inappropriate reversal of devolution. There should be no question that the amendment which would ensure Welsh Ministers retain their existing regulation powers should be tabled.

The proposed consult mechanism in respect of the specific NUAR service regulation making powers does not afford the same constitutional or legislative safeguards as consent mechanisms. The issues with concurrent powers apply equally in this area.