

Rt Hon Mark Drakeford MS

First Minister of Wales

15 May 2023

Dear Mark

Legislative Consent Memorandum: Data Protection and Digital Information (No. 2) Bill

At our meeting on 9 May 2023 we considered for the first time the Welsh Government's Legislative Consent Memorandum for the Data Protection and Digital Information (No. 2) Bill (the Memorandum).

We have a number of questions to put to you, which will help inform our report to the Senedd on the Memorandum.

I would be grateful to receive a response to the questions in the Annex by 1 June 2023.

I am copying this letter to the Economy, Trade and Rural Affairs Committee and to the Culture, Communications, Welsh Language, Sport and International Relations Committee, as these matters may be of interest to their work.

Yours sincerely,

Huw Irranca-Davies

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Chair



ANNEX

Clauses 54 (Power of public authority to disclose information to registered person) and 56 (Code of practice about the disclosure of information)

You are aware that the UK Government is of the view that clauses 54 and 56 of the Bill do not require the Senedd's consent as, in its view, these clauses relate to reserved matters. We note that it is your view that the UK Government has taken an "extraordinarily wide interpretation" of the reserved matter of 'internet services', and that you consider that these clauses relate to devolved matters of public services, economy and business and are, therefore, relevant provisions for the purposes of Standing Order 29.

Question 1: Please would you clarify why, if the Welsh Government is of the view that the devolved areas of public services, economy and business are engaged for clauses 54 and 56, the Senedd's consent should not also be sought for other substantive provisions of Part 2 of the Bill (clauses 46 to 60).

Question 2: Specifically in relation to clause 56, at paragraph 39 of the Memorandum you state that further consideration needs to be given to the devolved implications of a UK-wide Code of Practice, and that you will provide an update in due course. Are you as yet in a position to provide an update to the Senedd?

Clauses 61 to 77 (Part 3, Customer Data and Business Data)

Clauses 61 to 77 of the Bill provide various delegated powers to the Secretary of State and to the Treasury.

Question 3: At paragraph 42 of the Memorandum you state that further consideration needs to be given to the devolved implications of the regulation-making powers in clauses 61 to 77 and that you will provide an update in due course. Are you as yet in a position to provide an update to the Senedd?

Clause 92 (Disclosure of information to improve public service delivery to undertakings)

You will be aware that this clause amends section 35 of the *Digital Economy Act 2017* (the DEA Act 2017) to enable the sharing of information to improve the delivery of public services to businesses, expanding on the existing gateway which allows specified public authorities to share information to improve the delivery of public services to individuals and households. "Specified persons" are listed in Schedule 4 to the DEA Act 2017 and include 'Welsh Bodies' (various devolved Welsh authorities). Section 35 of the DEA Act 2017 allows the "appropriate national authority" to make regulations to add "specified persons" and "specified objectives". The "appropriate national authority" includes the Welsh Ministers in relation to Wales.

The amendments made by clause 92 of the Bill to section 35 of the DEA Act 2017 have the effect of extending a pre-existing delegated power (a Henry VIII power) exercisable by the Welsh Ministers in relation to Wales, by adding the word “undertakings” (meaning businesses and charitable bodies) alongside individuals and households. As an example, the Welsh Ministers would have the power to set a “specified objective” that, subject to other conditions in section 35, would have the purpose of improving a public service provided to undertakings. Previously, the scope of this power would have been limited to improving a public service to individuals and households.

Question 4: Please would you confirm that our understanding of the position is correct and that the amendments made by clause 92 do extend a pre-existing Henry VIII power exercisable by the Welsh Ministers, and clarify the reasoning behind this omission of information from the Memorandum.

Clause 93 (Implementation of law enforcement information-sharing agreements)

You will be aware that clause 93 provides a delegated power to the Secretary of State to implement, via regulations, international agreements relating to the sharing of information for law enforcement purposes.

In the Memorandum you state that the Welsh Ministers should be given appropriate powers to make regulations for the purpose of implementing an international agreement relating to sharing information for the aspects of law enforcement within the Senedd’s competency, and that this issue is subject to ongoing discussions with UK Government.

Question 5:

- a) Could you provide an update on these discussions?
- b) What is the Welsh Government’s view of the reserved and devolved matters in this area?
- c) Could you give an example of how international agreements falling under clause 93 might fall to the Welsh Government and/or devolved public bodies to deliver?
- d) Are you aware of upcoming international agreements that would be implemented via the Bill’s powers?
- e) We raised concerns during our scrutiny of the Welsh Government’s Legislative Consent Memorandum for the Health and Care Bill about the implementation of international healthcare agreements using secondary legislation, as proposed in this Bill. At that time, the Minister for Health and Social Services provided assurances that such agreements would be governed by an intergovernmental Memorandum of Understanding (MoU) that was updated to reflect the Bill (a version was made available to us in February 2022). Could you confirm whether similar intergovernmental arrangements will be put in place for international agreements falling under clause 93 of this Bill (if and when enacted)? Is this something the Welsh Government is advocating for?

f) During our consideration of the UK/Switzerland Convention on social security coordination in November 2021, you explained that no new requirements were being placed on Welsh Local Health Boards to deliver its arrangements. What is your view on the extent to which international agreements falling under clause 93 might place additional requirements on the Welsh Government or Welsh public bodies to deliver?

Clause 36 (Interview notices)

You will be aware that clause 36 inserts into the *Data Protection Act 2018* new section 148A which makes provision about interview notices, which can be used to require a person to attend an interview and answer questions when required by the Information Commissioner (the "Commissioner"). We note that, in practice, the reference to the Commissioner will be read as a reference to the newly-formed Information Commission, courtesy of section 102(2) of the Bill.

Additionally, clause 36 inserts new section 148B, which places certain restrictions on the circumstances in which the Commissioner can require a person to answer questions under an interview notice. Subsection (9) lists bodies to whom the Commissioner cannot give an interview notice, including: "the Office for Standards in Education, Children's Services and Skills 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." The functions referenced relate to the registration of children's homes in England, residential family centres in England, fostering agencies in England or, where the activities of a fostering agency are carried on from two or more branches, the branches in England, voluntary adoption agencies whose principal office is in England, and adoption support agencies in England or, where the activities of an adoption support agency are carried on from two or more branches, the branches in England.

No similar exemption is contained in the Bill for functions related to registration of similar establishments and agencies in Wales meaning that the Commissioner will be able to issue an interview notice in relation to those matters in Wales but not in England.

Question 6:

- a) Please would you clarify if this represents the Welsh Government's chosen and preferred position?
- b) Has the Welsh Government had discussions with the UK Government about the drafting of clause 36 and its effect in Wales?

Other matters

In the Memorandum, you outline various concerns that you have with the Bill as a whole. In particular, at paragraph 34, you explain that there are concerns that "the introduction of the Bill creates a risk to

the UK's current adequacy decision, which was granted in June 2021 by the EU for a period of 4 years initially. The potential loss of EU data adequacy is a key concern from a trade perspective as this would be a major threat for Welsh exporting businesses, whose main overseas market continues to be the EU."

Question 7:

- a) Are you able to expand on the implications for Wales should that adequacy decision from the EU be lost?
- b) If the Bill passes in its current form, what is your view of its impact on the EU's adequacy decision?
- c) What discussions have you had with the UK Government in relation to this issue?