



## Public Law Project briefing on the Data Reform Bill

### Summary

1. One of PLP's five strategic priority areas is government use of automated decision-making (ADM) systems, sometimes termed algorithmic decision-making. This briefing will highlight what the Data Reform Bill (the Bill), as introduced within the Queen's Speech 2022, should do in this area and why.
2. The following points will bring together aspects of [our response](#) to the Department for Digital, Culture, Media and Sport's (DCMS) consultation 'Data: a new direction' (the consultation) and our article in Prospect Magazine, '[Human oversight is crucial for automated decision-making. So why is it being reduced?](#)' (Tatiana Kazim, 6 December 2021).
3. The aim of the Data Reform Bill is to:

*"[d]esign a more flexible, outcomes-focused approach to data protection that helps create a culture of data protection, rather than "tick box" exercises." (p.58)*

### Recommendations

#### Reform of Data Protection Impact Assessments (DPIAs)

1. The consultation proposed removing the requirement to undertake DPIAs, which were viewed as a "tick box" exercise, rather than a crucial safeguard. **This requirement should not be removed. Instead, the Bill should be seen as an opportunity to enhance the utility of DPIAs by requiring compulsory publication.**
2. DPIAs help to identify and minimize the risks of new technologies before they arise. This benefits providers and users of ADM technologies because they avoid wasting resources on developing systems that flout legal standards protecting individual rights. It benefits individuals because it helps to prevent them from being subject to rights-violating systems. For example, the DPIA was valuable in understanding the implications of an ADM system piloted by the Ministry of Justice (MoJ) for use in the prison categorisation of newly sentenced offenders as part of its Digital Categorisation Service (DCS). **See our answer to Q2.2.7, paras 32-37 of our consultation response.**
3. A data controller is only required to carry out a DPIA where the data processing poses a threat to the rights and freedoms of individuals. This provides an appropriate minimum level of protection for all data subjects. **See our answer to Q2.2.8, paras 41-44.**
4. In its report on new technologies in the justice system, the Justice and Home Affairs Committee (JHAC) recommends that "comprehensive impact assessments should be made mandatory for each occasion an advanced technological tool is implemented in a new context or for a new purpose".<sup>1</sup>

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<sup>1</sup> Justice and Home Affairs Committee, *Technology rules? The advent of new technologies in the justice system* (HL 2021-2022, 59-61)



## Reform of Data Subject Access Requests (DSARs)

5. The ability of an individual to access their own data has been recognised as a fundamental right, and **should not be curtailed through the introduction of new restrictions on DSARs within the Bill.**
6. Suggestions have been made to align DSARs with Freedom of Information (FOI) requests, making them subject to similar restrictions. But the rights of data subjects are not usually enforced by the Information Commission's Office (ICO) and thus subjects would have limited avenues for redress if requests were unfairly denied. **See our answer to Q2.3.3, paras 48-50.**
7. Data subjects have a special interest in understanding the processing of their own data. **Given the unique position of data subjects, DSARs should remain free of charge.** Suggestions of an introduction of a small nominal fee, if pursued, would put data subjects at a disadvantage compared with requesters under FOIA. Further, even a small fee may be unaffordable to many. **See our answer to Q2.3.4, paras 52-57.**

*"Ensuring that UK citizens' personal data is protected to a gold standard while enabling public bodies to share data to improve the delivery of services." (p.58)*

## Possible reform to Article 5(1)(a) of the UK General Data Protection Regulation (UK GDPR)

8. To protect UK citizens' personal data to a gold standard, personal data must be processed lawfully, fairly, and in a transparent manner, as currently required under Article 5(1)(a) of the UK GDPR.
9. Fairness is conceptually distinct from transparency and should be treated as a separate consideration. The ICO explained that "telling someone what you are doing with their data does not, by itself, make it fair".<sup>2</sup>
10. Unfairness can exist where ADM technology systematically reproduces existing biases or inequalities in society or where it is trained mostly on data from one group of people and then applied to another group where it produces worse outcomes.
11. The courts and their interpretation of all the requirements of the Equality Act 2010 (including e.g. the Public Sector Equality Duty as interpreted by the courts in the case of *Bridges*) have a valuable role to play in assessments of fairness in the context of ADM. **Any definition of fairness in the Bill should not usurp or contravene other established interpretations of fairness, equality, and non-discrimination in the law.** Dee Masters and Robin Allen QC have suggested that data protection law should state "unequivocally, and without any exceptions, that data processing which leads to breaches of the EA 2010 is unlawful". **See our answer to Q1.5.3, paras 9-15.**

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<sup>2</sup> ICO, Response to DCMS consultation "Data: A new direction", 6 October 2021, available at <https://ico.org.uk/media/about-the-ico/consultation-responses/4018588/dcms-consultation-response-20211006.pdf>.



“Using data and reforming regulations to improve the everyday lives of people in the UK, for example, by enabling data to be shared more efficiently between public bodies, so that delivery of services can be improved for people.” (p.58)

## Use of personal data by public bodies

12. The Bill will regulate the sharing and processing of personal data by public bodies. **The Bill offers an opportunity to set transparency standards in the use of data to deliver of public services, especially when this data is being processed by government ADM systems.**
13. One way of achieving this would be through compulsory transparency reporting on the use of algorithms in decision-making for public authorities, government departments and government contractors using public data. This would enable those who are subject to ADM to hold government to account. Transparency requirements should apply, at minimum, to high-risk ADM systems, broadly and flexibly defined. **See our answer to Q4.4.1, Q4.4.2 and Q4.4.3, paras 65-80.**
14. **Possible reform or repeal of Article 22** – Article 22 prohibits solely automated decision making. A provision of this kind is essential for ensuring human oversight in public decision-making.
15. The JHAC highlights the “necessity of achieving “meaningful” human engagement with an automated tool, and its output”.<sup>3</sup> Meaningful human engagement requires more than a token gesture. **The Bill should include protection against *de facto* solely automated decision-making where a human official is merely rubberstamping a score, rating or categorisation determined by a computer.**
16. Any reform of Article 22 should clarify its key terms to ensure that it has broad practical application. **See our answer to Q1.5.14 and Q1.5.17, paras 19-29.**

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<sup>3</sup> Justice and Home Affairs Committee, *Technology rules? The advent of new technologies in the justice system* (HL 2021-2022, 48)



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