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Baroness Taylor of Bolton
Chair, Constitution Committee
House of Lords
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Dear Baroness Taylor

DATA PROTECTION BILL (6TH REPORT OF SESSION 2017–19): GOVERNMENT RESPONSE

I am writing to thank you, and your Committee, for your recent report on the Data Protection Bill (6th Report of Session 2017–19), and to set out the Government's response.

Your Committee's Report drew attention to three aspects of the Bill. I think it is probably most helpful if I address each in turn.

“We draw attention to the interlocking relationship between the powers in this Bill and current EU law, which after Brexit will become “retained EU law” under the European Union (Withdrawal) Bill. Bills such as this will need careful scrutiny to ensure, so far as possible, that their provisions will continue to function post-Brexit without needing significant amendment” (Paragraph 6)

The Government has always been clear on the relationship between the Bill, the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED). I acknowledge that the Bill is ambitious in its intent, but I can reassure the Committee that it was designed with this complexity in mind. This is evident in provisions such as clause 21, which allows the ‘applied GDPR’ to remain aligned with the GDPR proper between now and exit. The Government is therefore confident that the provisions in the Bill will continue to function post-exit without needing significant amendment, not least because the EU (Withdrawal) Bill will convert the GDPR into domestic law at the point of exit.

“We recommend that the Government clarifies the grounds of appeal for proceedings relating to ministerial certifications made under clause 25 or 109.” (Paragraph 8)

The Committee will be aware that this recommendation prompted a number of Committee stage amendments to the Bill which were debated on 15 November (*Hansard*, columns 2046-2053).

In responding to the debate, Baroness Williams clarified that in applying judicial review principles when considering an appeal under clause 109 (the same is true of appeals under clauses 25 and 77), the Upper Tribunal would be able to consider a wide range of issues, including necessity, proportionality and lawfulness. This would enable, for example, the Upper Tribunal to consider whether the decision to issue the certificate was reasonable, having regard to the impact on the rights of data subjects and balancing the need to safeguard national security. As was noted during the passage of what is now the Investigatory Powers Act 2016 (which in a number of places, for example section 179(2), applies the same formula to that used in clause 25(4) etc), the flexibility of the judicial review principles standard allowed for a detailed scrutiny of decisions. Lord Pannick (in an article in *The Times*, dated 12 November 2015) correctly identified judicial review as robust, yet flexible test that allows discretion to be applied as judges see fit, depending on the context of what is before them. Moreover, clauses 25(4), 77(6) and 109(4) of the Bill mirror section 28(5) of the Data Protection Act 1998 which also provides for the Upper Tribunal to apply judicial review principles. This provision has worked well since it came into force in March 2000.

“We draw attention to the number and breadth of the delegated powers in this Bill. This is an increasingly common feature of legislation which, as we have repeatedly stated, causes considerable concern. The Government’s desire to future-proof legislation, both in light of Brexit and the rapidly changing nature of digital technologies, must be balanced against the need for Parliament to scrutinise and, where necessary, constrain executive power.” (Paragraph 11)

Given the pace of evolution in the digital economy and the, as yet untested, practical consequences of the GDPR and the Bill, the Government considers the delegated powers in the Bill to be essential to accommodate developments in processing and the changing requirements of certain sectors. The Government’s experience, both under the 1998 Act and during the Committee stage of this Bill, has highlighted the frequency with which scenarios can arise which require further provision to be made, for example, for the processing conditions for sensitive data or the exemptions provided for in the legislation. Failure to make accommodation for developments in processing could also render the UK at a disadvantage internationally, for example if we were unable to make appropriate future provision for high growth sectors of the global economy. Nevertheless, the Government does accept that a number of the powers in the Bill can be refined to ensure that an appropriate level of Parliamentary scrutiny is provided and is tabling amendments to that effect.

For more information on this issue, I would point the Committee to the Government's comprehensive response to the 6th Report of Delegated Powers and Regulatory Reform Committee (Session 2017–19), which we are also publishing today.

I am copying this letter to Baroness Williams of Trafford and the Minister for Digital. I will also place a copy in the House Library. If you, or your Committee, would like to discuss any of these issues in more detail, please do not hesitate to get in touch with me.

A handwritten signature in cursive script that reads "Henry Ashton".

Lord Ashton of Hyde
Parliamentary Under Secretary of State