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My Lords

Data Protection Bill

I am grateful to Peers for an engaging debate on the first day of Committee. During the debate my noble friend, Lady Chisholm, and I promised to follow up on a number of specific points and I am happy to do so now.

Amendment 115

Lord Stevenson asked about extraterritoriality in the context of Amendment 115. Further to our exchange during the debate, I wanted to set out how the Government expects the position to evolve.

Between now and the point of exit, the GDPR is directly applicable in the UK. As set out in Article 3, the GDPR applies not only to processing throughout the EU but also, relevantly, to "the processing of personal data of data subjects who are in the Union by a controller or processor not established in the [EU], where the processing activities are related to the offering of goods or services [to them]". Member States are not in a position to 'derogate' from this. Article 27(1) then requires that a controller or processor covered by 3(2) must "designate in writing a representative in the Union". It is worth noting, however, that "mere accessibility" of a website from a Member State is insufficient to trigger the GDPR's extraterritoriality provisions: recital 23 indicates that the controller must actively "envisage offering services to data subjects in one or more Member States" and take steps to facilitate it.

Neither the EU-wide scope of Article 3(1) nor the extra-territorial scope of Article 3(2) make sense in the context of the *applied* GDPR, whose provisions only apply to the UK, and given that the type of processing captured by the applied GDPR is primarily within the public sector, relating to areas such as defence and UK consular services. Controllers in these situations are either in the UK or, if overseas, are not offering goods or services to

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those in the UK. We have therefore decided to omit Article 3 from the applied GDPR entirely and make alternative provision for the territorial application of the applied GDPR in clause 186.

It is worth making two remarks in relation to the position once the UK has left the EU. Firstly, the GDPR will, we assume, remain in force in the European Union. Notwithstanding the outcome of exit negotiations in this area, organisations in the UK who meet any of the conditions of Article 3 will therefore need to comply with the GDPR. Secondly, and more relevantly to Lord Stevenson's question, it will not be the applied GDPR which binds most organisations in the UK, but the version of the GDPR as saved using the powers in the EU (Withdrawal) Bill. The two are likely to be similar in many respects, but this point may well be one on which they differ.

Amendment 8

Lord Stevenson asked about government amendment 8, which relates to the definition of a "health professional" set out in clause 183. Having reviewed his question in Hansard, I would like to set out a little more by way of explanation as to how clause 183 is intended to operate.

Section 69 of the 1998 Act defined a "health professional" by way of a list and clause 183(1) is an almost verbatim copy of section 69, as amended. I agree with the noble Lord that the best way of understanding clause 183 is to conceive of it as a list of individuals known to be subject to existing, rigorously enforced professional standards. These standards cover issues such as acting in the best interests of the patient, as well as matters concerning confidentiality. Amendment 8 merely clarifies that – as was always intended – clause 183 also provides the relevant definition for Part 2 of the Bill, and not just Parts 3 and 4.

Guidance on alumni relations

I am happy to confirm that the Information Commissioner's intention is to publish her guidance on 'legitimate interests' processing, including – in the case of universities – processing for the purposes of alumni relations before the end of this year.

Use of consent in medical research

Lord Clement-Jones thought it might be helpful for me to set out 'chapter and verse' on how Articles 6 and 9 apply to the processing of (health) data for medical research purposes. I should begin by saying that, as health data is classed as a "special category" of data, in order for processing to be lawful, it must meet (at least) one of the conditions set out in each of the two Articles the noble Lord cited. I will start with Article 6.

Article 6 provides six possible conditions (6(1)(a) to 6(1)(f)). The most relevant are 6(1)(a) ("the data subject has given consent to the processing of his or her personal data for one or more specific purposes"); 6(1)(e) (the "processing is necessary for the performance of a task carried out in the public interest"); and 6(1)(f) (the "processing is necessary for the purposes of the legitimate interests pursued by the controller… except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject"). The "legitimate interests" ground is not available for public authorities processing in the performance of their tasks; and public authorities may find it difficult to meet the required standards for consent in circumstances where there is an imbalance in the relationship between them and the data subject (see recital (43)). That means Article 6(1)(e) is likely to be the most relevant processing condition for public authorities in this context. In the case of medical research, I made it clear during the debate on Monday that universities carrying out properly-conducted medical research would be able to rely on 6(1)(e) and that clause 7 of the Bill, which provides a non-exhaustive list of public interest tasks, would not prevent them from doing so.

In order to process special categories of data, including health data, a controller must also meet a condition in Article 9. Article 9(2)(a) permits processing of such data where the data subject has given his or her explicit consent, but there are other options available to controllers where consent is not feasible. It is worth mentioning, for example, 9(2)(h) which covers processing for the purposes of "medical diagnosis [and] the provision of health or social care or treatment" (see also Paragraph 2 of Schedule 1). Perhaps most pertinent to Monday's debate, however, is 9(2)(j). This covers processing for the purposes of "scientific research".

For a UK controller to take advantage of 9(2)(j), as further provided for in paragraph 4 of Schedule 1, the safeguards in Article 89(1) and clause 18(2) of the Bill must be met. In debate, Lord Patel suggested that clause 18, in particular, might benefit from amendment because it could impede clinical trials and interventional research which involve measures or decisions being taken about individuals without their consent (for example, when researchers use GP or NHS records to invite certain patients to participate in a new study). I have instructed my officials to consider this, and the other issues he raised, between now and Report stage of the Bill. In the meantime, I hope the above exposition helps noble Lords navigate these issues.

I am copying this letter to Baroness Williams of Trafford, Baroness Chisholm of Owlpen, the Minister for Digital and all Peers who spoke in Monday's debate and the Information Commissioner. I am also placing a copy in the House Library. If you would like to discuss these, or any further points, in more detail, please do not hesitate to get in touch.

Yours sincerely

Lord Ashton of Hyde
Parliamentary Under Secretary of State