Public Law Project

Public Law Project written evidence for the Data (Use and Access) Bill Public Bill Committee

Part 5 (Data Protection): Clause 80 (Automated Decision Making), Transparency and Clauses 70 and 71 (Delegated Powers)

- **Clause 80** of the Data (Use and Access) Bill ('the D(UA)') (Automated Decision Making ('ADM')):
    - Removes the current right not to have computers make significant decisions about our lives without meaningful human involvement for all decisions other than those using 'special category' data (**new Article 22B(1) UK GDPR – restrictions on ADM**)
    - Risks being a missed opportunity to improve and clarify the existing safeguards that apply where solely automated decision making is permitted (**new Article 22C UK GDPR – Safeguards for ADM)**.
    - Gives the Secretary of State the power to redefine central concepts by way of delegated powers **(new Article 22D(1) and (2) UK GDPR – Further provisions about ADM**).
- **Clauses 70 and 71**: represent a further 'excessive reliance' on delegated powers to vary central concepts of the wider data protection regime. The inclusion of these delegated powers was found to be 'inappropriate by the Delegated Powers and Regulatory Reform Committee, who have recommended their removal from the Bill.[1]

PLP Recommendations

Clause 80:

Recommendation 1: Article 22B should be amended so that it applies to all significant decisions, not just those significant decisions which are based on special category data.

Recommendation 2: Article 22C should be amended to explicitly refer to the existing time limit and explicitly refer to personalised notification requirements.

Recommendation 3: the power in Article 22D(1) should be subject to a requirement which cannot be altered by regulation that, for human involvement to be considered meaningful, the review must be performed by a person with the necessary competence, training, authority to alter the decision and analytical understanding of the data.

Recommendation 4: remove the delegated power in Article 22D(2).

Recommendation 5: introduce a statutory requirement for public bodies to comply with the Algorithmic Transparency Recording Standard.

Clauses 70 and 71:

Recommendation 6: implement the recommendations of the Delegated Powers and Regulatory Reform Committee and remove Clauses 70(4) (lawfulness of processing) and 71(5) (the purpose limitation) from the Bill.

[1] Paragraphs 7 and 9, House of Lords Delegated Powers and Regulatory Reform Committee, '9th Report of the Session 2024-25, Data (Use and Access) Bill,' HL Paper 49, 28 November 2024. Available here.

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Clause 80: Automated Decision-Making ('ADM')

The significance of increased use of automation in decision-making

Increasingly, automated algorithms and artificial intelligence ('AI') are being used by public bodies and private actors to make rights-critical decisions about people's lives which would traditionally have been made by humans: including decisions about education, health and social care, immigration, and welfare.[2]

ADM has the potential to make quicker, cheaper and more consistent decisions. However, ADM also comes with new forms of risk which are well documented and have been acknowledged in the Bill's Impact Assessment.[3] ADM systems can be biased and discriminatory; they can reduce accountability and transparency; and increase the risk of incorrect, unlawful or unfair decisions being made at speed and at scale.

ADM also represents a significant shift in the way that consequential decisions are made about our lives. Its adoption therefore raises fundamental questions about how decisions should be made, such as the appropriate role of discretion and professional judgment which automated technologies (which apply set rules or conduct statistical analysis) cannot provide.[4]

PLP's research has found that the current legal framework is not fully fit for purpose in relation to ADM; whilst it does contain some useful tools and safeguards which are relevant to and can be applied to ADM, on the whole, it is fragmented and it needs to adapt – having, for the most part, been developed with human decision makers in mind.

What is needed is comprehensive, considered legislative reform. In the meantime, one of the few safeguards against harmful ADM that already exists is Article 22 of the UK GDPR which, although not perfect, is of crucial importance. It is therefore extremely concerning that the D(UA) will disapply this safeguard from a significant number of decisions.

Article 22B (page 95, line 20 – page 96, line 2): disapplication of the restriction on ADM.

The change: new Article 22B amends Article 22 so that the current restriction on ADM contained in Article 22(1) only applies to decisions using 'special category' data – other decisions will no longer be subject to this restriction

Under the Article 22 UK GDPR, people have the right not to have computers make significant decisions about their lives without a human being meaningfully involved in that decision,[5] unless certain exceptions apply.[6]

Clause 80 D(UA) amends Article 22 so that this restriction **only applies** when decisions are made using 'special category data.' Special category data (or 'sensitive data') includes: personal data revealing racial or ethnic origin; political opinions; religious or philosophical beliefs; trade union membership; genetic data; biometric data (used for identification purposes); data concerning health; data concerning a person's sex life; and data concerning a person's sexual orientation.[7] For all other

[2] See for example the tools on the PLP's Tracking Automated Government Register, available here.
[3] Department for Science, Innovation and Technology (2024) 'Data (Use and Access) Bill: Impact Assessment, para 544. Available here.
[4] Cobbe, J. 'Administrative law and the machines of government: judicial review of automated public-sector decision-making' (2019) Legal Studies (Society of Legal Scholars), 39(4), 636–655.
[5] Article 22(1)
[6] The exceptions are a) explicit consent, b) in performance of a contract, and c) in accordance with a law that includes suitable measures to safeguard the data subject's rights and freedoms and legitimate interests – Article 22(2) UK GDPR.
[7] Article 9(1) UK GDPR.

decisions, Clause 80 changes the law to permit the taking of significant decisions entirely by a computer without a human being involved.

Why is this a concern?

The inclusion of a 'human in the loop', although not a panacea, is currently functioning as a safety net protection against the risks associated with ADM.[8] DWP, for example, cite human involvement as one of the key safeguards for its use of ADM to detect benefits fraud[9] and the new Eligibility Verification Measure which it is seeking to introduce through the Public Authorities (Fraud, Error and Recovery) Bill,[10] and in DWP's use of AI more widely.[11]

The D(UA) Impact Assessment acknowledges the risk of discrimination that is created by permitting most decisions to be fully automated (i.e. not have a human check).[12] It states that the decision to retain the protection for special category data will mitigate this. It will not.

Automated decisions can and have had significant, discriminatory and harmful effects on people's lives without involving special category data. This is because non-special category data can act as a proxy for other characteristics (such as nationality or postcodes) and not all protected characteristics are captured by special category data.

Example 1: *the A-level scandal consisted of an algorithm which harmfully downgraded A-level results of socio-economically disadvantaged students in 2020 without using sensitive data.*[13]

Example 2: *Dutch law enforcement were invited by the 'SyRI' algorithm to visit the homes of innocent migrants and accuse them of welfare fraud, their algorithm used data sets such as water bills.*[20]

Both of these algorithms resulted in significant harm to individuals and led to a significant undermining of public trust in ADM. **The effect of a decision matters, whatever category of data it was based on.**

The significance of this change has not been sufficiently acknowledged during Parliamentary consideration of the D(UA) bill thus far. At Second Reading Baroness Jones referred to the need for "*responsible and safe use of solely automated decision-making*" and described the changes in Clause 80 as being about clarification.[14] At Committee Stage, she stated that Clause 80 was an attempt to "*make sure that there is meaningful human involvement and people's futures are not being decided by an automated machine*."[15]

When this aspect of the Bill was raised at Second Reading in the House of Commons,[16] it was not engaged with by the Minister who responded. The Minister for Data Protection and Telecoms referred to the explicit inclusion of 'meaningful human involvement' in the definition of ADM (the term is currently contained in guidance).[17] While welcome, that is a separate issue: the restriction on solely ADM for decisions taken without special category data will be removed irrespective of whether decisions have meaningfully involved a human being.

The definitional requirement for 'meaningful human involvement' in a decision is aimed at preventing data controllers circumventing the restriction on solely ADM by having a person act as a tokenistic

[8] Tatiana Kazim, 'Human oversight is crucial for automated decision-making. So why is it being reduced?' Prospect magazine (Dec 2021)
[9] Department for Work and Pensions, 'Annual Report and Accounts 2023-24' (2024) HC 62, p.111.
[10] DWP, Factsheet: DWP's Eligibility Verification powers in the Public Authorities (Fraud, Error and Recovery) Bill, 24 February 2025
[11] DWP, Prior Information Notice, Nexus AI, 24 February 2025, Notice Identified, 2025/S 000-007055: refers to DWP's 'overall strategy of keeping humans in the loop on any decision', https://www.find-tender.service.gov.uk/Notice/007055-2025?origin=SearchResults&p=1
[12] para 531, D(UA) Impact Assessment
[13] Ofqual (August 2020) Guidance, available here – page 7.
[14] HL Debate (19 November 2024), vol 841 col 147 – available here.
[15] HL Debate (16 December 2024), vol 842 col 44GC – available here.
[16] HC Debate (12 February 2025), vol 762: by Victoria Collins MP at Col 303; Rebecca Long Bailey MP at col 291; and Iqbal Mohammed at Col 337 – available here.
[17] Ibid, col 303.

'rubber stamp' a decision rather than having any meaningful involvement in it. **Under the revised provisions, a rubber-stamped decision taken without using special category data would still not be covered by the restriction against solely ADM.**

Glossing over the significance of this change poses significant risk of harm to individuals. New Article 22B goes far beyond mere clarification of the current position. It instead represents a substantial narrowing of the existing requirement for human involvement in significant decisions, creating an increased risk that people will be harmed by unlawful, unfair and discriminatory decisions.

Government's stated intention does not match the reality of what Article 22B does.

Recommendation 1: Article 22B should be amended so that it applies to all significant decisions, not just those significant decisions which are based on special category data.

Article 22C (page 96, lines 3-19): introduces ambiguity into the application of existing safeguards which apply where solely ADM is permitted.

The change: Article 22C rephrases safeguards which already apply where solely ADM is permissible under Article 22.

When solely ADM is permitted under the current Article 22 GDPR's exceptions, a set of safeguards apply.[18] The current Bill's new Article 22C sets out the safeguards that should apply when solely ADM is permitted under the new legislation (both in relation to decisions taken using 'special category' data under one of the permitted exceptions, and decisions not using 'special category' data which would now be generally permitted). At Second Reading, Baroness Jones indicated that Article 22C was intended to set out the existing safeguards "*much more clearly*."[19]

It does not introduce any new safeguards than exist already, and **the drafting does not address the key issues where clarification is required, and in some cases is less clear.** In particular, the provisions:

- Do not explicitly set out when and how individuals should be notified about a decision, and is less clear in this regard than the existing s.14 Data Protection Act 2018 (which the D(UA) repeals). This risks permitting decision makers to simply publish generic information in an obscure online privacy notice, rather than providing a personalised notice at the time that matters – when the decision is taken.

- Do not explicitly set out the need for individuals to be provided with a personalised explanation of how and why the decision was taken.

As set out in PLP's comparative research report, Around the World in AI regulation[20] - which analysed the effectiveness of approaches taken to AI transparency regulation of public authorities in other jurisdictions, public authorities should be:

- Required to **explicitly inform** decision subjects, or those affected by a decision or action taken by a public authority about the use of an AI, algorithmic or automated tool or system when communicating the decision to them.

- Required to **proactively provide explanations to affected individuals** alongside a notification providing information on **how and why the decision was reached**, including specific

[18] Article 22(3) UK GDPR; Articles 12-14 UK GDPR; and s.14 Data Protection Act 2018
[19] HL Debate (19 November 2024), vol 841 col 147 – available here.
[20] Public Law Project 'Around the World in AI regulation' (2024) – available here.

categories of information such as tailored information on the contribution of AI, algorithmic or automated tool or system in the decision-making process

This information is necessary for individuals to be able to meaningfully and effectively make representations and contest the decisions that are made about them.

To ensure there is no ambiguity around this, the current provisions in new Clause 22C should be amended to make clear the point in time that individuals should be provided with the information and to explicitly set out that that this should require an individualised explanation of how and why that decision was taken.

Recommendation 2: Article 22C should be amended to explicitly refer to the existing time limit and explicitly refer to personalised notification requirements.

Delegated powers in Article 22D (page 96, line 20 – page 97, line 5): empowers the Secretary of State to redefine central, contested concepts.

The change: Article 22D would give powers (inherited from the previous DPDI Bill) to the Secretary of State to use regulations to define what constitutes 'meaningful human involvement' and whether a decision is, or is not, to be taken to have a 'similarly significant effect'[21] *for the data subject.*

Both of these terms are critical in defining the scope of Article 22 protections. These terms have also been the subject of significant uncertainty and debate because judicial consideration of them has so far been limited.[22]

a. Meaningful human involvement (Article 22D(1) – page 96, lines 22-25):

New Article 22A(1)(a)[23] amends Article 22 by making explicit the existing requirement[24] that human involvement in a decision must be meaningful if that decision is to be regarded as not solely automated (and thereby fall beyond the scope of Clause 80). Making this requirement explicit is a welcome step towards resolving the concept's ambiguity but new Article 22D(1)[25] puts that progress at risk. New Article 22D(1) empowers the Secretary of State, in effect, to determine whether something constitutes meaningful human involvement.

Permitting such a central concept to be amended by regulation, in the absence of Parliamentary scrutiny and without setting a minimum safeguard on the face of the Bill is problematic. Labour recognised this during the passage of the DPDI Bill. Baroness Jones tabled an amendment to the DPDI Bill which would have set out, as a minimum, that "*review must be performed by a person with the necessary competence, training, authority to alter the decision and analytical understanding of the data*".[26] Amending the Bill in this way would have the benefit of ensuring that the concept can remain flexible, whilst resolving some of the concept's ambiguity on the face of the Bill.

Ambiguity in meaningful human involvement arises because whether there has been human involvement in a decision is a matter of degree. The GDPR's approach of drawing a single, binary

[21] The right not to be subject to solely ADM under Article 22 UK GDPR applies in relation to decisions that have a legal or similarly significant effect (Art 22(1)). Legal effect is something that affects a person's legal status or their legal rights. A **similarly significant effect** is something that has an equivalent impact on an individual's circumstances, behaviour or choices. See ICO Guidance.
[22] Section 3.4.1, Edwards, Williams & Binns (July 2021) Legal and regulatory frameworks governing the use of automated decision making and assisted decision making by public sector bodies. The Legal Education Foundation, available here
[23] Page 95, lines 10-12.
[24] Information Commissioner's Office Guidance 'How do we ensure fairness in AI?' available here.
[25] Page 95, lines 22-25.
[26] See Amendment 40 in the Marshalled List for Committee (DPDI Bill)

distinction between that which is meaningful and that which is not can (and has) resulted in litigation to determine which side of the line a given example may fall, for example where the decision maker:

a. lacked the technical knowhow to understand what the automated system did;
b. lacked the authority to change the automated decision;
c. was not allowed enough time to properly review a decision;
d. was influenced by 'automation bias'; or
e. due to the 'blackbox' nature of the algorithm wasn't in a position to understand it.

***Example**: in Case C-634/21, SCHUFA Holding (Scoring) (December 2023), the CJEU found that a third-party credit score (which was being heavily relied upon by a lender to determine loan applications) could amount to a solely automated decision. It was a question of the degree to which the lender relied on the scores in practice.*

Recommendation 3: the power in Article 22D(1) should be subject to a requirement which cannot be altered by regulation that, for human involvement to be considered meaningful, the review must be performed by a person with the necessary competence, training, authority to alter the decision and analytical understanding of the data.

b. Significant decision (Article 22D(2) – page 96, lines 26-28):

New Article 22A(1)(b)[27] introduces the concept of a 'significant decision' which re-states the existing scope of Article 22.[28] New Article 22D(2), in effect, empowers the Secretary of State to define what constitutes a significant decision.

Permitting the scope of the Article 22 to be alterable by regulation in this way is problematic. For example. the concept of a 'significant decision' raises important questions about how Article 22 applies where a decision process has multiple stages.[29]

The risk is that the Secretary of State could provide that an interim decision that could have a serious impact on an individual doesn't constitute a significant decision for the purposes of the Article. An example would be where the DWP decided automatically, with no human involvement, to suspend someone's Universal Credit pending investigation, on the basis of a computer's prediction that they might be a fraud risk.

Recommendation 4: remove the delegated power in Article 22D(2).

[27] Page 95, lines 13-16.
[28] Article 22(1) limits the right not to be subject to solely automated decision where the decisions "*produces legal effects concerning [the decision subject] or similarly significantly affects him or her*."
[29] Reuben Binns, Michael Veale, 'Is that your final decision? Multi-stage profiling, selective effects, and Article 22 of the GDPR,' *International Data Privacy Law*, Volume 11, Issue 4, November 2021, Pages 319–332.

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Transparency in public body use of algorithmic tools

The D(UA) Bill is also an opportunity for the Government to demonstrate leadership in AI regulation and improve public trust by increasing transparency about public sector use of ADM.

As Government has acknowledged, transparency in public sector use of algorithms is *'essential to building greater confidence and trust both in the government and its use of technology'*.[30]

PLP's recent report provides a comparative analysis of the transparency requirements across five jurisdictions (Canada, the USA, Europe, France and Japan) and outlines recommendations for achieving meaningful transparency in the UK.[31] The report found that this should include mandatory detailed disclosure of information about public sector use of ADM in a centralised public register.

The UK is well placed to implement this. Government has already developed an Algorithmic Transparency Recording Standard (ATRS);[32] a standardised way for public sector organisations to publish information when they are using algorithmic tools.

However, PLP's recent report demonstrates that where transparency requirements are not legally enforceable, they are associated with low compliance rates.[33]

This has also been reflected within the UK, where departmental compliance with the ATRS has been low. Under the current government, compliance has improved more tools being added to ATRS hub. However, PLP's Tracking Automated Government (TAG) register counts an additional 55 such tools.

The need for compliance with the ATRS to be put on a statutory footing was recognised by Labour during consideration of the DPDI when Baroness Jones jointly tabled an amendment to this effect.[34]

Lord Bassam also highlighted during Committee stage that placing ATRS on a statutory footing is *"forming part of the architecture needed to begin building a place of trust around the increased use of ADM and the introduction of AI into public services."* He outlined the importance of *"tak[ing] the public with us on this journey…**Transparency, openness and accountability are key to securing trust in what will be something of a revolution in how public services are delivered and procured in the future**."*[35]

At second reading of the Bill in the House of Lords, Baroness Jones stated that compliance with the ATRS will be *"underpinned by digital spend controls, which means that when budget is requested for a relevant tool, the team in question must commit to publishing an ATRS record before receiving the funds."*[36] This does not set out:

- What the enforcement mechanism would be if, following implementation of the tool, no ATRS record is in fact published,
- How compliance will be ensured for projects falling below the spend control thresholds.
- How compliance will be ensured for measures that are already in use. For example the DWP is currently operating a machine learning model to identify applications for advance payments that the model assesses as being of high risk of fraud[37] – however the DWP has not published information about this tool on the ATRS.

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[30] DSIT, Algorithmic Transparency Recording Standard – Guidance for Public Sector Bodies, 5 January 2023.

[31] Public Law Project 'Around the World in AI regulation' (2024) – available here.

[32] DSIT, Algorithmic Transparency Recording Standard Hub – available here.

[33] Canada, for example, has introduced a non-statutory requirement for disclosing automated decision-making models which is enforced by measures internal to government. It has been ineffective: as of May 2024, only 21 models had been disclosed, whereas more than 300 have been uncovered by the Staring Centre.

[34] Amendment 74, Second Marshalled List of Amendments to be moved at Grand Committee – available here.

[35] HL Deb (27 March 2024), vol 837, col 214GC, available here.

[36] HL Deb (16 December 2024), vol 842, col 49GC: https://hansard.parliament.uk/lords/2024-12-16/debates/90BA207A-2205-4E76-9383-CBA8B39F0599/Data(UseAndAccess)Bill(HL)

[37] Q16, Work and Pensions Committee, Oral Evidence: DWP's Annual Report and Accounts (19 January 2025), HC 688 https://committees.parliament.uk/oralevidence/15307/pdf/

Further, government has not disclosed the exemptions which exist for this non-legislative mechanism. DWP's AI security policy, for example, explains that where compliance with the ATRS would normally be required "*but the user has a strong justification not to disclose their use of AI on the ATRS, an ATRS exemption can be sought from the Department of Science, Innovation and Technology*."[38] As a result, the public has no way of determining the sorts of automated systems which might be exempt from the ATRS.

As set out in PLP's comparative research report, Around the World in AI regulation,[39] the example of a similar approach taken in Canada suggests that internal spend control measures are unlikely to be effective at securing consistent compliance with the ATRS[40]. Under the Canadian model, federal institutions are requirement to publish Algorithmic Impact Assessments prior to implementing an ADM system. While this requirement is included in a mandatory policy-setting instrument with an accountability framework which is internal to Government, compliance has been relatively low. As at 7 February 2025, 25 AIA's had been published[41]. In contrast, the independent Canadian Tracking Automated Government Register records 303 entries.[42]

Recommendation 5: introduce a statutory requirement for public bodies to comply with the ATRS.

[38] DWP Artificial Intelligence Security Policy, available here. Paragraph 9.
[39] Public Law Project 'Around the World in AI regulation' (2024) – available here.
[40] n21, page 27
[41] Government of Canada, Open Government Portal (accessed 10 February 2025) – available here.
[42] Starling Centre, Tracking Automated Government Register Canada – available here.

Clauses 70(4) and 71(5): Improper use of delegated powers

There has been concern in recent years that 'more and more extensive powers to make law have been delegated to Ministers while parliamentary control over the exercise of those powers has eroded...' to the extent that it 'compromises the UK's system of parliamentary democracy'[43].

The Attorney-General has recently highlighted that '*excessive reliance on delegated powers' is 'upset[ing] the proper balance between Parliament and the executive*' striking at *'rule of law values...[and] also at the cardinal principles of accessibility and legal certainty'*[44]. He has emphasised the need to reconsider *'the balance between primary and secondary legislation, which in recent years has weighed too heavily in favour of delegated powers'.*

The D(UA) is one of the first tests of whether this balance will be struck in practice.

It is positive that the D(UA) has implemented some of the Delegated Powers and Regulatory Reform Committee recommendations to address some of the problematic use of delegated powers in the DPDI.

However, PLP is concerned that the D(UA) continues to include several widely drafted delegated powers that would permit the Secretary of State to make significant changes to the data protection regime without adequate Parliamentary scrutiny. This includes Clauses 70(4) and 71(5) which give broad powers to the Secretary of State to amend UK GDPR lawfulness of processing provisions and purpose limitation provisions respectively. These provisions have been criticised by the Delegated Powers and Regulatory Reform Committee as inappropriate.[45]

Recommendation 6: implement the recommendations of the Delegated Powers and Regulatory Reform Committee and remove Clauses 70(4) (lawfulness of processing) and 71(5) (the purpose limitation) from the Bill.

[43] Hansard Society, *Proposals for a New System for Delegated Legislation: A Working Paper*, February 2023; Secondary Legislation Scrutiny Committee, *Government by Diktat: a Call to Return Power to Parliament*, November 2021; DPRRC, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, November 2021.

[44] Attorney General's 2024 Bingham Lecture on the rule of law (October 2024) – available here.

[45] Paras 7 & 10, DPRRC, (November 2024) '9th Report of Session 2024–25', HL 49, available here.