

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 4) on the Data Protection and Digital Information Bill

May 2024



1. Background

The UK Government's Data Protection and Digital Information Bill

- 1.** A Data Protection and Digital Information Bill was introduced into the House of Commons on 18 July 2022. However this Bill was subsequently placed on pause prior to its second reading.
- 2.** The Data Protection and Digital Information (No. 2) Bill¹ was introduced into the House of Commons and had its first reading on 8 March 2023.
- 3.** The Data Protection and Digital Information (No. 2) Bill was carried over to the 2023-24 UK Parliament session and became the Data Protection and Digital Information Bill² ("the Bill"). It is sponsored by the Department for Science, Innovation and Technology.
- 4.** The Bill was introduced into the House of Commons on 8 November 2023, and had its third reading on 29 November 2023.
- 5.** The Explanatory Notes to the Bill provide the following overview:

"This Bill is intended to update and simplify the UK's data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards."³

- 6.** The long title to the Bill states that it is a Bill to:

"Make provision for the regulation of the processing of information relating to identified or identifiable living individuals; to make provision about services consisting of the use of information to ascertain and verify facts about individuals; to make provision about access to customer data and business data; to make provision about privacy and electronic communications; to make provision about services for the provision of electronic signatures, electronic seals and other trust services; to make provision about the disclosure of information to improve public service delivery; to make

¹ [Data Protection and Digital Information \(No. 2\) Bill](#), as introduced (Bill 265)

² [Data Protection and Digital Information Bill](#), as introduced (Bill 1)

³ [Data Protection and Digital Information Bill, as introduced, Explanatory Notes](#), November 2023

provision for the implementation of agreements on sharing information for law enforcement purposes; to make provision about the keeping and maintenance of registers of births and deaths; to make provision about information standards for health and social care; to establish the Information Commission; to make provision about oversight of biometric data; and for connected purposes.”⁴

7. First reading in the House of Lords took place on 6 December 2023, followed soon after by second reading on 19 December. Committee Stage in the House of Lords began on 20 March 2024 and concluded on 24 April 2024. At the time of agreeing this report, Report Stage had yet to be scheduled.

The Welsh Government's Legislative Consent Memorandum, Supplementary Legislative Consent Memorandum (Memorandum No. 2), and Supplementary Legislative Consent Memorandum (Memorandum No. 3)

8. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

9. On 29 March 2023, the Rt Hon Mark Drakeford MS, the then First Minister of Wales (the First Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.⁵

10. The First Minister laid a Supplementary Legislative Consent Memorandum (Memorandum No. 2) on 25 May 2023.⁶

11. We reported on the Memorandum and Memorandum No. 2 on 24 July 2023 (our first report).⁷

12. Paragraphs 14 and 15 of our first report describe the intergovernmental working on the Bill.

⁴ Data Protection and Digital Information Bill, as introduced (Bill 1)

⁵ Welsh Government, [Legislative Consent Memorandum. The Data Protection and Digital Information \(No. 2\) Bill](#), March 2023

⁶ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\). The Data Protection and Digital Information \(No. 2\) Bill](#), 25 May 2023

⁷ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Legislative Consent Memoranda on the Data Protection and Digital Information \(No. 2\) Bill](#), July 2023

- 13.** Paragraphs 16 to 19 and 30 to 32 of our first report set out the clauses of the Bill which, at the time, the Welsh Government considered to require the Senedd's consent, and identified where disagreement existed between the Welsh and UK Governments.
- 14.** Paragraphs 20 to 26 and 33 to 46 of our first report set out the Welsh Government's position on the Bill, as set out in the Memorandum and Memorandum No. 2.
- 15.** Paragraphs 47 to 60 of our first report consider the UK-EU dynamic which is relevant to the Bill.
- 16.** Our first report contained six conclusions and seven recommendations.
- 17.** The First Minister responded to our first report on 5 September 2023.⁸
- 18.** The First Minister laid a further Supplementary Legislative Consent Memorandum (Memorandum No. 3)⁹ on 11 December 2023.
- 19.** We reported on Memorandum No. 3 on 26 January 2024 (our second report).¹⁰
- 20.** Paragraphs 21 and 22 of our second report describe the intergovernmental working on the Bill.
- 21.** Paragraphs 23 to 27 of our second report set out the clauses of the Bill which, at the time, the Welsh Government considered to require the Senedd's consent, and highlighted the Welsh Government's position on the Bill, as set out in Memorandum No. 3.
- 22.** Our second report contained six conclusions and 10 recommendations.¹¹

⁸ [Letter from the First Minister](#), 5 September 2023

⁹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 3\), The Data Protection and Digital Information Bill](#), 11 December 2023

¹⁰ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 3\) on the Data Protection and Digital Information Bill](#), January 2024

¹¹ On 31 January 2024 the Committee [wrote](#) to the First Minister seeking further information on provisions relating to direct marketing and democratic engagement (these provisions were not considered as part of Memorandum No.3) and received a [response](#) from the First Minister on 12 February 2024.

23. We wrote¹² to the House of Lords' Delegated Powers and Regulatory Reform Committee to draw its attention to our second report, and received a response¹³ on 30 January 2024.

24. The First Minister responded to our second report on 8 March 2024.¹⁴

25. The Cabinet Secretary for Economy, Energy and Welsh Language, Jeremy Miles MS (the Cabinet Secretary), wrote again on 16 April 2024¹⁵, in response to further questions we asked on 15 March 2024.¹⁶

26. On 13 May 2024, correspondence between the Welsh and UK governments, as referenced in the Cabinet Secretary's letter on 16 April 2024, was shared with the Committee. This correspondence included a letter from the First Minister to Julia Lopez MP, the Minister of State for Data and Digital Infrastructure, on 23 January 2024; and letters from the Minister of State on 6 February 2024 and 1 March 2024.¹⁷

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 4)

27. On 13 March 2024 the UK Government tabled amendments to the Bill for consideration at Lords' Committee Stage.

28. In his letter to us on 16 April 2024, the Cabinet Secretary noted that he would be laying a further supplementary legislative consent memorandum, in respect of the amendments tabled by the UK Government on 13 March 2024.¹⁸

29. The Cabinet Secretary laid a Supplementary Legislative Consent Memorandum (Memorandum No. 4)¹⁹ on 25 April 2024.

30. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Culture, Communication, Welsh Language, Sport

¹² [Letter to the House of Lords' Delegated Powers and Regulatory Reform Committee](#), 26 January 2024

¹³ [Letter from the House of Lords' Delegated Powers and Regulatory Reform Committee](#), 30 January 2024

¹⁴ [Letter from the First Minister](#), 8 March 2024

¹⁵ [Letter from the Cabinet Secretary for Economy, Energy and Welsh Language](#), 16 April 2024

¹⁶ [Letter to the First Minister](#), 15 March 2024

¹⁷ For this correspondence, please see the [Legislative Consent: Data Protection and Digital Information Bill webpage](#)

¹⁸ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

¹⁹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 4\), The Data Protection and Digital Information Bill](#), 25 April 2024

and International Relations Committee should report on Memorandum No. 4 by 13 May 2024.²⁰

Engagement with the UK Government and intergovernmental working

31. In his letter on 16 April 2024, the Cabinet Secretary told us that discussions with the UK Government had concluded. He said:

“We received a ‘final package’ of proposed amendments from the UK Government which it states it would be willing to make should Welsh Ministers deem them sufficient to recommend consent to the Bill in the Senedd. Following careful consideration of the package, we informed the UK Government on 9 April that the proposed package of amendments was not sufficient and, therefore, the Welsh Government would not be recommending consent for the Bill.”²¹

32. Annex 2 of the Cabinet Secretary's letter provides details of the requests made by the Welsh Government and the amendments the UK Government provided in response.²²

33. The Cabinet Secretary added:

“Whilst the Welsh Government is supportive of the policy intent behind much of the Bill, the proposed amendments represent a significant lack of movement from the UK Government beyond the offer of consultation provisions. This was despite the Welsh Government being clear throughout the Bill's passage that the inclusion of any form of consultation provision in areas we consider to be devolved, or the creation of concurrent powers without a consent mechanism, is contrary to both our principles on UK Bills, as well as the Senedd's consistent opposition to similar approaches.”²³

34. The Cabinet Secretary also said that the Welsh Government has asked the UK Government “to reconsider its position” on the concerns it has raised on the Bill “in

²⁰ Business Committee, [Timetable for consideration: Supplementary Legislative Consent Memorandum \(Memorandum No. 4\) on the Data Protection & Digital Information Bill](#), May 2024

²¹ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

²² Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

²³ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

order for us to reach a satisfactory resolution which would enable a recommendation to the Senedd for consent to the Bill".²⁴

35. Paragraphs 5 and 6 of Memorandum No. 4 set out to the Senedd the Welsh Government's engagement with the UK Government since the laying of Memorandum No. 3 on 11 December 2023.

36. At paragraph 6 of Memorandum No. 4 the Cabinet Secretary states:

"Both official level and Ministerial level engagement has also continued in relation to concerns relating to the impact of the Bill on the retention of EU Data Adequacy and in relation to the devolved implications (as set out across previous LCMs) of the following provisions:

- Part 2, Digital Verification Services (DVS) - clause 74, Code of Practice about the disclosure of information (clause 56 as introduced);*
- Part 3, Customer Data and Business Data - clauses 85-107 (clauses 61-77 as introduced);*
- Part 4, Other provision about digital information - clause 126, Implementation of law enforcement information-sharing agreements (clause 93 as introduced), clause 127 Meaning of "appropriate national authority", and clause 151 Regulations; and,*
- Part 4, Other provision about Digital Information - clauses 138-141 National Underground Asset Register."*

Update on the position since the publication of the Memorandum, Memorandum No. 2 and Memorandum No. 3, and provisions for which the Senedd's consent is required

37. Clause numbering in Memorandum No. 4 refers to the Bill as brought from the Commons.

²⁴ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

38. As set out in paragraphs 11 to 25 of Memorandum No. 4, the Cabinet Secretary's assessment is that the following provisions require the Senedd's consent:

- In relation to Part 3 of the Bill (Customer data and Business data) – an amendment to clause 96 (Levy) (we believe this to be amendment 196²⁵) and an amendment to clause 103 (Regulations under this Part) (we believe this to be amendment 197²⁶).
- In relation to Part 4 of the Bill (Other provision about Digital Information) – amendments to clause 138 (National Underground Asset Register (NUAR)) (we believe these to be amendments 240 to 246²⁷), amendments to clause 139 (Information in relation to apparatus) (we believe these to be amendments 248 and 249²⁸), and an amendment to Schedule 13 (National Underground Asset Register: monetary penalties) (we believe this to be amendment 247²⁹).

39. The Cabinet Secretary states that the UK Government agrees that clauses 85 to 107 of the Bill (61 to 77 as introduced) concerning customer data and business data related to a devolved matter “in so far as the customer is a business and not an individual”, and therefore consider the Senedd's legislative consent “is required but limited in this respect”.³⁰ The Cabinet Secretary adds that the UK Government considers that the reserved matter of regulation of the sale and supply of goods and services to consumers applies (paragraph 72(a) of Schedule 7A to the *Government of Wales Act 2006* (the 2006 Act)).

40. The Cabinet Secretary also states that the UK Government agrees with the Welsh Government's position that legislative consent is required for clauses 138 to 141 which make-up the NUAR provisions in the Bill.³¹

²⁵ Data Protection and Digital Information Bill, [Marshalled List of Amendments to be moved in Grand Committee](#)

²⁶ Data Protection and Digital Information Bill, Marshalled List of Amendments to be moved in Grand Committee

²⁷ Data Protection and Digital Information Bill, Marshalled List of Amendments to be moved in Grand Committee

²⁸ Data Protection and Digital Information Bill, Marshalled List of Amendments to be moved in Grand Committee

²⁹ Data Protection and Digital Information Bill, Marshalled List of Amendments to be moved in Grand Committee

³⁰ Memorandum No. 4, paragraph 24

³¹ Memorandum No. 4, paragraph 25

- 41.** In Memorandum No. 4, the Cabinet Secretary provides an updated overview of the Welsh Government's position on the Bill.
- 42.** On clauses 85 to 107, which relate to customer data and business data, the Cabinet Secretary states the "Welsh Ministers are of the view that the current approach to conferring powers solely upon the Secretary of State again fails to reflect devolution and is inappropriate".³²
- 43.** This reflects the position outlined in the Cabinet Secretary's letter to us on 16 April 2024 in which he stated that the creation of concurrent powers without consent mechanisms is contrary to the Welsh Government's principles and fails to respect devolution.³³ In the same letter, the Cabinet Secretary told us the Welsh Government had sought concurrent plus powers³⁴, adding:

*"Having concurrent regulation making powers would enable Welsh Government to influence how Smart Data schemes are delivered in Wales. It would also enable Welsh Ministers to introduce schemes in sectors where UK Government have no plans, or in sectors which are being considered by UK Government but which are of low priority."*³⁵

- 44.** On clauses 138 to 141, which relate to the creation of a NUAR, in his letter to us on 8 March 2024 the First Minister told us that he had written to the Minister of State for Data and Digital Infrastructure on 23 January 2024, setting out the Welsh Government's concerns around the UK Government's proposed legislative approach and the impact of the NUAR provisions on Welsh Ministers' powers.³⁶
- 45.** In Memorandum No. 4, the Cabinet Secretary provides an update to the Welsh Government's position and states "We consider the removal of a devolved executive function to be a completely inappropriate reversal of devolution".³⁷

³² Memorandum No. 4, paragraph 26

³³ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

³⁴ A "concurrent plus" power is a type of concurrent power which can be exercised: (a) by the Welsh Ministers, in relation to Wales; or (b) provided that the Welsh Ministers consent, by UK Ministers in relation to Wales. When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales.

³⁵ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

³⁶ See paragraph 26.

³⁷ Memorandum No. 4, paragraph 26

46. Again, this reflects the position outlined in the Cabinet Secretary's letter to us of 16 April 2024 in which he stated that the Welsh Government had informed the UK Government that the removal of a devolved executive function from the Welsh Ministers is "completely inappropriate". He also told us that the Welsh Government had emphasised that the amendment proposed by the UK Government, which would ensure Welsh Ministers retain their existing regulation-making powers under section 79 of the *New Roads and Street Works Act 1991*, "should not be conditional upon us agreeing to any of the other amendments proposed and therefore should be tabled".³⁸

47. In his letter on 16 April 2024, the Cabinet Secretary provided more detail on the Welsh Government's concerns with the NUAR provisions in the Bill. He said:

"... the amendments to section 79 of the NRSWA 1991 within the Bill do not set out that the 'record of information' is to be used or recorded solely for the purposes of the NUAR. Nor is there anything to indicate that these records cannot be used for other purposes beyond the remit of the NUAR. This means that whilst the record of information is crucial for the NUAR, any regulations made by Welsh Ministers under their existing powers could have a purpose beyond that of the NUAR. This, again, suggests that the removal of Welsh Ministers' powers would be a disproportionate approach.

Whilst a 'consult' mechanism is included within the NUAR provisions, this places no binding commitment on the UK Government to take our views into account following consultation and does not suitably reflect devolution. This is not considered to be constitutionally acceptable and cannot compensate for the removal of powers which Welsh Ministers already hold.

Concerns were also raised around whether the ability to control our own data in Wales would be negatively impacted by these provisions, where they provide for the Secretary of State to hold the data contained within the register of information. Bodies in Wales currently have access to such data and it is important

³⁸ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

*that the right to access the data and make changes to it, as
and when required, is retained.”³⁹*

48. In Memorandum No. 4, the Cabinet Secretary also provides an update on provisions in the Bill which have been the subject of the previous legislative consent memoranda and states that, despite discussions being held with UK Government since the introduction of the Bill, “concerns outlined across the previous three LCMs remain in relation to the devolved implications of a number of the Bill’s provisions”.⁴⁰

49. On clause 41 (previously clause 36 as introduced), which makes provision for Interview Notices, the Cabinet Secretary states that concerns remain with this clause. He states that the Welsh Ministers are of the view that a similar exemption to that which appears in the Bill for the Office for Standards in Education, Children’s Services and Skills (Ofsted) should be granted to the Welsh Ministers as the regulator for the equivalent services in Wales.⁴¹

50. In his letter to us on 16 April 2024, the Cabinet Secretary highlighted that the UK Government, in its proposed package of amendments which the Welsh Government deemed insufficient, had proposed to remove Ofsted’s exemption to the Information Commissioner’s interview notice powers, and that Ofsted’s existing exemption to the Information Commissioner’s assessment notices powers under section 147(6) of the *Data Protection Act 2018* would be removed.⁴² The Welsh Government had been content with the proposed amendment as it addressed its “concerns around ensuring parity in our policy for Wales”.⁴³

51. On clauses 74 and 78 (previously clauses 54 and 56 as introduced) which make provision about Digital Verification Services (DVS), the Cabinet Secretary states that, as these clauses are both considered to relate to devolved matters, the “Welsh Ministers are of the view that the current approach to conferring powers solely upon the Secretary of State fails to reflect devolution and is inappropriate”.⁴⁴

52. In his letter on 16 April 2024, the Cabinet Secretary told us that the UK Government had proposed to amend clause 78 to require the Secretary of State

³⁹ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

⁴⁰ Memorandum No. 4, paragraph 26

⁴¹ Memorandum No. 4, paragraph 27

⁴² Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024 Annex 2

⁴³ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

⁴⁴ Memorandum No. 4, paragraph 26

to consult the Welsh Ministers whilst preparing or revising the Code of Practice.⁴⁵ He said the Welsh Government had “sought concurrent plus powers with a carve out in relation to clause 78”, adding:

“This would place a requirement on UK Ministers to obtain consent from Welsh Ministers for any UK wide Code of Practice to apply in Wales, while also giving Welsh Ministers the power to prepare and publish a Wales specific Code of Practice, should we wish to do so in the future.

This approach was adopted in line with our constitutional principles, and recognising the merits of UK alignment.”⁴⁶

53. On clause 126 (previously clause 93), which makes provision about the implementation of law enforcement information sharing agreements, and clauses 127 and 151, which make provision about the meaning of “appropriate national authority” and Regulations, the Cabinet Secretary notes his view that the Senedd has legislative competence to make provision for the prosecution of criminal offences and execution of criminal penalties on a wide range of devolved matters. He states that the “Welsh Ministers are again of the view that conferral of powers solely upon the Secretary of State fails to reflect devolution and is inappropriate”.⁴⁷ He adds:

“Our view is that an appropriate recognition for devolved interests could be reflected alongside the potential merits of UK-wide policy delivery through the conferral of concurrent plus powers in each of the above areas. This would ensure the devolved powers could be exercised in Wales where relevant, whilst providing that any UK Government exercise of those powers in Wales is contingent upon the agreement of the Welsh Ministers. UK Government have rejected that approach, whilst offering amendments including concurrent powers (without consent mechanisms) and consultation provisions. This approach does not align with our principles, nor the Senedd's

⁴⁵ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

⁴⁶ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

⁴⁷ Memorandum No. 4, paragraph 26

consistent opposition to the creation of such concurrent powers."⁴⁸

54. In Memorandum No. 4, the Cabinet Secretary also confirms that concerns remain in relation to “the interrelated issues of the independence of the Information Commissioner’s Office and the impact of the Bill on the UK’s EU Data Adequacy status, with a number of provisions considered as being challenging and having the potential of a review by the Commission and legal challenge in the Court of Justice of the European Union”.⁴⁹

55. The Cabinet Secretary adds:

*“This Adequacy status concern is shared by others, reflected by the Northern Ireland Executive’s Department for the Economy report ‘Understanding the risks to cross border transfer of personal data: EU-UK Data Adequacy’.”*⁵⁰

56. In responding to our second report, the First Minister told us that the UK Government had issued a letter to the Welsh Government on 1 March 2024 in which it declined to share its risk assessment on the potential impact of the Bill on the UK’s EU data adequacy decision.⁵¹ We asked the Welsh Government to share the 1 March 2024 correspondence with us. In his letter to us on 16 April 2024, the Cabinet Secretary said the Welsh Government had sought agreement from the UK Government to share the correspondence with us and was awaiting a reply.⁵² This correspondence was received by the Committee on 13 May 2024.⁵³

57. The Cabinet Secretary concludes, in Memorandum No. 4, that the Welsh Government cannot recommend that the Senedd consent to the Bill “due to the constitutional concerns which remain”.⁵⁴

⁴⁸ Memorandum No. 4, paragraph 26. See also Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 2

⁴⁹ Memorandum No. 4, paragraph 28

⁵⁰ Memorandum No. 4, paragraph 29

⁵¹ Letter from the First Minister, 8 March 2024

⁵² See also Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 1

⁵³ See paragraph 26.

⁵⁴ Memorandum No. 4, paragraph 31

2. Committee consideration

58. We considered Memorandum No. 4 on 7 May 2024.⁵⁵ We agreed our report on 13 May 2024.⁵⁶ Given its late arrival on 13 May 2024, we were only very briefly able to review the correspondence between the Welsh and UK governments dated 23 January 2024, 6 February 2024, and 1 March 2024. This is unsatisfactory.

Our view

Legislative consent

59. We note the Cabinet Secretary's assessment of the provisions within the Bill that require the consent of the Senedd, as set out in Memorandum No. 4.

Conclusion 1. We consider that the amendments to the clauses (and Schedule) set out in Memorandum No. 4 fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29, and therefore require the consent of the Senedd.

60. We note that the Cabinet Secretary has concluded that it is not appropriate to recommend that the Senedd gives its consent to the Bill "due to the constitutional concerns which remain".

Engagement with the UK Government, intergovernmental working, and general observations

61. We acknowledge that the Welsh Government has been seeking changes to the Bill since its introduction and, through the earlier memoranda and in correspondence to the Committee, the previous First Minister and the Cabinet Secretary have sought to keep the Committee and the Senedd updated on intergovernmental engagement.

62. We note the Cabinet Secretary's comments that the UK Government offered a "final package" of proposed amendments, which was subsequently turned down by the Welsh Government, which deemed them insufficient.

63. Specifically on the NUAR provisions in the Bill, we note the Cabinet Secretary's statements that the amendment proposed by the UK Government, which would ensure the Welsh Ministers retain their existing regulation-making

⁵⁵ [Legislation, Justice and Constitution Committee](#), 7 May 2024

⁵⁶ [Legislation, Justice and Constitution Committee](#), 13 May 2024

powers under section 79 of the 1991 Act, should not be conditional on the Welsh Government agreeing to the other proposed amendments. On this point, we agree with the Cabinet Secretary's position.

64. Following the conclusion of these intergovernmental discussions, it does not appear that amendments have been made to the Bill to address the Welsh Government's proposals. The inability of governments to reach agreement on matters of considerable importance is resulting in unsatisfactory outcomes. This is a disappointing reflection of what we are coming to see on a regular basis when Bills introduced to the UK Parliament make provision in devolved areas.

65. Furthermore, it is not clear to us whether amendments will follow at a later stage of the Bill's passage through the UK Parliament but, with the Bill being at Report Stage in the second House, we note that its passage is already at an advanced point.

66. We note that the Bill continues to have implications in relation to devolved areas and devolved executive competence, namely:

- The conferral of various delegated powers on the Secretary of State and the Treasury to act in devolved areas in Part 3 of the Bill and in the new Part 3A and section 80 of the 1991 Act, in each case without concurrent or concurrent plus powers being conferred on the Welsh Ministers in those areas.
- The return of delegated powers under section 79 of the 1991 Act (as amended by the Bill) from the Welsh Ministers to the Secretary of State.
- The revocation of secondary legislation agreed by the Senedd, namely the Street Works (Records) (Wales) Regulations 2005, and extension of the equivalent regulations in England to Wales, via clause 141 of the Bill.

Conclusion 2. The conferral of various delegated powers on the Secretary of State and the Treasury to act in devolved areas, powers currently delegated to the Welsh Ministers under section 79 of the *New Roads and Street Works Act 1991* being transferred to the Secretary of State, and the revocation of Senedd legislation in the form of the Street Works (Records) (Wales) Regulations 2005 are serious matters and we have concerns as to their constitutional propriety.

Conclusion 3. As a Committee we have previously welcomed the revised intergovernmental structures which arose from the review of intergovernmental relations undertaken jointly by the UK government and the devolved

governments. Given these new structures, we are unclear as to why the Welsh and UK governments have not been able to reach agreement on important constitutional matters arising from the Bill.

Conclusion 4. If the Bill is passed by the UK Parliament in its current form and the Senedd withholds its consent to the relevant provisions in the Bill (as set out in the legislative consent memoranda laid before the Senedd), this will again bring into question the operation of the Sewel Convention.

67. We comment further on some of these issues in our consideration of specific clauses of the Bill (and amendments to those provisions) and matters outstanding from our second report in the next section of this report.

Comments regarding specific clauses of (and amendments to) the Bill requiring consent, and matters outstanding from our second report

Provisions relating to customer data and business data

68. Clauses 86 and 88 confer various regulation-making powers on the Secretary of State and the Treasury in relation to customer data and business data. A broad scope is provided for the regulations to capture a wide array of businesses that supply goods, services or digital content that process relevant data.

69. In this regard we note in particular that the letter from the Minister of State for Data and Digital Infrastructure on 1 March 2024 confirms it is the UK Government's intention that the Bill will "enable the better use of data in health and adult social care".

70. Given their status as relevant provisions in all previous legislative consent memoranda, the clauses in the Bill relating to customer data and business data have been the subject of extensive commentary in our first and second reports.

71. In our second report we concluded that, without the Welsh Government's full assessment of the devolved implications of the regulation-making powers in Part 3 of the Bill which relate to customer data and business data, we did not believe the Senedd will have sufficient information to make an informed decision on whether it should consent to these relevant provisions in the Bill.

72. When we wrote to the First Minister on 15 March 2024 we stated our view that, up to that point, the responses provided by the Welsh Government to our first and second reports did not provide an assessment of the devolved implications of the regulation-making powers in Part 3 of the Bill.

73. We acknowledge that, in Annex 2 of his letter to us on 16 April 2024, the Cabinet Secretary provides further detail about how and why the Welsh Government asked for clauses 85 to 107 of the Bill to be amended and what the Welsh Ministers would do if concurrent plus regulation-making powers were delegated to them.

74. We note the Cabinet Secretary's assessment that having concurrent regulation-making powers would enable the Welsh Government to influence how Smart Data schemes are delivered in Wales, while also enabling it to introduce schemes in sectors where the UK Government has no plans to do so or in sectors which, while being considered by the UK Government, are of low priority.

75. We note that the Cabinet Secretary's view as set out in Memorandum No. 4 is that the current approach to conferring powers solely upon the Secretary of State fails to reflect devolution and is inappropriate, and that consent "cannot be recommended due to the constitutional concerns which remain".

Conclusion 5. In relation to the provisions in the Bill relating to customer data and business data, we acknowledge and support the Cabinet Secretary's view that the conferral on the Secretary of State and not the Welsh Ministers of regulation-making powers which may be exercised in devolved areas is inappropriate. By extension, we also take the same view in relation to equivalent regulation-making powers exercisable by the Treasury in devolved areas, as conferred by the Bill.

76. We note that the amendments to clauses 96 and 103, as detailed in Memorandum No. 4, further amend provisions in the Bill which require the Senedd's legislative consent.

Provisions relating to the National Underground Asset Register

77. In our second report we noted that, through amendments made to the Bill at Commons' Report Stage, new provisions had been added to the Bill requiring, and making provision in connection with, the keeping of a register of information relating to apparatus in streets, to be called the National Underground Asset Register (NUAR).

78. We noted our concern that, through amendment NC42 tabled at Commons' Report Stage, regulation-making powers under section 79 of the 1991 Act, so far as exercisable in relation to Wales, are to be transferred from the Welsh Ministers to the Secretary of State.

79. We said that the transfer of existing regulation-making powers currently exercisable by the Welsh Ministers to the Secretary of State – meaning the modification of devolved competence – is a serious matter, and the explanation provided by the UK Government did not provide an appropriate or sufficient justification.

80. We recommended that, given the “constitutional policy concerns” regarding the NUAR provisions in the Bill and specifically the return of powers under section 79 of the 1991 Act (so far as exercisable in relation to Wales), the First Minister should escalate this issue to Ministerial level discussions, up to and including the formal dispute resolution procedures.

81. We also said that we would welcome details on any remedial action the Welsh Government considers it could take in respect of the transfer to the Secretary of State of existing delegated powers exercisable by the Welsh Ministers. In so doing we asked specifically whether the Welsh Government considers that it would be within the Senedd’s legislative competence to bring forward provisions in a Bill that would re-delegate to the Welsh Ministers the regulation-making powers under section 79 of the 1991 Act which are being transferred to the Secretary of State.

82. We acknowledge the relevant responses by the First Minister and the Cabinet Secretary to us which confirm that:

- The First Minister wrote to the Minister of State for Data and Digital Infrastructure on 23 January 2024 setting out the Welsh Government’s concerns around the UK Government’s proposed legislative approach and the impact of the NUAR provisions on the powers of the Welsh Ministers.⁵⁷
- Whilst a consult mechanism is included within the NUAR provisions, it places no binding commitment on the UK Government to take the Welsh Government’s views into account following consultation, and the Welsh Government told the UK Government that it is not considered to be constitutionally acceptable and cannot compensate for the removal of powers which the Welsh Ministers already hold.⁵⁸
- The Welsh Government has concerns about whether the ability to control its own data in Wales would be negatively impacted by these

⁵⁷ Letter from the First Minister, 8 March 2024

⁵⁸ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

provisions, where they provide for the Secretary of State to hold the data contained within the register of information.⁵⁹

- The Welsh Government informed the UK Government that the removal of a devolved executive function from the Welsh Ministers is completely inappropriate, and that the amendment proposed by the UK Government which would ensure the Welsh Ministers retain their existing regulation-making powers under section 79 of 1991 Act should not be conditional upon the Welsh Government agreeing to any of the other amendments proposed.⁶⁰
- The Welsh Government considers that it would be within the legislative competence of the Senedd to bring forward provisions in a Bill that would re-delegate to the Welsh Ministers the regulation-making powers under section 79 of the 1991 Act, subject to the Welsh Ministers consulting the appropriate UK Minister in accordance with paragraph 11(2) of Schedule 7B to the 2006 Act.⁶¹

Conclusion 6. We acknowledge and support the Cabinet Secretary's view that, in relation to the provisions in the Bill relating to a National Underground Asset Register, the removal of devolved executive function is an "inappropriate reversal of devolution".

Conclusion 7. The revocation of Senedd agreed secondary legislation, namely the Street Works (Records) (Wales) Regulations 2005, and extension of the equivalent regulations in England to Wales (via clause 141 of the Bill) is inappropriate.

Recommendation 1. Should the Bill be enacted in its current form, the Cabinet Secretary should confirm if it is the Welsh Government's intention to bring forward provisions in a Bill that would re-delegate to the Welsh Ministers the regulation-making powers under section 79 of the *New Roads and Street Works Act 1991* (subject to the Welsh Ministers consulting the appropriate UK Minister in accordance with paragraph 11(2) of Schedule 7B to the Government of Wales Act 2006).

83. We note that the amendments to clauses 96 and 103, as detailed in Memorandum No. 4, further amend provisions in the Bill which require the Senedd's legislative consent.

⁵⁹ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

⁶⁰ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024

⁶¹ Letter from the First Minister, 8 March 2024

Provisions relating to interview notices

84. We also commented on the provisions in the Bill relating to interview notices in both our first and second reports.

85. As highlighted in Chapter 1 of this report, clause 41 includes an exemption for Ofsted from the Information Commissioner's interview notice powers. No equivalent exemption has been provided for the Welsh Ministers for similar functions exercisable in Wales. We note that, while the UK Government proposed to remove Ofsted's exemption rather than provide a similar exemption for the Welsh Ministers as was requested by the Welsh Government, the Welsh Government had been content with this proposed amendment as it addressed its concerns "around ensuring parity in our policy for Wales".

86. To date, no such amendment has been agreed and so disparity remains between the provisions applying in England and in Wales. As such, we acknowledge the Welsh Government's position that concerns remain in respect of clause 41.

Provisions relating to Digital Verification Services (DVS)

87. In our previous two reports, we have also looked closely at the provisions in the Bill relating to DVS.

88. In our second report we said that, while we do not consider that the consent of the Senedd is required for the provisions in the Bill relating to DVS, we are nonetheless keen to understand the devolved implications of a UK-wide Code of Practice about the disclosure of information and the powers being provided to the Secretary of State. We also concluded that, if the Welsh Government remains of the view that consent is required for the provisions in the Bill relating to DVS, we do not believe the Senedd will have sufficient information to make an informed decision on whether it should consent to these provisions in the Bill without detailed information about provisions.

89. In his letter to us on 8 March 2024, the First Minister told us that, on 6 February 2024, the Minister of State for Data and Digital Infrastructure, Julia Lopez MP, wrote to the Welsh Government noting that, under the Welsh Devolution Guidance Note⁶², consent should be sought when conferring or imposing reserved functions on a devolved Welsh authority. As a result, while the UK Government

⁶² UK Government, [Devolution Guidance Note. Parliamentary and Assembly Primary Legislation affecting Wales](#)

maintain that these functions are reserved, the UK Government was now of the view that legislative consent should be sought for clause 74 and clause 78(3).⁶³

90. We asked the Welsh Government to share with us the correspondence received on 6 February 2024 from the Minister of State for Data and Digital Infrastructure.⁶⁴ We also sent a similar request to the Minister of State.⁶⁵

91. The letter dated 6 February 2024 was shared with us on 13 May 2024. We note that, in the letter, the Minister of State for Data and Digital Information states:

“The UK Government maintains that these functions are reserved, but in further consideration of the Welsh Devolution Guidance Note, which sets out that consent should also be sought when conferring or imposing reserved functions on a devolved Welsh authority, we have come to the view that it is appropriate to seek agreement to Clause 74 and Clause 78(3) - either through a Legislative Consent Motion or a statement made by the Welsh Ministers - noting that there is no procedure in the Senedd Standing Orders covering situations where a UK Parliament bill imposes reserved functions on devolved Welsh authorities.”

92. At the time of writing this report, a reply from the Minister of State had not been received by the Committee.

93. Given the apparent change in position by the UK Government on legislative consent for the DVS provisions as a result of consulting the DGN, we also asked the Welsh Government for its views on the different criteria and approaches that appear to be applied by the UK Government, the Welsh Government and the Senedd's Standing Orders when assessing whether a Bill's provisions require the Senedd's legislative consent. In his letter to us on 16 April 2024, the Cabinet Secretary told us that the Welsh Government is “committed to the Sewel convention” as reflected in section 107(6) of the 2006 Act and that it would “continue to comply with the Senedd's Standing Orders”.⁶⁶

⁶³ Letter from the First Minister, 8 March 2024

⁶⁴ Letter to the First Minister, 15 March 2024

⁶⁵ [Letter to the Minister of State for Data and Digital Infrastructure, Julia Lopez MP](#), 15 March 2024

⁶⁶ Letter from the Cabinet Secretary for Economy, Energy and Welsh Language, 16 April 2024, Annex 1

94. As we recently said in our report on the Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Victims and Prisoners Bill⁶⁷, the fact that the UK Government's DGN sets out reasons when it thinks consent is required by the Senedd for clauses in UK legislation is not relevant for the purpose of the tests in the Senedd's Standing Orders. Memorandum No. 4 is laid before the Senedd under Standing Order 29, and it is confusing and unhelpful to make reference to criteria that do not apply to the Senedd's legislative consent process.

95. We remain of the view that clauses 74 and 78 of the Bill relating to the DVS do not make provision for any purpose within the legislative competence of the Senedd.

Conclusion 8. While we disagree with the Welsh Government's position on the requirement for legislative consent in respect of clauses 74 and 78 (and related amendments to those clauses), we support the view that, where matters are considered to relate to devolved matters, the conferral of regulation-making powers solely upon the Secretary of State is inappropriate. In this respect, we note the UK Government's view that legislative consent should be sought when conferring or imposing reserved functions on a devolved Welsh authority and, as a result, it considers that agreement should be sought for clause 74 and clause 78(3).

Provisions relating the implementation of law enforcement information sharing agreements, the meaning of "appropriate national authority", and Regulations

96. In both our first and second reports we commented on the powers in the Bill to make regulations for the purpose of implementing an international agreement relating to the sharing of information.

97. Where the Welsh Ministers do not make regulations to implement international agreements and powers in the Bill to do so are instead exercised by the Secretary of State, we recommended that the Welsh Government make a commitment that it would provide a detailed explanation to the Senedd in advance of such regulations being made by the Secretary of State.

⁶⁷ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Victims and Prisoners Bill](#), April 2024

98. We note the First Minister's response on 8 March 2024 that "Should this occur, the Senedd will be updated of any powers being exercised in devolved areas through the usual process."⁶⁸

99. We also note the Welsh Government's view, as stated in Memorandum No. 4, that an appropriate recognition for devolved interests could be reflected alongside the potential merits of UK-wide policy delivery through the conferral of concurrent plus powers but this was rejected by the UK Government which instead offered amendments including concurrent powers with consultation provisions.

Conclusion 9. We acknowledge and support the Cabinet Secretary's view that, in relation to the provisions in the Bill relating to the implementation of law enforcement information sharing agreement, the conferral solely upon the Secretary of State of regulation-making powers which may be exercised in devolved areas fails to reflect devolution and is inappropriate.

The UK's current EU data adequacy decision

100. We have highlighted in our previous two reports that the Bill has resulted in some concerns over a risk to the UK's current data adequacy decision, which was granted in June 2021 by the EU for an initial period of 4 years. We recognised that the Bill intersects with UK-EU obligations.

101. While the Welsh Government, in the Memorandum, set out its view that the loss of the UK's current adequacy decision is a "key concern from a trade perspective"⁶⁹, our concerns extend beyond trade to all data sharing covered by the Bill and adequacy decision, including law enforcement cooperation.⁷⁰ No further information has been provided by the Welsh Government in relation to other data areas covered by the decision, including in devolved areas.

102. We note that, in Memorandum No. 4, the Cabinet Secretary states that the Welsh Government continues to have concerns regarding the Bill's impact on the UK's EU Data Adequacy status and alludes to a potential legal challenge in the Court of Justice of the European Union.

⁶⁸ Letter from the First Minister, 8 March 2024

⁶⁹ Memorandum, paragraph 34

⁷⁰ Report on the Welsh Government's Legislative Consent Memoranda on the Data Protection and Digital Information (No. 2) Bill, paragraph 99

103. In our view, the provision of a tailored explanation of the Welsh Government's concerns and the impact on Wales in Memorandum No. 4 would have aided our, and the Senedd's, consideration of the impact of the Bill.

Conclusion 10. The views expressed by the Cabinet Secretary in Memorandum No. 4, that a number of the Bill's provisions could impact on the UK's EU Data Adequacy status and have the potential to lead to legal challenge in the Court of Justice of the European Union, are stark and concerning.

Recommendation 2. The Cabinet Secretary should, during the relevant consent debate for the Bill, provide full details to explain his statement that a number of the Bill's provisions could impact on the UK's EU Data Adequacy status and have the potential to lead to legal challenge in the Court of Justice of the European Union.

104. As the Senedd Committee responsible for monitoring the implications of external matters on constitutional affairs, when we consider legislative consent memoranda we, as standard, look for any issues which could have such impact. During our consideration of the Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill⁷¹, we were able to secure a commitment⁷² from the Welsh Government that it would make it clear when UK Bills intersect with international obligations.

Recommendation 3. The Cabinet Secretary should make clear during the relevant consent debate for the Bill whether, in addition to the UK-EU obligations already cited, the Welsh Government considers the Bill has implications for other international arrangements such as the UK-US data bridge established in 2023. If so, the Cabinet Secretary should provide detailed information.

The quality of Memorandum No. 4

105. Memorandum No. 4 unfortunately describes amendments that have been tabled to the Bill at Lords' Committee Stage by way of referring to what appear to be internal intergovernmental references, rather than the numbers attached to the amendments on the publicly available amendment papers.

106. We understand that, during pre-tabling intergovernmental discussions, a numbering system may be used to identify and keep track of developments and

⁷¹ [Legislative Consent: Professional Qualifications Bill](#)

⁷² [Letter from the Minister for Education and Welsh Language](#), 6 October 2021, response to recommendation 9

negotiations on particular amendments. However, those numbers are irrelevant to anyone outside of the Welsh and UK Governments.

Conclusion 11. For transparency and to aid an already difficult scrutiny process, amendments listed in legislative consent memoranda laid before the Senedd should be described by way of making reference to the numbers attached to them in the formal UK Parliamentary amendment papers.