Coroners and Justice Bill: clause 152

Standard Note: SN/HA/5001
Last updated: 11 March 2009
Author: Grahame Danby
Section Home Affairs Section

There has been much publicity over the information sharing provisions, notably clause 152, in the *Coroners and Justice Bill 2008-09*, which has completed its Commons Committee Stage. The Public Bill Committee debated the clause in its ninth and tenth sittings on 26 February, with the outcome that the clause was ordered to stand (unamended) part of the Bill. Subsequently, the Government has announced its intention to withdraw the clause. This note describes the relevant policy background on information sharing and outlines what the clause provides for.

Concerns over the clause had recently been acknowledged by the responsible Secretary of State – with a suggestion of future amendments. In the *Guardian* on 27 February, Jack Straw wrote the following:

> The climate in a post-9/11 world is much harder than anyone imagined, even in the immediate aftermath of that outrage. I do not pretend we've got everything right. We haven't. Take the data-sharing measures proposed in the coroner's and justice bill. Their aim is good, but parliamentary scrutiny has thrown up justifiable concerns that the powers provided could be misused. It's not our intention but I agree, so we are acting to get a much better balance between data protection and access to services.[1]

Speaking in the Public Bill Committee on 10 March 2009, the Parliamentary Under-Secretary of State for Justice (Bridget Prentice) said:

> Further to that point of order, Mr. Cook. I accept that the Committee in its scrutiny is aware of the difficulties with clause 152. In fact, I have said in Committee that I want to see whether
>
> > "we can come up with a more streamlined version that takes into account the fact that Parliament has a role in scrutinising the decisions of Ministers".——[Official Report, Coroners and Justice Public Bill Committee, 26 February 2009; c. 390.]
>
> I also said:

[1] "Our record isn't perfect. But talk of a police state is daft: There was no golden age of liberty. Since 1997, we have done more to extend freedoms than any government before", *Guardian*, 27 February 2009

> "I acknowledge that the clause as drafted has the potential to be far wider than it is intended to be."——[Official Report, Coroners and Justice Bill Public Bill Committee, 26 February 2009; c. 386.]
>
> As a result of our scrutinising matters in Committee, we have decided to remove clause 152. I apologise to the hon. Member for North-West Norfolk that such details should have appeared in the press before they were brought to the attention of the Committee. However, I have followed the proper process and have asked Cabinet colleagues to withdraw the clause from the Bill so that we can have further consultation. I hope that we shall be able to look at how we can draft a more appropriate clause, not necessarily under the Bill, but at some further stage, so that we can put in place a proper data-sharing provision. I hope that I have clarified the position.[2]

The Government has, for some years,[3] been developing a strategy on data-sharing across government departments – motivated as a means of providing more efficient and accessible public sector services. One obvious impediment to increased data sharing is the second data protection principle, given in Schedule 1 of the *Data Protection Act 1998* (DPA):

> Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.[4]

Although the DPA provides for a number of exemptions and exceptions to this, few of which are blanket in nature,[5] greater comfort to would-be information sharers can be provided by legislation. Recent examples of data sharing powers can be found in, among others, the following:

- *Digital Switchover (Disclosure of Information) Act 2007*
- *Serious Crime Act 2007*
- *Education and Skills Bill 2007-08*
- *Pensions Bill 2007-08*
- *Counter-Terrorism Bill 2007-08*

As its title implies, the ***Coroners and Justice Bill 2008-09*** covers a wide range of subjects but, at least in so far as data protection is concerned, clause 152 contains by far the most controversial measures. While some reports have suggested that the clause would remove the barriers to the bulk sharing of personal data across government departments, it would be more accurate to say the barriers would be lowered (albeit significantly) – and with some in-built safeguards.

Clause 152 of the *Coroners and Justice Bill* would obviate the need for primary legislation to enable personal data sharing, providing instead a secondary legislation route. It inserts a new Part (5A) on information sharing in the DPA. In particular, a new section (50A) would enable Ministers to make "information-sharing orders" enabling "any person" to share

---

2 PBC Deb 10 March 2009 cc585-6

3 *Privacy and Data Sharing*, Performance and Innovation Unit, April 2002

4 *Data Protection Act 1998*, Schedule 1, Part I

5 Not even national security: see *Tolley's Data Protection Handbook*, 4th Edition, 2006, chapter 20.

information which consists of or includes personal data. Quite what constitutes personal data is the subject of ongoing debate,[6] but it is defined in section 1 of the DPA as follows:

> "personal data" means data which relate to a living individual who can be identified—
> (a) from those data, or
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

New section 50A includes a definition of sharing that explicitly overrides the second data protection principle:

> For the purposes of this Part a person shares information if the person […] consults or uses the information for a purpose other than the purpose for which the information was obtained.[7]

However, among the conditions attaching to the contents of an information-sharing order is one that requires specification of the purposes for which the information is to be shared.[8] Constraints are also placed on when a particular Minister can make an information-sharing order[9] and this "designated authority"[10] – in general the appropriate Minister in Whitehall or one of the devolved administrations – must further be satisfied that the following conditions are met:

> (a) that the sharing of information enabled by the order is necessary to secure a relevant policy objective,
>
> (b) that the effect of the provision made by the order is proportionate to that policy objective, and
>
> (c) that the provision made by the order strikes a fair balance between the public interest and the interests of any person affected by it.[11]

The orders would be able to, among other things, impose conditions on information-sharing, "provide for a person to exercise a discretion in dealing with any matter" and "modify any enactment".[12] An information-sharing order could also provide for the creation of offences; obvious possibilities would include serious breaches of the conditions imposed by any such order on information-sharing.

New section 50D requires the designated authority to consult affected persons in advance of making an information-sharing order. A draft of such an order would also have to be submitted to the Information Commissioner. The latter would have 21 days to submit, should he so choose, a report to the designated authority. Any such report would state whether or not the Information Commissioner was satisfied that the draft order was proportionate and had achieved a fair balance between the public interest and the interests of affected persons. The draft order, with any report by the Information Commissioner, would then be laid before Parliament or, as appropriate, the Scottish Parliament, National Assembly for Wales or the

---

6 Some assistance comes from *Opinion 4/2007 on the concept of personal data*, adopted on 20 June 2007 by the Article 29 Data Protection Working Party (an independent European advisory body on data protection and privacy).

7 New section 50A(3), DPA

8 New section 50A(5)

9 New section 50C, DPA

10 A definition of "designated authority", taking into account devolution arrangements, appears in New section 50A, DPA

11 New section 50A(4), DPA

12 "modify" includes amend, add to, revoke or repeal – new section 50F, DPA

Northern Ireland Assembly. In all cases, it would be subjected to the relevant affirmative resolution procedure.

In the light of an adverse report by the Information Commissioner, a Minister might choose not to lay the draft order (or the report) before Parliament:

> If the Commissioner submits a report under subsection (4) and the designated authority proceeds to lay the draft order before Parliament, the designated authority must at the same time lay a copy of the report before Parliament.[13]

New section 50E provides an additional hurdle in relation to the making of information-sharing orders in that it provides for oversight by the Secretary of State having primary responsibility for government policy on data protection – the Secretary of State for Justice. His consent is necessary when an appropriate (Whitehall) Minister wishes to make an order; in the case of the devolved administrations he must be consulted. An appropriate Minister wishing to make an order which would impact on either information sharing or legislation in Scotland, Wales or Northern Ireland would have to obtain the consent of the appropriate devolved government.

Liberty "strongly opposes" these proposed amendments to the DPA, commenting adversely on "such broad and sweeping powers to make secondary legislation."[14] Its second reading briefing on the Bill cites in support the Joint Committee on Human Rights.[15] On the other hand, the Information Commissioner's Office *initially* indicated a belief that the *Data Protection Act 1998* as it stands, and the introduction in the present Bill of Commissioner's reports on draft information-sharing orders, provide appropriate safeguards for personal privacy.[16] However, a more recent commentary from the Information Commissioner's Office states:

> The Bill's information-sharing provisions are too wide, and its safeguards relatively weak. The provisions should only apply in precisely defined circumstances where there is a legal barrier to information sharing that would be in the public interest. The Bill needs an additional safeguard, to prevent the use of information-sharing orders in the context of large-scale data sharing initiatives that would constitute significant changes to public policy.[17]

Clause 153 would insert five new sections (52A-52E) into the *Data Protection Act 1998*. These deal with the preparation, approval, publication and effect of a data-sharing code and any subsequent modifications to it. This clause represents the Government's response to the following recommendation in the *Data Sharing Review Report* of Richard Thomas (Information Commissioner) and Mark Walport (Director of the Wellcome Trust) published on 11 July 2008:

> Recommendation 7(a): We recommend that new primary legislation should place a statutory duty on the Information Commissioner to publish (after consultation) and periodically update a data-sharing code of practice. This should set the benchmark for guidance standards.[18]

---

13 New section 50D(6), DPA

14 *Liberty's Second Reading Briefing on the Coroners and Justice Bill in the House of Commons*, January 2009

15 Joint Committee on Human Rights, *Data Protection and Human Rights*, HL 72/HC 132, 2007-08 para 20

16 *Coroners and Justice Bill: A commentary from the Information Commissioner's Office – Second Reading 26 January 2009*, Information Commissioner's Office, 22 January 2009

17 http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/ico_commentary_170209.pdf (13 February 2009)

18 Richard Thomas and Mark Walport, *Data Sharing Review Report*, 11 July 2008

Such a code would contain practical guidance on the sharing of personal data, both to meet the requirements of the DPA and to promote good practice having regard to the interests of data subjects and others. Provision is made for the Information Commissioner to consult both data controller and data subject interests.

As noted above, the Government believes that data sharing has an important role in improving public services while, at the same time, acknowledging the privacy rights of individuals. A leading article in the *Independent* provided one of the more hostile responses to the information-sharing proposals in the Bill:

> The Coroners and Justice Bill , published yesterday, proposes to give ministers the right to allow public bodies to exchange sensitive data about each of us between themselves. The effect would be to free organisations such as the Inland Revenue and the National Health Service from the present data protection laws which state that such information can only be used for the purpose for which we originally handed it over. Ministers would even be able, in theory, to transfer public records to private companies. If this Bill is passed by Parliament, it will represent yet another encroachment by the state into areas in which it has no business.
>
> […]
>
> There is a good reason why government agencies have hitherto not been allowed to pass around our personal data at will. And that is because it belongs to us, not the state. We provide this information to receive certain specified benefits and services, on the understanding that it will be kept strictly confidential. If ministers are unable to recognise why it is inappropriate for them to undermine our privacy in this way, they simply reveal themselves to be unfit to govern.[19]

In the second reading debate on the *Coroners and Justice Bill*, which took place on 26 January 2009, the Secretary of State (Jack Straw) said:

> Let me turn finally to the provisions relating to changes to the Data Protection Act 1998. In an age of instantaneous electronic information, it is fundamental that data held on individuals are secure and properly protected. That plainly has not always been the case. At the same time, provided security and scrutiny are guaranteed, better data sharing can greatly work in the interests of the public. It can help to improve opportunities for the most disadvantaged, provide better public services, reduce the burden on businesses, implement policies more effectively and detect fraud.
>
> At present, when a family is bereaved they often have to contact Government Departments and local authority departments many times over to make the necessary arrangements, often providing the same information. Responsible data sharing between the relevant agencies would reduce the number of people who would need to be notified of a death, thereby helping to relieve distress at a difficult time.
>
> Last year, my right hon. Friend the Prime Minister asked Professor Mark Walport and the Information Commissioner, Richard Thomas, to conduct an independent review of data protection and data sharing. The review recommended stronger safeguards to protect data and upgraded arrangements for data sharing. It said, in particular, that
>
> "there is a lack of clarity about what the law permits or prohibits."
>
> So, alongside new powers, clause 152 provides a new scheme for data sharing. Under those powers, an order may be made only in circumstances where sharing the information is in the public interest and proportionate to the impact it may have on the

[19] "Riding roughshod over our privacy", *Independent*, 15 January 2009

> person affected. The Information Commissioner will provide independent oversight of the process, scrutinising draft orders and laying before Parliament a report of his findings. Every single order will have to be debated and approved by Parliament.[20]

For the Opposition, Dominic Grieve countered:

> With his characteristic skill, the Secretary of State reduces a seismic change in the relationship between the state and the citizen to something utterly benign. Is it not the case that a great deal of the information that the state acquires from individuals is acquired for specific purposes that Parliament has set down? The Government are proposing to drive a coach and horses through the duty of confidentiality that the state owes to individuals in any case where a quite nebulous concept of public good decides to trump the private right. That is surely not a matter that we should be considering in a portmanteau Bill of this sort. It ought to be contained in separate stand-alone legislation. It has enormous implications for civil liberties and it is not right that the Government should come to the House and ask us to have it as a little add-on to another complex piece of legislation.[21]

---

[20] HC Deb 26 January 2009 cc41-2

[21] HC Deb 26 January 2009 c42