Edgar A. Whitley

Submission to the House of Lords Constitution Committee Inquiry into "Legislative Process: Stage 1: Preparing legislation for introduction in Parliament" Consultation

Documentation

Dr Edgar A. Whitley, Associate Professor (Reader) in Information Systems, London School of Economics and Political Science. Co–chair Cabinet Office Privacy and Consumer Advisory Group (PCAG)—Written evidence (LEG0019) PART ONE

Executive summary

1. This submission responds to a key section of the inquiry from the perspective of information systems: the social study of information and communications technologies. It focuses on the role of technology when addressing Questions 1–3 on creating a good law There are, however, also implications for Questions 6 and 7 (on the role of technology).
2. For questions 1–3, the submission draws on research that questions the idea of technology–neutral laws[1] and argues instead that technological issues should not be left for codes of practice, regulations and statutory instruments. This because apparently neutral technological decisions can, in fact, have a significant impact on the way a law is implemented and, as such, should be subject to proper, detailed scrutiny. In particular, these decisions can be such a key part of the proposed legislation that they should be subject to more scrutiny than codes of practice and statutory instruments typically receive.

Against technology–neutral laws.

3. "Would you say that, done right and should the codes come out right, the clauses in the Bill have the potential to improve public services through better use of data?" [Question from Matt Hancock, Digital Economy Public Bill Committee, 11 October 2016[2]].
4. I was asked this question as part of the scrutiny of the Data Sharing clauses in the Digital Economy Bill. Implicit in the question is the idea that the Bill provides the high level description of the government's intentions (around data sharing to improve public services in this case) and that the detail about how this should be achieved (and the oversight mechanisms associated with it) are not that important and can be left to codes of practice that may not even be scrutinised properly by Parliament.
5. This can be seen as intending to produce a form of "technology neutral" legisation. The view that technology is neutral has been described as "one of the most dangerous of all modern mantras"[3] As Koops[4] notes technology neutral

[1] Whitley, E. A. (2013). On technology neutral policies for e–identity: A critical reflection based on UK identity policy, *Journal of International Commercial Law and Technology* 8(2), 134–147. and Whitley, E. A., and Hosein, G. (2010). *Global challenges for identity policies*, Palgrave Macmillan Basingstoke, especially chapter 10.

[2] https://hansard.parliament.uk/commons/2016-10-11/debates/cc664aca-a5c4-4a4b-b174-0b448660a979/DigitalEconomyBill(SecondSitting)

[3] Pringle, R., K. Michael, and M. G. Michael. "Unintended Consequences: The Paradox of Technological Potential." IEEE Potentials 35, no. 5 (September 2016): 7–10. doi:10.1109/MPOT.2016.2569672.

[4] Koops, B.-J. (2006). Should ICT regulation be technology–neutral?, in *Starting points for ICT regulation: Deconstructing prevalent policy one-liners* B.-J. Koops, M. Lips, C. Prins, and M. Schellekens

legislation is often a response to the classic concern that technology specific regulation might rapidly become out of date or obsolete. Concerns about the role of technology can include *technology indifference* (i.e. how it is formulated or in terms of its intended effects), *implementation neutrality* (i.e. implementation is not tied to particular technologies) and *potential neutrality* (i.e. its effects do not hinder particular developments). The final approach focuses on technology neutrality as a *legislative technique* that allows laws to be sufficiently sustainable in order to provide certainty but also explicit about which technologies they are intended to cover (and why) so that whenever there are fundamental changes to the technology it is possible to trigger a revision in the law.

6. I believe that it is becoming increasingly problematic to produce technology neutral legislation of this latter kind. Instead, there are growing requirements for the specifics of the technology to be provided at the start of the legislative process. There are three reasons for this: a) Legislation should be based on clear user needs; b) Implementation decisions are always choices; and c) Implementation decisions need proper scrutiny and should not be left to lower profile scrutiny such as statutory instruments, regulations or tabled codes of practice.
7. To illustrate these points, I draw on the clauses in Part 5 of the Digital Economy Bill. Unfortunately, as I noted in my oral evidence to the Public Bill Committee, this Part of the Bill is lacking the kind of detail that I believe is necessary. I therefore draw on the clauses present in the Bill alongside indications as to the government's thinking as found in the "Better use of data in government" consultation on data sharing[5].

Legislation should be based on clear user needs

8. Clauses 38–39 of the Digital Economy Bill relate to the sharing of civil registration data (i.e. data on births, marriages and deaths) within Government. The consultation document helpfully provides an example of the kind of data sharing that might arise with this data: "A couple have recently had a new baby daughter. Following registering the birth of their daughter they applied for Child Benefit. They were really pleased to find out that they no longer had to send their child's birth certificate to HMRC as a new digital service would match their daughter's birth records against birth information held by the General Register Office. The whole experience was far better than their previous experience of claiming Child Benefit when they had to purchase a new birth certificate to send to HMRC in the post to replace a lost certificate. As a result they had to wait a number of weeks before receiving their entitlement letter and birth certificate. This time the process of claiming Child Benefit was straightforward, secure and hassle free".
9. A real world example of how this kind of data sharing might benefit citizens relates to a local authority offering a nappy collection service[6], a clear user need.

(eds.), TMC Asser Press The Hague, 77–108.

[5] https://www.gov.uk/government/consultations/better-use-of-data-in-government

10. Immediately after this, however, the consultation asks about bulk data sharing of civil registration data. "Question nine: Do you think bulk registration information, such as details of all deaths, should be shared between civil registration officials and specified public authorities to ensure records are kept up to date (e.g. to prevent correspondence being sent to families of a deceased person)?".
11. Whilst such receipt of such correspondence can be distressing, this is already covered by the existing Tell us once service[7]. No guidance is provided, however, about the other user needs that might be addressed by these bulk data sharing provisions, nor is there any evidence of what the Government Digital Service describes as "discovery" work ("A short phase, in which you start researching the needs of your service's users, find out what you should be measuring, and explore technological or policy-related constraints"[8]).

Implementation decisions are always choices

12. The government has stated that their approach to data sharing would have "positive benefits on privacy and security" there are different ways of implementing the data sharing proposals around civil registration. It is possible to implement data sharing in a way that is privacy enhancing, for example by using attribute checks. Here a local authority offering the nappy service only needs to check the "attribute" of whether a household has a child under 4 years of age—the answer is either Yes or No. They do not need to know the child's actual age[9] nor see their birth certificate[10]. Other implementations of data sharing, however, can be much more privacy invasive and increase data handling risks[11] with significant consequences for public trust.
13. Similar implementation decisions can be found in the clauses about addressing fuel poverty. Here the consultation notes that "Automatic [fuel discount] rebates can only happen if the state can *inform* energy companies (*through a data match*) which of their customers should receive it" (emphasis added), yet a few paragraphs later, the consultation states "The only information shared between energy suppliers and Government would be a simple 'eligibility flag' [Y/N] along with customers' names and addresses (or equivalent unique identifiers)".
14. Having energy companies checking an eligibility flag is a very different approach to government informing (all the) energy companies about which of their customers should receive an energy rebate.

---

[6] http://www.anglesey.gov.uk/planning-and-waste/recycling-and-waste/household-waste-collection/nappy-collection-service/

[7] https://www.gov.uk/after-a-death/organisations-you-need-to-contact-and-tell-us-once

[8] https://www.gov.uk/service-manual/phases

[9] http://www.bbc.co.uk/news/uk-wales-north-west-wales-37495589

[10] http://www.bbc.co.uk/news/uk-wales-north-west-wales-37483290

[11] https://www.nao.org.uk/report/protecting-information-across-government/ and https://www.gov.uk/government/publications/review-of-data-security-consent-and-opt-outs

15. There will be operational advantages and disadvantages to both approaches and it is important that Parliamentarians are fully informed about the implemention choices they are implicitly or explicitly endorsing when scrutinising the legislation.

Implementation decisions need proper scrutiny

16. The case of the data sharing provisions add further complexity to the situation by seeking to resolve some of the concerns about technological issues through the use of Codes of Practice issued by the relevant Minister and to which persons to whom the Codes apply must have regard. Unfortunately none of the Codes of Practice were ready for the Public Bill Committee, despites requests for such detail being made since the earliest stages (2013) of the policy making process.
17. This point has been made a number of times before. For example, the Joint Committee on the Draft Investigatory Powers Bill[12] made specific recommendations about the publication of codes of practice: "Above we have demonstrated the importance of codes of practice in containing **much of the detail about the way the powers in the draft Bill will be exercised**. This point was also underlined recently by the House of Commons Science and Technology Committee. This is particularly the case in relation to the definitions of communications data (see paras 69–70), ICRs (paras 120–122), the removal of electronic protection (paras 263–264), and Equipment Interference (paras 292–295). The Codes of Practice **will provide essential further details on how the powers in the draft Bill will be used in practice**. We recommend that **all of them should be published when the Bill itself is introduced** to allow both Houses to conduct full scrutiny of their contents. (Recommendation 84)" (§697–698 emphasis added).
18. As Mr Edward Garnier noted in relation to the Identity Cards Act (another piece of legislation that sought to be technology neutral) a particular problem with secondary legislation such as statutory instruments and codes of practice is that, in practice, the debates are often poorly attended and so effective scrutiny of the details will be limited, raising the prospect of "legislation by statutory instrument" [18 October 2005, Column 804].
19. A similar point was made by the House of Lords Constitution Committee in 2009[13] : "We are concerned that primary legislation in the fields of surveillance and data processing **all too often does not contain sufficient detail and specificity to allow Parliament to scrutinise the proposed measures effectively**. We support the conclusion of the Joint Committee on Human Rights that **the Government's powers should be set out in primary legislation**, and **we urge the Government to ensure that this happens in future**. We will keep this matter under close review in the course of our bill scrutiny activities" (§474 emphasis added).
20. In 2014, the Australian Law Reform Commission[14] noted that privacy laws be "sufficiently flexible to adapt to rapidly changing technologies and capabilities

[12] http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/9302.htm

[13] http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/18/18.pdf

without the need for constant amendments. **At the same time, they should be drafted with sufficient precision and definition to promote certainty as to their application and interpretation**" (§2.30 emphasis added).

21. Scrutiny of a separate part of the Bill (about age verification and access to online pornography), involved discussion of precisely the kind of detail that I am advocating ("On age verification, attention has been drawn to the consequences of failing to think through plans, including the possibility that information on passports and driving licences could be misused when collected as part of an age verification system").
22. In that case, however, the relevant clauses of the Bill are primarily concerned with the designation and funding of an ager verification regulator.
23. There is reference to the regulator publishing guidance about "types of arrangements for making pornographic material available that the regulator will treat as complying with [the relevant] subsection" and a detailed draft BSI Publicly Available Specification (PAS 1296) is currently subject to a public consultation.

Responding to your specific questions

24. *Q1) How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?*
25. In this context, the current practices are not particularly effective as they do not provide sufficient detail for proper scrutiny of proposals.
26. *Q2) Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of 'good law'?*
27. If these details are not on the face of the Bill I believe that the absence of the detail found in Codes of Practice makes effective scrutiny impossible.
28. *Q3) Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?*
29. If the detail is not provided on the face of the Bill then it must be published ahead of Parliamentary scrutiny, for example, by issuing draft Codes of Practice.
30. *Q6) How effectively do Parliament and the Government make use of technology at this stage of the legislative process?*
31. As my submission makes clear, my main issue is not with regard to the use made of technology rather it concerns the details *about* legislative proposals.
32. *Q7. How could new or existing technologies be used to support the development and scrutiny of legislation?*
33. As noted above, provision of detailed Codes of Practice / Statutory Instruments would help the development and scrutiny of legislation.

18 October 2016

[14] http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123