

Explanatory Memorandum to The Digital Government (Welsh Bodies) (Wales) Regulations 2018

This Explanatory Memorandum has been prepared by the Office of the Chief Digital Officer and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with

Standing Order 27.1

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Digital Government (Welsh Bodies) (Wales) Regulations 2018. I am satisfied that the benefits justify the likely costs.

Julie James
Leader of the House and Chief Whip
13 March 2018

1. Description

- 1.1. The Digital Economy Act 2017 (“The Act”) provides new powers for public bodies to share data to help improve the delivery of public services, and to identify and deal with debts owed to, and fraud against, the public sector. To be able to access these new powers, public bodies need to be named in the appropriate Schedules to the Act and, in the case of the public service delivery powers, also named against a specific objective.
- 1.2. These regulations set out the devolved Welsh public bodies that will be able to access the new powers alongside the English and non-devolved bodies that are already named in the Schedules to the Act.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

None.

3. Legislative background

- 3.1. The Act introduced a suite of measures designed to support the digital transformation of government and enabling the delivery of better public services. The digital government elements of the Act provide new powers for public authorities to share personal information to combat fraud against the public sector and empowers the public sector to reduce the debts owed to government by allowing early identification of and help for people who owe debts to multiple public agencies. The Act also introduces new offences and penalties for unlawful disclosure.
- 3.2. In March, the UK Government will also set out new regulations which include four specific objectives for the use of the new powers in relation to sharing data for public service delivery – objectives designed to help identify and support individuals and households affected by multiple disadvantages, eligible for support under a television retuning scheme, or living in fuel or water poverty.
- 3.3. To be able to access these new powers, public bodies need to be named in the relevant Schedule to the Act. At present, only English and non-devolved public authorities are named in those Schedules.
- 3.4. These new regulations are made under the following sections of the Act :
 - Section 35(3) enables the Welsh Ministers to add, remove or modify any entry relating to a person or description of a person listed in Schedule 4: Public Service Delivery: specified persons for the purposes of section 35 (Disclosure of information to improve public service delivery).
 - Section 36(5)(a) enables the Welsh Ministers to add, remove or modify an entry relating to a person or description of a person listed in Schedule 5: Public Service Delivery: specified persons for the purposes of sections 36 and 37 (Disclosure of Information to/by gas

and electricity suppliers).

- Section 38(5)(a) enables the Welsh Ministers to add, remove or modify an entry relating to a person or description of a person listed in Schedule 6: Public Service Delivery: specified persons for the purposes of sections 38 and 39 (Disclosure of information to/by water and sewerage undertakers).
- Section 44(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of the provisions listed above.
- Section 48(5) enables the Welsh Ministers to add, remove or modify any entry relating to a person or a description of a person listed in Schedule 7: specified persons for the purposes of the debt provisions.
- Section 54(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of section 48(5).
- Section 56(6) enables the Welsh Ministers to add, remove or modify any person listed in Schedule 8: specified persons for the purposes of the fraud provisions.
- Section 62(2)(b) enables the Welsh Ministers to make consequential, supplementary, transitional or savings provisions in consequence of section 56(6).

3.5. This instrument is subject to the approval of the Assembly.

4. Purpose & intended effect of the legislation

4.1. The effect of these new regulations is to extend the new powers to share data in the Act to devolved Welsh public authorities. This will mean they can share data for the purposes of improving public service delivery, dealing with debt and tackling fraud with other public bodies in Wales and bodies across the UK that are also specified in the Act.

4.2. Specifying these bodies at this time also means that the appropriate Welsh bodies can be referred to in the Digital Government (Disclosure of Information) Regulations 2018 that UK Government intends to lay in March. This will enable those bodies to share data to support the objectives listed in para 3.2.

4.3. These new powers are permissive. Where a public body in Wales is named, it is under no obligation to share data for any purpose, if it chooses not to. If data-sharing is desired, new codes of practice are being introduced by UK Government which will set out how that data should be shared and the procedures to follow. These will be available in Welsh once they have been finalised. These new powers provide a statutory basis for data to be shared – organisations involved in sharing

data will still need to meet the requirements of current and future data-protection regulations.

- 4.4. If these Regulations are not made, Welsh public bodies will not be able to access the new powers and will continue to have to create new statutory gateways using existing processes, where these are needed.

5. Consultation

- 5.1. Details of the consultation are included in the Regulatory Impact Assessment in Part 2 below.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

1.1. Option 1 – Do nothing

Maintain the status quo. Public authorities in Wales will be able to share data under any existing legal gateways but if they do not exist they will need to establish new legal gateways for specific purposes when a need for them arises, as they will not have access to the new data sharing powers granted to specified public bodies under Part 5 of the Digital Economy Act 2017.

1.2. Option 2 – Introduce new Regulations

Introduce new legislation which will insert relevant Welsh public authorities into schedules 5 to 8 to the Digital Economy Act 2017. This will enable Welsh public authorities to share data with other public bodies (specified in the same schedules) across the UK for the purposes of improving public service delivery, identifying and collecting debts, and identifying and taking action against fraud.

2. Costs & benefits

Option 1 - Costs

- 2.1. Establishing new statutory gateways for data-sharing can meet an identifiable need, but it is a time consuming and resource intensive process. It does not provide public authorities with a clear and established solution which enables them to respond quickly to changing needs. The resources required to establish specific gateways to share data will continue to be used inefficiently under this option.
- 2.2. The anticipated costs of this option are assessed as minimal as there will be no change from existing processes. The current main costs are discussed below.
- 2.3. Establishing a new legal gateway involves public sector officials' time in researching the legal framework and negotiating the terms of the data sharing with the authorities involved. New gateways will also require new legislation. The process required for each new gateway will depend on the specific requirements in each case and the administrative requirements will therefore also vary. Anecdotal evidence from civil servants across the UK suggests establishing a new data sharing gateway can take several years to negotiate and establish. This is an ongoing cost and the total value will depend on the number and type of gateways required.
- 2.4. A further cost is associated with the time delay in negotiating a data sharing gateway. This can cause delays in improved processes or launching policy interventions, and delay the benefits of those interventions. This may directly impact on the well-being of the individuals for whom data sharing was intended to benefit, and lead to a wide range of unquantifiable societal and economical costs. Delaying the provision of a legal gateway for data sharing for these purposes will also lead to, again

unquantifiable, costs in terms of duplication of administrative processes across public authorities.

Option 1 - Benefits

- 2.5. The main benefit in maintaining the status quo is that it is a known process, with well understood benefits and risks. The scrutiny around the current process already prevents data-sharing where this would be outside of the limits set by the Human Rights Act as well as current and future data protection requirements, preventing possible data loss. These safeguards would be maintained and strengthened under option 2 through scrutiny of public service delivery regulations and new safeguards around data sharing agreements. Policy benefits can still be delivered under this option but may be delayed, reduced or prevented entirely where a data sharing gateway cannot be established in good time, or at all.

Option 2 - Costs

- 2.6. Public authorities will incur no additional cost as a direct result of this change. The powers are permissive and therefore impose no statutory requirement on the authorities. Those that do decide to participate in data-sharing exercises under the new powers will incur one-off costs to familiarise their staff with the new legislation. Familiarisation may take a number of forms but could include reading and understanding the new legislation, disseminating the new information and training staff to understand the new rules.
- 2.7. If they do decide to use the powers, as is the case for data sharing under a do nothing option public authorities will also incur costs to establish a new data sharing agreement under the new regulations. Each new agreement must be established as a pilot and the potential impact, risks, ethical issues, monitoring, evaluation requirements and other factors considered in line with the new codes of conduct before any data is shared. Again, the cost of this process is difficult to estimate but is also expected to be minimal, and significantly less than the resource required to establish a new gateway under the existing regime.
- 2.8. There may also be costs for private bodies working on behalf of a public authority. These costs will be reimbursed by the public sector as part of commercial arrangements.
- 2.9. Data sharing is expected to increase as a result of these new powers, which will increase administrative costs involved in the data sharing itself as well as the additional costs incurred in recovering increased amounts of debt. These costs cannot be readily estimated, as they will depend on the data sharing arrangements that are established under this power. However, time will need to be spent on preparing the new arrangement (including the production and publication of privacy and other impact statements), auditing by the ICO, and operating the new arrangement in line with DPA, GDPR and Human Rights Act principles. This change may result in more data sharing requests. However, this will be limited to

requests from the specified bodies, and only where the objective is to improve the delivery of public services, to identify and deal with debts owed to the public sector, and to identify and tackle fraud. These costs would exist for any data sharing undertaken through any other new or existing legal gateway and are expected to be outweighed by the benefits achieved.

Option 2 - Benefits

2.10. The administrative burden on the public sector bodies will be reduced.

The costs associated with existing process of establishing specific legal gateways will be eliminated and significant time savings will be achieved. These are ongoing benefits and the total value will depend on the number and type of future data sharing requests.

2.11. *Simplifying the legislative framework*

The law surrounding data-sharing between public bodies at present is complex, with powers scattered across a large number of statutes, which may be expressly set out, or implied. Establishing a new data sharing gateway for each specific requirement only adds to this complexity. The current system lacks flexibility and cannot respond to rapidly changing requirements due to the length of time the legislative process takes.

2.12. This option will simplify the legislative landscape for Welsh public bodies and will reduce the time it takes to create new data sharing relationships. Although legislation will be required to set out the list of Welsh public bodies and to define any new data-sharing objectives for the public service delivery powers, these will not need to set out fully all of the categories of data being shared. This will allow more flexibility for public authorities seeking to share data which may change over time.

2.13. *Policy delivery benefits*

The new process to establish a data sharing exercise under the new powers will be simpler and quicker to complete than establishing a new legal gateway. This will eliminate any delays in policy delivery, and ensure policy is always developed on the latest data available. Policy benefits will be delivered more rapidly and will be increased by better availability of data which will also allow more robust measurement of the impact.

2.14. Although the number of data sharing requests may rise, further benefits may be realised through more policies making better use of available data due to the increased ease of data sharing.

2.15. *Targeting of public services*

This change will ensure that public services have access to the data they need to deliver public services that are accurately targeted and delivered to those that need them most. Changing the way data is shared, and reducing the bureaucracy around establishing a data sharing agreement, will ensure that data can move between appropriate public authorities in a way which supports improved outcomes for citizens, makes the best use of public resources, and protects personal privacy. The overall societal

and economic benefits of this are difficult to quantify and will be dependent on the intended outcomes of data sharing.

2.16. This change will mean that public resources and funds that are currently used to establish appropriate gateways for sharing information can be redirected to other priorities.

2.17. *Recovery of debt*

This option aids in the recovery of debt through a number of means:

- (i) Reducing the cost and time required to set up a data sharing agreement, and reducing the complexity of the agreement, will increase the amount of data shared overall;
- (ii) Helping to develop a single customer view which will aid a coordinated response to recovering debt owed to Government.

2.18. 90% of the debt owed to the public sector is owed to either DWP or HMRC, which already have sufficient powers to share data. The remaining debt is owed to other government departments and Local Authorities, which do not have sufficient powers to share information easily. Improved data sharing around debt could aid in earlier identification of debt, increase recoveries, and reduce the amount of debt written off by public bodies.

2.19. UK Government estimates that £2.4 billion is owed by debtors who owe money to multiple government departments, and that approximately 10% of this is not covered by existing data sharing agreements. This option will help identify people who have multiple debts to government, and enable a coordinated approach to recoveries that would reduce costs and minimise the impact on potentially vulnerable citizens who may be struggling to deal with multiple demands for repayment.

2.20. *Tackling Fraud*

The Annual Fraud Indicator estimated that the total loss to the UK economy due to fraud as £190 billion, and the total amount attributable to the public sector as £40.4 billion.¹ This estimate does not include losses as a result of 'errors' or other factors such as negligence or failure to take due care. The actual level of losses, both overall and to the public sector, is likely to be much higher.

2.21. Data matching is a proven way to identify fraud. The National Fraud Initiative is a national data-matching exercise designed to identify and prevent fraud and overpayments. Between 1996 and 2015, the NFI has identified over £30 million fraud losses in Wales and over £1.3 billion in the UK, across a variety of areas including council tax, immigration, welfare benefits and blue badge use amongst others.²

¹<https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/11/Annual-fraud-indicator-2017.pdf>

² https://www.wao.gov.uk/sites/default/files/download_documents/417A2016-NFI-eng.pdf

- 2.22. Wider use of data sharing could improve the prevention, detection and investigation of fraud through a number of means, including:
- Improved targeting and risk-profiling of potentially fraudulent individuals;
 - Streamlining processes, enabling the Government to act more quickly; and
 - Simplifying the legislative landscape.
- 2.23. Increased data sharing will contribute to an improved evidence base, helping to inform decision making, supporting the use of tailored approaches such as behavioural insights, and making interventions more effective overall.

Summary

- 2.24. When comparing the relative costs and benefits of the two options, there is a strong argument that simplifying the data sharing legislative landscape will lead to minimal increase in relative costs but provide far wider potential for benefits. Without the new powers it is likely that data sharing would continue to be desired but this would either be hampered or delayed by the lack of a flexible legal gateway, leading to poor outcomes for citizens and increased relative costs for public authorities.
- 2.25. The powers will also give Welsh public bodies the same powers as English and non-devolved bodies. The costs associated with the new processes are significantly less than those associated with the current process of establishing new data-sharing gateways (with legislation) and offer more flexibility and ability to respond to emerging requirements.

3. Sectors

3.1. Local Government

There is no direct regulatory impact being imposed on local government as a result of this change. The powers are permissive and as such, local authorities are free to use them or not. One off familiarisation costs, costs to assess in line with code of conduct, more data requests (but from a restricted group of other authorities) may emerge.

3.2. Business

There will be no direct impact being imposed on business as a result of this change. These new powers will not introduce any new statutory obligations or requirements or increase the amount of debt a business may owe the Government.

- 3.3 As an indirect impact on businesses, data sharing may identify a higher level of debt or increase levels of fraud than the current system, which may result in increased debt recovery from businesses.

3.4 Voluntary Sector

There will be no direct impact on any voluntary sector organisation as a result of this change. Where voluntary sector organisations provide services on behalf of government bodies, they may incur familiarisation costs for their staff if they are to participate in a future data sharing agreement, but these are not likely to be intensive or time-consuming and will not require more resource than current processes.

4. Duties

4.1. Equality of Opportunity

An equality impact assessment has been completed and will be published on the Welsh Government website. No significant impact has been identified as a result of these Regulations.

4.2. Welsh Language

A Welsh Language impact assessment has been completed and will be published on the Welsh Government website. No significant impact has been identified as a result of these Regulations.

4.3. Sustainable Development

Environmental impact screening has been conducted and no environmental impact has been identified.

The Well-being of Future Generations (Wales) Act 2015 requires the Welsh Ministers to take action, taking account of the five ways of working set out in section 5 of the Act ('the sustainable development principle'), aimed at achieving the 7 well-being goals set out in section 4 of the Act, and the objectives published by the Welsh Ministers in November 2016.

- 4.4. Providing public bodies in Wales with the ability to share information and data will improve the delivery of public services to all. At this stage the Welsh Government are simply implementing the Digital Economy Act 2017 against the UK Government objectives and other data sharing provisions within the Act. Consideration of the sustainable development principle will continue as the Act is further implemented in devolved areas.

4.5. Welsh Consolidated Fund

There is no expenditure from the Welsh Consolidated Fund anticipated as a result of this change.

5. Consultation

- 5.1. A public consultation was held from 8th December 2017 – 5th February 2018. Stakeholders were asked to consider whether the public bodies that were being considered for each power were the right ones. The consultation also asked for specific feedback on the inclusion of health bodies, what public service objectives could be considered for Wales in the future, and how the new powers could be used to support the Welsh

Language. Full lists of the proposed bodies intended to be named in the regulations were included in the consultation.³

5.2. This consultation was open to all, but responses were specifically encouraged from:

- Local government;
- Arms length bodies;
- NHS organisations;
- Third sector organisations;
- Fire and rescue authorities; and
- Schools, colleges and universities

5.3. A small number of statutory consultees (Scottish and Northern Irish Governments, the Information Commissioner and Ministers for the Cabinet Office) were also contacted separately and encouraged to respond.

5.4. A total of 26 responses, including one statutory consultee, were received as follows:

Category	Responses received
Public body in Wales	11
Local authority	6
Voluntary sector organisation	2
Registered Social Landlord	2
Individual	2
Private organisation	1
UK Government department	1
Other	1

5.5. Following the consultation, the responses were assessed with a particular focus on any suggestions for changes to the list of Welsh public authorities to be included for each list, and the questions around the inclusion of health bodies in the Public Service Delivery powers. The responses to the questions about the Welsh language were also assessed.

5.6. The responses to the consultation were broadly positive, with a number of suggestions to include additional bodies. A small number of these suggestions were to include non-devolved bodies (such as the Department for Work and Pensions), or other bodies which have already been specified in the UK schedules and do not need to be replicated.

³ <https://beta.gov.wales/digital-economy-act-proposed-list-data-sharing-public-bodies-wales>

- 5.7. As a result of the consultation, and to ensure the list of bodies were proportionate in terms of their requirement to share personal data, the following changes were made to the lists of bodies:

Public Service Delivery Powers

- State schools, further education colleges and higher education institutions were added to the list of bodies able to share data with/from energy and water suppliers
- The Board of Community Health Councils and Special Health Authorities were added to the list of bodies able to share data, for the purposes of future objectives (health bodies are excluded from using the forthcoming UK Government objectives)
- Registered Social Landlords were added to the list of bodies able to share data
- The Higher Education Funding Council for Wales was removed from the list of bodies able to share data
- The National Parks Authority was removed from the list of bodies able to share data

Fraud Powers

- Natural Resources Wales was added to the list of bodies able to share data
- Registered Social Landlord were added to the list of bodies able to share data
- The following bodies were removed from the list of bodies able to share data:
 - The Local Democracy and Boundary Commission for Wales
 - Qualifications Wales
 - National Park Authorities in Wales
 - The National Museum of Wales

- 5.8. No changes were made to the list of bodies able to share data under the new debt powers.

- 5.9. A full government response to the consultation is being prepared and will be published in due course.

6. Competition Assessment

A competition filter test was applied to the changes and no significant impact was identified to businesses, charities or the voluntary sector. The main impact and costs will fall to the public sector.

7. Post implementation review

- 7.1. No formal review is planned. However, Welsh Government will take an interest in any future use of the new powers and how effective any data sharing arrangement are.
- 7.2. Each new data sharing arrangement will need to include monitoring and evaluation requirements and these will be used to inform future data sharing exercises using the new powers.