

HEALTH AND SOCIAL CARE (NATIONAL DATA GUARDIAN) BILL

EXPLANATORY NOTES

What these notes do

- These Explanatory Notes relate to the Health and Social Care (National Data Guardian) Bill as introduced in the House of Commons on 1 November 2016.
- These Explanatory Notes have been prepared by the Department, with the consent of Jo Churchill, the Member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Act does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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Overview of the Bill

1. The purpose of the Health and Social Care (National Data Guardian) Bill is to establish a National Data Guardian for Health and Social Care, and to promote the provision of advice and guidance about the processing of health and adult social care data in England.
2. The Bill provides for the establishment of a statutory office holder to be known as the National Data Guardian for Health and Social Care (the Data Guardian). The role of the National Data Guardian for Health and Care already exists informally, and the Bill will define the role and put it on a statutory footing. The Data Guardian may publish formal guidance, and give informal advice, assistance and information, about the processing of health and adult social care data in England. Health and adult social care data includes information relating to the health of both adults and children and to social care or carer support for adults. The Data Guardian may not publish guidance or give advice, assistance and information about the processing of children's social care data. The Bill imposes a duty on public bodies exercising functions that relate to health, adult social care and adult carer support in England (and individuals who contract with those bodies to provide health services, adult social care or adult carer support) to have regard to the Data Guardian's guidance. The Bill also makes provision about the administrative and financial operation of the Data Guardian's office.

Policy background

3. The role of the National Data Guardian for Health and Care was established in November 2014, with the intention that it advocates for patients and service users on how their health and social care data is used. The Government gave a commitment at that time to place the role on a statutory footing at the earliest opportunity so that it could have a formal power to advise on this issue.
4. The Government consulted on the functions associated with the role between September-December 2015 and, as was reflected in the response published in July 2016, there was broad support for putting the role on a statutory footing.
5. The provisions in this Bill seek to implement the outcome of that consultation, by establishing the role on a statutory basis. The Bill will establish a National Data Guardian for Health and Social Care, with powers to provide formal guidance and informal advice, assistance and information about the processing of health and adult social care data in England.

Territorial extent and application

6. Clause 3 sets out the territorial extent of the Bill. The Bill extends to England and Wales only. Clause 1, which provides for the Data Guardian to publish guidance and give advice, information and assistance, only applies in relation to the processing of health and adult social care data in England. Clause 1(3), which imposes a duty to have regard to the Data Guardian's guidance, only applies to public bodies exercising functions that relate to health, adult social care and adult carer support in England, and individuals who contract with those bodies to provide health services, adult social care or adult carer support.
7. See the table the Annex for a summary of the position regarding territorial extent and application in the United Kingdom.
8. As the Bill is a Private Member's Bill, the new English votes provisions in the House of Commons Standing Orders do not apply.

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Commentary on Provisions of the Bill

Clause 1: National Data Guardian for Health and Social Care

9. Clause 1 establishes the statutory office holder to be known as the National Data Guardian for Health and Social Care, and makes some general provisions about the Data Guardian's functions and the way in which they are to be carried out.
10. Under subsection (1) the Data Guardian must be appointed by the Secretary of State. The Schedule makes further provision about the establishment, maintenance and operation of the office of the Data Guardian.
11. Subsection (2) empowers the Data Guardian to publish formal guidance about the processing of health and adult social care data in England. An example of something that the Data Guardian could publish guidance about is security standards for storing health and adult social care data. "Health and adult social care data" is defined in clause 2(6). It includes information relating to the health of both adults and children and to social care and carer support for adults. The Data Guardian may not publish formal guidance about the processing of children's social care data (clause 2(3)).
12. Subsection (3) imposes a duty on certain organisations and individuals to have regard to the National Data Guardian's published guidance. The duty applies to public bodies exercising functions that relate to the health service, adult social care or adult carer support, and to individuals providing health services, adult social care or adult carer support under arrangements with those bodies. The first category to whom the duty applies covers public bodies that provide, commission or regulate health services, adult social care or adult carer support, or exercise any other function in relation to the health service, adult social care or adult carer support. The second category covers anyone providing publicly funded health services, adult social care or adult carer support commissioned by or on behalf of such a public body.
13. Subsection (4) requires the Data Guardian to keep his or her published guidance under review and to revise the guidance as he or she considers appropriate. This requirement is intended to ensure that the published guidance remains relevant over time and, where appropriate, is updated to reflect new evidence.
14. Subsection (5) requires the Data Guardian, before publishing guidance, to consult such persons as he or she considers appropriate.
15. Subsection (6) allows the Data Guardian to give informal advice, assistance and information about the processing of health and adult social care data in England. "Health and adult social care data" is defined in clause 2(6). The Data Guardian can give advice, assistance and information to anyone, so long as it is about the processing of health and adult social care data in England. However, the advice, assistance and information cannot relate to the processing of children's social care data (clause 2(3)). Unlike the Data Guardian's published guidance, no one has a statutory duty to have regard to the Data Guardian's advice, assistance and information.
16. Subsection (7) refers to the power of the Data Guardian to publish guidance or give advice, assistance and information about the processing of health and adult social care data in England, giving the Data Guardian flexibility in how far any particular piece of advice, assistance, information or guidance may extend. For example, guidance may be published in relation to all cases to which a power to issue guidance extends, or in relation to cases that are

specified in the guidance. The effect of this subsection is to clarify that the Data Guardian can publish guidance and give advice on specific topics or themes and can target guidance and advice to certain organisations, individuals or sectors, as appropriate.

17. Subsection (8) provides that the duty to have regard to the Data Guardian's published guidance only applies so far as the guidance is relevant to the body's or person's functions or activities. Where a public body or person exercises functions or performs activities in relation to both adult and children's social care, the duty to have regard to the Data Guardian's published guidance will only apply in relation to their adult social care functions or activities.
18. Subsection (9) introduces the Schedule to the Act which gives detailed provision about a broad range of matters relating to the office of the Data Guardian, its constitution and how members of staff and advisors are to be appointed and remunerated.

Schedule: Further provisions about the Data Guardian as introduced in Clause 1

19. The Schedule covers a broad range of matters relating to the office of the Data Guardian, its constitution and how members of staff and advisors are to be appointed and remunerated.
20. The Schedule sets out the Data Guardian's terms of appointment (paragraphs 1 to 6).
21. Paragraph 7 makes provision about the Data Guardian's remuneration. The Secretary of State may pay the Data Guardian remuneration, expenses, allowances or compensation for loss of office.
22. Paragraph 8 allows the Data Guardian to appoint members of staff and advisors.
23. Paragraph 9 allows the Data Guardian to pay remuneration, expenses and allowances to members of staff and expenses and allowances to advisors.
24. Paragraph 10 provides that the Data Guardian's members of staff and advisors are not civil servants.
25. Paragraph 11 allows the Data Guardian to authorise a member of his or her staff to do anything required or authorised to be done by the Data Guardian.
26. Paragraph 12 allows the Data Guardian to make arrangements for people to be seconded to serve as members of staff, which may include provision for payments (paragraph 13). Paragraph 14 provides that a period of secondment does affect the continuity of the person's employment with his or her employer, or of his or her service in the civil service.
27. Paragraph 15 provides that the Secretary of State must pay to the Data Guardian the amount he considers appropriate for the purpose of enabling the Data Guardian to carry out his or her functions.
28. The Schedule also makes provision about the Data Guardian's financial and reporting framework (paragraphs 16 to 20).
29. Under paragraph 16, the Data Guardian will be required to keep accounts and proper financial records.
30. Paragraph 17 requires the Data Guardian to produce an annual report of his or her activities as soon as reasonably practical after the end of each financial year. "Financial year" is defined in paragraph 20. The annual report must include a statement of accounts for the financial year in such form as directed by the Secretary of State; a general description of any guidance published and any advice, assistance or information given by the Data Guardian in the financial year; and a general description of the Data Guardian's priorities for the current financial year.

31. The Data Guardian must send a copy of the annual report to the Secretary of State before the end of the June following the financial year to which the statement of accounts relates (paragraph 18). Paragraph 19 requires the Secretary of State to lay a copy of the annual report before Parliament.
32. "Financial year" is defined in paragraph 20 as the period beginning with the day on which the first Data Guardian is appointed, and thereafter a period of 12 months ending on 31st March.

Clause 2: Interpretation

33. Clause 2 defines some important terms used in clause 1. Subsection (1) provides that the definitions in clause 2 apply to clause 1.
34. Subsection (2) provides that "adult carer support" means support provided to a carer under Part 1 of the Care Act 2014. "Carer" is defined in subsection (4).
35. Subsection (3) provides that "adult social care" includes all forms of personal care and other practical assistance provided for individuals aged 18 or over who, by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstances, are in need of such care or other assistance. However, this will not include anything provided under sections 23C to 24D of the Children Act 1989; anything provided by an establishment or agency for which Her Majesty's Chief Inspector of Education, Children's Services and Skills is the registration authority under section 5 of the Care Standards Act 2000; or anything provided under section 3 of the Adoption and Children Act 2002.
36. Subsection (4) provides that "carer" has the meaning given in section 10 of the Care Act 2014. This means an adult who provides or intends to provide care for another adult, except, in some cases, where this is done voluntarily or under a contract.
37. Subsection (5) provides that "the health service" means the health service continued under section 1(1) of the National Health Service Act 2006.
38. Subsection (6) provides that "health and adult social care data" means information that relates to: the physical or mental health or condition of an individual, the diagnosis of his or her condition or his or her care or treatment; the provision of adult social care to an individual or an assessment for such care; and the provision of adult carer support or an assessment for such support. It does not matter whether or not the identity of the individual is ascertainable from the information.
39. Subsection (7) provides that "processing" has the same meaning given in section 1(1) of the Data Protection Act 1998. This is a broad definition that captures a range of activity involving data, including obtaining, holding, recording, using and sharing.
40. Subsection (8) provides that a "public body" means a body or other person whose functions are of a public nature or include functions of that nature. Where a body or person's functions are not all of a public nature, they are only considered a public body to the extent of their functions of a public nature.

Commencement

41. As provided for in Clause 4 of the Bill, all of the Bill's provisions are to be brought into force by regulations made by the Secretary of State.

Financial implications of the Bill

42. The Bill will require expenditure to fund the office of the National Data Guardian for Health and Social Care in order that it can undertake its statutory functions. The Department of Health has estimated that these costs will be approximately £700,000 per annum.
43. The Bill may result in some implementation costs for the bodies and individuals required to have regard to the Data Guardian's published guidance, in that they will need to review and assess the relevance of the guidance.

Annex: Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	No	No	No	Yes	Yes	Yes	No
Schedule	Yes	No	No	No	Yes	Yes	Yes	No
Clause 2	Yes	No	No	No	Yes	Yes	Yes	No
Clause 3	Yes	No	No	No	Yes	Yes	Yes	No
Clause 4	Yes	No	No	No	Yes	Yes	Yes	No
Clause 5	Yes	No	No	No	Yes	Yes	Yes	No

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