

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 brought from the House of Commons on 9 July 2018 (HL Bill 122).

- These Explanatory Notes have been prepared by the Department, with the consent of Baroness Chisholm of Owlpen, 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 Bill 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 National 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. The Bill imposes a duty on public bodies within the health and adult social care sector (and private organisations who contract with them to deliver health or adult social care services) to have regard to the National Data Guardian's guidance. The Bill also makes provision about the administrative and financial operation of the National Data Guardian's office.
3. The Bill contains six clauses covering the following headings:
 - National Data Guardian for Health and Social Care;
 - Interpretation;
 - Consequential amendments;
 - Extent;
 - Commencement; and
 - Short Title

Policy background

4. The role of the National Data Guardian for Health and Care was established in November 2014, with the intention that would advocate for patients and service users on how their health and 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.
5. The Government consulted on the functions associated with the role from September to 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.
6. 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 to organisations and individuals about the processing of health and adult social care data in England.

Territorial extent and application

7. Clause 4 sets out the territorial extent of the Bill. The Bill extends to England and Wales only. Clause 1, which provides for the National 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.
8. See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

Commentary on Provisions of the Bill

Clause 1: National Data Guardian for Health and Social Care

9. Clause 1 creates the office of the National Data Guardian for Health and Social Care (the Data Guardian) 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 guidance about the processing of health and adult social care data in England. "Health and adult social care data" is defined in Clause 2(6), and "processing" is defined in Clause 2(7). An example of something that the Data Guardian could publish guidance about is security standards for storing health and adult social care data.
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 persons providing health services or adult social care under arrangements with those bodies. The first category covers public bodies that provide, commission or regulate health or adult social care services, or exercise any other function in relation to the health service or adult social care. The second category covers anyone providing publicly funded health services or adult social care commissioned by, or on behalf of, a public body.
13. Subsection (4) requires the Data Guardian to keep his or her published guidance under review, and subsection (5) allows the Data Guardian to revise the guidance as he or she considers appropriate. These requirements are intended to ensure that the published guidance remains relevant over time and, where appropriate, is updated to reflect new evidence.
14. Subsection (6) requires the Data Guardian, before publishing their guidance, to consult such persons as he or she considers appropriate.
15. Subsection (7) allows the Data Guardian to give informal advice, assistance and information about the processing of health and adult social care data in England. The Data Guardian can give advice, assistance and information to anyone, so long as it is about, or relates to, the processing of health and adult social care data in England. Unlike the Data Guardian's published guidance, no one has a statutory duty to have regard to the Data Guardian's advice, assistance or information.
16. Subsection (8) 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 (9) 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 services.
18. Subsection (10) introduces the Schedule to the Bill 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.

Clause 2: Section 1: Interpretation

19. Clause 2 defines some of the terms used in Clause 1.
20. Subsection (1) provides that the definitions in Clause 2 apply to Clauses 1 and 2.
21. Subsection (2) defines “adult carer support”.
22. Subsection (3) provides that “adult social care” includes all forms of personal care and other practical assistance provided for individuals 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 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.
23. Subsection (4) defines “carer”.
24. Subsection (5) provides that “the health service” means services that must or may be provided as part of the health service continued under section 1(1) of the National Health Service Act 2006.
25. Subsection (6) provides that “health and adult social care data” means information (however recorded) that relates to: (i) the physical or mental health or condition of an individual, the diagnosis of his or her condition or his or her care or treatment; (ii) any form of personal care or other practical assistance provided to an individual aged eighteen or over who, by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or other similar circumstances, is in need of such care or other assistance; and (iii) the assessment or provision of carer support under Part 1 of the Care Act 2014. It does not matter whether or not the identity of the individual is ascertainable from the information.
26. 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.
27. Subsection (8) provides that a “public body” means a body or other person whose functions is of a public nature or includes functions of that nature. Where a body or person’s functions are not all of a public nature, they are only a considered a public body to the extent of their functions of a public nature.

Clause 3: Consequential amendments

28. This clause introduces amendments to other legislation as a consequence of this Bill.

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

29. Schedule 1 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.
30. Schedule 1 sets out the Data Guardian’s terms of appointment (paragraphs 1 to 6).
31. Paragraph 7 makes provision about the Data Guardian’s remuneration. The Secretary of State may pay the Data Guardian remuneration, expenses and allowances.
32. Paragraph 8 allows the Data Guardian to appoint members of staff and advisors.
33. Paragraph 9 allows the Data Guardian to pay remuneration, expenses and allowances to members of staff, and expenses and allowances to advisors.
34. Paragraph 10 has the effect that service as a member of staff or as an adviser to the Data Guardian does not count as service for the civil service

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35. 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.
36. Paragraphs 12 to 14 allows the Data Guardian to second staff and to make payments to people who are seconded.
37. 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.
38. The Schedule also makes provision about the Data Guardian’s financial and reporting framework (paragraphs 16 to 20).
39. Under paragraph 16, the Data Guardian will be required to keep accounts and proper financial records.
40. Paragraph 17 requires the Data Guardian to produce an annual report of his or her activities at 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 the form directed by the Secretary of State; a general description of any guidance published and any advice, assistance or information given in the financial year; and a general description of the Data Guardian’s priorities for the current financial year.
41. The Data Guardian must produce the annual report as soon as reasonably practicable after the end of a financial year (paragraph 17), and must send copies of the annual report to the Secretary of State before the end of the following June (paragraph 18).
42. Paragraph 19 requires the Secretary of State to lay copies of the annual report before Parliament.
43. “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.

Schedule 2: Consequential amendments as introduced in Clause 3

44. This Schedule makes consequential amendments to the following Acts to include references to the National Data Guardian for Health and Social Care where appropriate:
 - the Public Records Act 1958;
 - the Parliamentary Commissioner Act 1967;
 - the House of Commons Disqualification Act 1975;
 - the Freedom of Information Act 2000;
 - the Equality Act 2010.

Commencement

45. As provided for in Clause 5 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

46. 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.
47. 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 A – 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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