medConfidential note to DPRRC on Health and Care Bill powers

1. Part 3[1] of the Health and Care Bill creates powers for the Secretary of State to migrate legal duties, powers and functions between "relevant" [2] public bodies.

2. Part 9, Chapter 2 of the Health and Social Care Act 2012[3] created a statutory safe haven for health and care data [4] which was given unique powers for the collection and processing of NHS patients' data. (The safe haven is defined in statute as the Health and Social Care Information Centre, but currently uses the 'trading name' NHS Digital).

3. Quite aside from its core technical and administrative functions, the safe haven is also required to provide a mechanism that – despite the fact it can be directed or commissioned by them to provide information systems – remains statutorily *independent* of DHSC and other NHS bodies. It is only in this way that tensions between patients' concerns about use of their data, the NHS's own requirements for data use, and the need for data-driven innovation can be resolved.

4. Decades of experience[5] have shown that for any such safe haven to be trusted by the various parts of the system – let alone the public – it *must* be statutory.The Government's commitment to trustworthy use of data, and to institutional safeguards around data use, was reaffirmed[6] by the then Secretary of State on the floor of the House of Commons in June 2021.

5. A statutory safe haven subject to the whims of a Secretary of State is in no meaningful way a safe haven, nor arguably is it statutory. It certainly isn't meaningfully independent – issues the House of Commons Health Select Committee highlights in paragraphs 112-117 of its report on the Bill.[7]

6. **All of the powers within Part 9 (Chapter 2)[8] of the Health and Social Care Act 2012 should be excluded from the powers proposed in Part 3 of the Health and Care Bill.**[9]

7. We understand others are making similar cases for HFEA, HTA, and other "relevant" bodies to be similarly excluded; we fully support those arguments for the same reasons that the Health and Social Care Information Centre / NHS Digital should be excluded.

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[1] Clauses 86-89 (pages 79-82) in the Bill as introduced in the Commons: https://publications.parliament.uk/pa/bills/cbill/58-02/0140/210140.pdf

[2] Clause 86, ibid.

[3] https://www.legislation.gov.uk/ukpga/2012/7/part/9/enacted

[4] https://digital.nhs.uk/about-nhs-digital/our-work/keeping-patient-data-safe/how-we-look-after-your-health-and-care-information/nhs-digital-s-legal-right-to-collect-information

[5] The original NHS Information Authority (NHSIA) was established by Act of Parliament in 1999. The National Programme for IT (NPfIT) and Connecting for Health in the 2000s led to the formation of the NHS Information Centre (NHSIC), first as a Special Health Authority then recreated as in 2012 as the statutory body legally named the Health and Social Care Information Centre (HSCIC).

[6] https://www.theyworkforyou.com/debates/?id=2021-06-24b.1112.0

[7] pages 29-30: https://committees.parliament.uk/publications/5827/documents/67112/default/

[8] The powers to publish information standards in Chapter 1 are already shared across multiple public bodies; it might be easier to exclude the entirety of Part 9 for simplicity.

[9] We refer to Part 3 of the Bill that entered Commons Committee, which may be amended in the interim.

medConfidential follow up note

Following up on our note of a couple of weeks ago, DHSC, NHS England and NHS Digital have now announced the migration of statutory responsibilities using the powers in clauses 89 and 90 of the Bill.

Details are available at:

> As reported in the medical press: https://www.digitalhealth.net/2021/11/nhs-digital-nhsx-merge-nhs-england/
>
> Government announcement: https://www.gov.uk/government/news/major-reforms-to-nhs-workforce-planning-and-tech-agenda
>
> NHS announcement: https://digital.nhs.uk/news/latest-news/department-of-health--social-care-announcement-on-nhs-tech-agenda
>
> Text of Wade-Gery Review: https://www.gov.uk/government/publications/putting-data-digital-and-tech-at-the-heart-of-transforming-the-nhs

It is said privately that the “NHS Digital” brand will be retired, and that NHS Digital will cease to exist as an arm’s length body within 6 months – likely following the passing of the current Bill and the powers becoming available.

Such restructuring would require moving the powers in Part 9, Chapter 2 of the Health and Social Care Act 2012 which are given to the Health and Social Care Information Centre (HSCIC) alone. NHS England itself describes the role of HSCIC (on page 2) as:

technology. The HSCIC has two overriding priorities:

a. First, to be the primary statutory safe haven for the extraction and management of patient data that are required for the production of national statistics and for commissioning, regulatory and research purposes.

b. Second, to be a centre of excellence for the delivery and project management of national technology and related infrastructure for

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health and care. The HSCIC has statutory responsibilities, some of them in conjunction with NHS England and the Department of Health, for the setting of information and technology standards, including information governance standards and standards for data security.

The announcement only deals with the second priority – the first being largely forgotten by a Government and Department which appear to conceive the NHS *solely* in the context of responding to a single issue: the pandemic.

When the Health and Care Bill was in front of the Commons, there was no mention of such an extreme use of secondary legislation to move responsibility between bodies for powers that are set out in primary

legislation, with explicit statutory safeguards. This was instead snuck out during Report stage in a letter from NHS England's Chief Executive to NHS staff that made no reference to the legislative changes required.

Of even greater concern is that the role of the "statutory safe haven" for the NHS in England seems to have been treated as nothing more than a piece on the NHS chessboard.

Assurances of independence given in the 2012 Act for the Health and Social Care Information Centre, as it is named in legislation – "NHS Digital" being a trading name – will be broken by the use of a statutory instrument or instruments, not primary legislation, to affect the proposed 'merger'. It is also unclear how anyone reading legislation.gov.uk after such a change would be able to tell that the HSCIC was no longer obligated to do what a plain reading of the law says it should do.

While the merits of any particular change may be beyond the Delegated Powers and Regulatory Reform Committee's remit, the scope of this change and the method of its implementation would be hugely impactful.

We note that the merger of NHS England and NHS Improvement – previously Monitor and the Trust Development Authority – has required specific and long-awaited primary legislation, and further note that the dissolution of the predecessor body to the HSCIC itself was affected in primary legislation (cf. section 276, HSCA 2012). This Government, which is becoming notorious for its planning and consideration of outcomes being completely disconnected from its announcements and legal obligations, seems to have chosen another path...

How this operates as an example of the Committee's excellent report earlier in the week is hopefully self-explanatory.

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