

EXPLANATORY MEMORANDUM TO
THE HEALTH AND SOCIAL CARE ACT 2012
(CONSISTENT IDENTIFIER) REGULATIONS 2015

2015 No. 1439

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Health and Social Care (Safety and Quality) Act 2015 (“the 2015 Act”) imposes a duty on providers and commissioners of publicly funded health services and adult social care in England (“relevant persons”) to include a consistent identifier in information processed about a patient or service user. These Regulations provide that the NHS Number is the consistent identifier which must be so included.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 2 of the 2015 Act inserts a new section 251A (‘Consistent identifiers’) into the Health and Social Care Act 2012 (“the 2012 Act”). Section 251A imposes a duty on providers and commissioners of publicly funded health services and adult social care (“relevant persons”) to include a consistent identifier in information processed about a patient or service user.

4.2 Section 3 of the 2015 Act inserts a new section 251B (‘Duty to share information’) into the 2012 Act. Section 251B imposes a duty on relevant persons to share information about a patient or service user with persons working for the relevant person, and any other relevant providers or commissioners with which the relevant person communicates about that patient or service user.

4.3 Both duties apply only so far as the relevant person considers that the inclusion of the identifier, or the disclosure of information, is likely to facilitate the provision of health services or adult social care to the patient or service user, and is in his or her best interests.

4.4 Section 251A(1) of the 2012 Act now confers a duty on the Secretary of State to make regulations to specify the consistent identifier to be used. These Regulations are the first regulations to be made under that duty.

4.5 During the passage through Parliament of the 2015 Act, the Government noted the Department’s intention that regulations made under Section 251(A)(1) would be used to specify the NHS Number as the required consistent identifier (House of Commons, 7 November 2014, volume 587, column 1101).

4.6 There are several exceptions from the duties:

(a) The duties do not apply when a patient or service user objects to his or her information being shared, or his or her NHS number being used, or where it is reasonable to consider that the individual would be likely to object;

- (b) The duties do not apply when a patient or service user receives services anonymously (e.g. sexual health services), or may receive such services anonymously;
- (c) Where an individual does not have an NHS number, the duty to use it does not apply, and;
- (d) If, for any other reason, a provider or commissioner is not reasonably able to comply with the duties, the duties do not apply. For example, this would mean that the duty would not apply should an organisation be required to incur an unreasonably high cost in order to comply.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1. The objective of the duties in the new sections 251A and 251B of the 2012 Act is to require health and adult social care organisations to share information, using the NHS Number as a consistent identifier, in support of the direct care of patients and people who use adult social care services in England.

7.2 Sharing of information between organisations responsible for an individual's care supports the delivery of safe, effective and integrated care. However, the 2013 Caldicott review ('Information: to share or not to share? The Information Governance Review'¹) found that there is a culture of anxiety which prevents information sharing between organisations. The current legislative landscape was found to be a significant contributory factor, with a risk-averse response to data protection law in particular being cited as a barrier to sharing. The review recommended that the duty to share information should be as important as the duty to protect patient confidentiality. The 2015 Act provides for an express duty to share information where this facilitates an individual's care or treatment, and is in his or her best interests.

7.3 The intended effect is that this will increase the quality and efficiency of health and care services by ensuring that relevant, accurate and current information is available to those directly involved in an individual's care, and by reducing the duplication of work between commissioners and providers of care when people transfer between different care settings.

7.4 In order to fully realise the benefits of information sharing for direct care purposes, it is important that the information shared is accurate, relevant and timely. The inclusion of a consistent identifier in patient and service user records, and in correspondence between health and social care organisations involved in an individual's care, will help to ensure that the right information is available when it is needed to support the delivery of safe and effective care.

¹ *Information: to share or not to share? The information governance review*, Department of Health, March 2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192572/2900774_InfoGovernance_accv2.pdf

- 7.5 Everyone registered with the NHS in England and Wales has an NHS Number, which is unique to each patient, and which can be used by health and care organisations to identify patients correctly. It has been a longstanding policy of successive Governments that the consistent identifier which should be used across health and adult social care to support the delivery of safe, effective and efficient care is the NHS Number². These Regulations will require health and social care organisations subject to the duties to include the NHS Number in patient and service user records and correspondence where this will support the provision of care to the individual concerned, and is in his or her best interests.
- 7.6 The 2015 Act provided for no new offences for non-compliance with the duties, and did not provide for any new penalties or sanctions for non-compliance. The Government's objective is to address the current risk aversion by health and care organisations which prevents information sharing, using consistent identifiers, in ways which support the delivery of safe, effective care to individuals. As such, the Government considers that penalties or sanctions for non-compliance would risk undermining the attainment of this objective. The duties do not require or permit relevant persons to do anything which would be inconsistent with their duties under the Data Protection Act 1998 relating to the use of personal information. The enforcement regime and sanctions for the Data Protection Act 1998 will continue to apply to organisations subject to the 2015 Act duties.
- 7.7 An equality assessment for the new duties under sections 251A and 251B was prepared as part of the impact assessment for the 2015 Act³. The equality assessment found that the benefits of improved quality and safety of care through improved information sharing and use of consistent identifiers will be felt by patients and people who use adult social care services and who share a number of the protected characteristics set out in the Equality Act 2010. The indicative evidence of benefits to groups sharing a protected characteristic assists in the discharge of the Department's obligations under the public sector equality duty, particularly in terms of having due regard to the need to advance equality of opportunity for groups with protected characteristics of age and disability, who may experience greater health and care challenges. The improvement in service provision to all services users will assist the Department in fostering good relations between such groups. Increased information sharing and a requirement to use the NHS Number may however create risks for people who share a protected characteristic (for example, confidentiality and consent for sharing may be of particular concern for certain groups, such as lesbian, gay, bisexual and transgender patients). In consideration of the requirements of the public sector equality duty, the equality assessment set out mitigations to these risks, including the express provision in the 2015 Act that the new duties would not apply when an individual objects to his or her information being shared.
- 7.8 In respect of the duties under section 1 of the National Health Service Act 2006, the impact assessment also noted that the new duties are likely to have the greatest impact in securing continuous improvement in service quality and reducing health inequalities. The impact assessment evidence indicates that the new duties will help improve the health and care of those who have the most complex health and care needs and who may find their care pathways more difficult to navigate, which typically includes groups who may experience greater health and care challenges –

² *Personalised health and care 2020*, National Information Board, November 2014, chapter 6, page 29
<https://www.gov.uk/government/publications/personalised-health-and-care-2020>

³ <http://www.legislation.gov.uk/ukpga/2015/28/impacts>. Hard copies are also available from the Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS.

older people, disabled people, and those with complex and multiple long term conditions.

- 7.9 The Secretary of State has a duty when exercising functions in relation to the health service to promote the autonomy of other persons exercising functions in relation to, or providing services for, the health service, so far as is consistent with the interests of the health service. These Regulations limit the autonomy of NHS bodies and organisations providing NHS-funded care, by requiring the use of the NHS Number in certain circumstances. However, the Government's view is that the Regulations support the promotion of a comprehensive health service, by supporting more efficient information sharing for the purposes of the provision of health services, with the aim of directly improving the provision of services to patients.

8. Consultation outcome

- 8.1 There is no statutory duty to consult on the Regulations. The Department of Health, working with national health and social care organisations, has undertaken extensive engagement with health and care professionals, providers, commissioners, patients and the public in the preparation of the 2014 strategy for health and social care data and technology, 'Personalised Health and Care 2020: a Framework for Action'⁴. This engagement confirmed the importance of the use of consistent identifiers to support the provision of care and treatment, and there was strong support for the use of the NHS Number as the consistent identifier across health and adult social care to support effective information sharing. As such, no further consultation has been undertaken in the preparation of these Regulations.

9. Guidance

- 9.1 To support compliance by relevant persons with the duties under the 2015 Act, guidance will be made available following the coming into force of the duties. Guidance will be provided through the Information Governance Alliance ('the IGA'), a group of national health and care organisations, including the Department of Health. The IGA is working together to provide consistent guidance and support to the health and adult social care sector on information governance matters.

10. Impact

- 10.1 An impact assessment examining the impact of the duties on affected bodies was produced for the 2015 Act. The impact assessment is attached and is published at: <http://www.legislation.gov.uk/ukpga/2015/28/impacts>.
- 10.2 Organisations subject to the duties may incur some costs in complying with them (for example, the costs to organisations of familiarising themselves with the legislation, and making any necessary changes to their policies and processes in order to comply). However, benefits are also anticipated through reduced costs of gathering information about patients and service users, and efficiencies generated through better information sharing processes. The impact assessment demonstrates a small net benefit for business, because the anticipated savings generated by the duties are expected to offset the expected costs of compliance. A small net cost was found for non-business organisations over the 10 year period assessed. However, the benefits to these bodies which were included in the assessment are thought to be a small

⁴ *Personalised Health and Care 2020*, National Information Board, November 2014, chapter 6, page 29
<https://www.gov.uk/government/publications/personalised-health-and-care-2020>

proportion of the total potential benefits, and are anticipated to continue to accrue well beyond the 10 year appraisal period.

11. Regulating small business

- 11.1 Small and micro businesses which provide publicly funded health services and adult social care will be subject to the new duties. The impact assessment for the Bill found that the duties are likely to result in net benefits for businesses, including small and micro businesses. However, guidance will be provided which will help small and micro businesses to understand how to comply in the most cost effective and proportionate way for their organisation. Sections 251A and 251B of the 2012 Act now also provide that, where an organisation is not reasonably able to comply with the duties, the duties do not apply. For example, this would mean that the duty will not apply should an organisation be required to incur an unreasonably high cost in order to comply.

12. Monitoring & review

- 12.1 The Health and Social Care Information Centre assesses the progress of health and social care organisations in implementing the use of the NHS Number through the Information Governance Toolkit⁵, which organisations complete each year. Local authorities with adult social care responsibilities are increasingly completing Toolkit assessments.
- 12.2 In addition, the use of the NHS Number will be captured as part of the NHS England Digital Maturity Index, which assesses the digital maturity and information sharing practices of NHS organisations.
- 12.3 The Department of Health is encouraging the use of NHS Numbers in adult social care by local authorities through the implementation programme for the Care Act 2014. The Department has no plans to undertake a formal central collection to monitor use of the NHS Number by local authorities and providers of adult social care at the present time, but we will ask the Association of Directors of Adult Social Services and the Local Government Association to keep this under review as part of their support programme for local authorities.

13. Contact

- 13.1 Joe Hicks at the Department of Health, Tel: 0113 2545070 or email: joe.hicks@dh.gsi.gov.uk can answer any questions regarding the instrument. Alternatively, Jennifer Byrom at the Department of Health, Tel: 0113 2546102 or email jennifer.byrom@dh.gsi.gov.uk can be contacted.

⁵ <https://www.igt.hscic.gov.uk/>