

HEALTH AND SOCIAL CARE (CONTROL OF DATA PROCESSING) BILL

DELEGATED POWERS MEMORANDUM

Prepared by the Department of Health, Social Services and Public Safety

Introduction

This Memorandum identifies those provisions in the Health and Social Care (Control of Data Processing) Bill which confer power to make delegated legislation.

The use of service user information, whether for direct care or purposes other than direct care (“non-direct care”), is governed by the common law duty of confidentiality, the Data Protection Act 1998 and the Human Rights Act 1998. Where service users’ information is held in confidence processing may only be justified in the common law in one of three ways:

- The service user has given valid consent;
- The disclosure is in the public interest; or
- A statutory basis exists which permits or requires disclosure.

The Bill will establish regulation making powers which will allow the Department to set aside the common law duty of confidentiality so that service user identifying information can be used for non-direct care purposes, without consent, in very limited and controlled circumstances.

Legislation to introduce similar provisions in the rest of the UK has already been enacted. In England and Wales, the provisions are contained within sections 60 and 61 of the Health and Social Care Act 2001 (as re-enacted by sections 251 and 252 of the National Health Service Act 2006).

Overview of the Health and Social Care (Control of Data Processing) Bill

The Bill will provide a clear statutory framework, with robust and stringent safeguards, which will enable the use of health and social care information which identifies individuals to be used for medical or social care purposes which are designed to benefit health and social care, or achieve some other tangible benefit

that might reasonably be described as a public good, without the consent of the individuals whose information may be used.

The policy objective underlying this Bill is to minimise the risk of legal challenge which the Department and the health and social care sector could potentially face as a consequence of using service user information which identifies individuals for purposes other than the direct care of the individual. This will allow the potential benefits of such use to be realised whilst safeguarding the interests of the individual, the health and social care sector as guardian of the information and information users such as researchers.

The provisions of the Bill will only be utilised where it is impossible or impracticable to gain the consent of individuals, anonymised or pseudonymised information would not achieve the desired outcome and the committee established under the provision authorises the processing.

The Bill has a total of 6 clauses. There are 6 powers allowing the Department of Health, Social Services and Public Safety to make statutory rules by draft affirmative resolution. As the powers, if they were to be used, would allow the use of confidential service user information, which would identify individuals, without their consent it is appropriate that the regulations are subject to Assembly scrutiny.

The Bill contains a relatively standard provision which allows regulations to contain such incidental, supplementary, transitory, transitional or saving provisions as the Department considers necessary. This does not, on its own, provide the Department with any additional powers. Rather it allows such provisions to be included in the subordinate legislation described below, provided that the provisions relate strictly to the specifics of the power or duty described.

The purpose of the Bill is to provide for the processing of health and social care information, which identifies individuals, to be used for medical or social care purposes, without their consent, in limited and controlled circumstances.

Clause 1(1)

Clause 1(1) of the Bill provides a discretionary power to enable the Department to make Regulations to require or regulate the processing of information. This power is conferred on the Department to exercise for medical or social care purposes which it considers are in the interests of improving health and social care or are in the public interest.

It also provides a power to allow the Department to set out in Regulations the type of information which can be processed.

Processing is defined in clause 1(15) of the Bill and means the use, disclosure or obtaining of the information. Clause 1(15) provides the Department with a discretionary power to expand on this definition by including other things which may be done.

Clause 1(2)

Clause 1(2) expands the power provided in clause 1(1) to enable the Department to make Regulations to:

- require (in relation to health information) or authorise (in relation to health and social care information) disclosure or other processing;
- prescribe what type of health and social care information can be processed;
- prescribe who can process this information;
- prescribe conditions and undertakings to be attached to any processing;
- ensure that processing of information done in accordance with the regulations is lawfully done despite any obligation of confidence owed in respect of that information – in effect, setting aside the common law duty of confidentiality;
- create offences or other procedures to enforce any provision of the regulations.

These regulation making powers do have limits.

The Bill provides that :

- **authorisation** for the processing of health and social care information must be given by a committee (clause 1(3)) (the power to establish such a committee is given to the Department under clause 2(1));
- regulations may not **require** the processing of identifying health information if it would be reasonably practicable to achieve the intended purpose in another way, having regard to the cost of and the technology available (clause 1(5));
- the Department must carry out an annual review of regulations which **require** processing of health information and, if it is determined, at that time, that the purpose of the processing could now be achieved by other means, in other words the regulations are no longer required, the Bill contains a provision which requires the Department to make further regulations to vary or revoke the original regulations (clause 1(6));
- regulations may not require that health information is processed solely or principally for determining the care and treatment of an individual (clause 1(7));
- any processing under the regulations must be consistent with the requirements of the Data Protection Act 1998 (clause 1(8)).

Clause 2

Clause 2(1) – Establishment of a committee

It is the intention that a committee will be established to oversee the entire process and make decisions on applications to process information. A discretionary power to enable the Department to do this has been included in the Bill.

Clause 2(2)

It is the intention that the committee will be able to authorise the processing of information and attach certain conditions to that processing.

The Bill contains a power to enable the Department to stipulate the circumstances in which the committee may authorise processing. It also contains a power to set out conditions which applicants must comply with and undertakings which they must give.

Clause 2(3)

Clause 2(3) expands the power provided in clause 2(1) and allows the Department to make regulations to set out what persons or bodies are to be represented on the Committee, to provide for the appointment, tenure and vacation of the office of the Chair, and of other the members, of the Committee, the procedure of the committee, the payment of such expenses and allowances as the Department may determine, and the publication of any approval decisions made by the Committee.