EXPLANATORY MEMORANDUM TO

THE HEALTH AND SOCIAL CARE ACT 2012
(CONTINUITY OF INFORMATION: INTERPRETATION) REGULATIONS 2015

2015 No. 1470

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 two duties 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, and to share information about a patient or service user with other relevant persons, where this would facilitate the provision of care to an individual and is in his or her best interests. These Regulations make provision for the disapplication of these duties from healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies.

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. Regulations, which will come into force at the same time as these Regulations, will specify the NHS Number as the consistent identifier which must be so included (2015, no. 1439).

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 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.

4.5 Section 4 of the 2015 Act inserts a new section 251C ('Continuity of information: interpretation') into the 2012 Act, which makes provision for the interpretation of the duties under new sections 251A and 251B. Section 251C(2) sets out which persons are subject to the duties by defining a 'relevant health or adult social care commissioner or provider' or 'relevant person'.

4.6 Section 251C(3) of the 2012 Act now confers a power on the Secretary of State to make regulations which exclude persons from the definition of 'relevant health or adult social care commissioner or provider', and therefore disapply the duties from those persons. These Regulations are the first regulations to be made under that power.

4.7 The definition of a 'relevant person' is based on the definitions of 'adult social care' and 'health services' under the 2012 Act. Providers and commissioners of 'adult social care' and 'health services', as defined under the 2012 Act, are within scope of the new duties, unless they are excluded from scope by these Regulations.

4.8 During the passage through Parliament of the 2015 Act, the Government noted the Department's intention that regulations made under section 251C(3) would be used to exclude certain providers and commissioners of children's health care, and providers and commissioners of children's social care, from the scope of the duties (House of Commons, 7 November 2014, volume 587, column 1102).

4.9 These Regulations exclude from scope healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies.

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.

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 Number[2]. Regulations, which will come into force at the same time as these Regulations, will specify the NHS Number as the consistent identifier which must be used (2015, no. 1439).

7.6 These Regulations will disapply the duties in the new sections 251A and 251B of the 2012 Act from healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies. This is because, in relation to these bodies, we do not yet have robust evidence of the full impact of compliance with the duties. In particular, the adoption of the NHS Number across education settings and children's social care may have a substantial impact. The Department for Education has committed to undertake an evidence gathering exercise to assess the impact of the extension of the duties by the end of 2015. Until that evidence is available, and a decision is taken by Government about the future application of the duties on that basis, these Regulations exclude these bodies from the scope of the new 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 Act[3]. 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

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[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

[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.

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

7.9 The effect of these Regulations is to disapply the duties in the 2015 Act from healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies. As outlined above, the Department for Education has committed to undertake an evidence gathering exercise, to assess the impact of the extension of the duties, by the end of 2015. The Government will remain mindful of its duty under section 149 of the Equality Act 2010 when considering the evidence gathered about the impact of these duties on these bodies.

7.10 Since October 2014, all new legislation is subject to the 'families test', to ensure it supports strong and stable families. While the effect of these Regulations is to exclude from scope healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies, the Department considers that the disapplication of the duties has no impact on family formation or on families going through couple separation. The Government will remain mindful of the need to support strong and stable families when reviewing the evidence gathered in the course of the Department for Education review.

8. Consultation outcome

8.1 There is no statutory duty to consult on the Regulations. The effect of the provisions is to ensure that persons providing or commissioning services falling within the scope of the 2012 Act definition of health services and adult social care, but where the evidence base for their inclusion within the scope of the duties has not yet been established, are not subject to the duties under new sections 251A and 251B of the 2012 Act. As the effect of the Regulations is to maintain the *status quo* for these organisations until such time that a decision can be made on the basis of the evidence gathered in the course of the Department for Education review, these Regulations have not been subject to consultation.

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.

9.2 As these Regulations disapply the duties from certain persons, there is no plan to produce guidance on the Regulations.

10. Impact

10.1 The effect of these Regulations is to exclude certain persons from the scope of the duties under the 2015 Act. The Regulations do not impose any new requirements on the private or voluntary sector, and no impact on these sectors is foreseen.

10.2 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.

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

11. Regulating small businesses

11.1 The effect of these Regulations is to exclude from the scope of the duties certain persons. As such, they do not impose any new requirements on small businesses, and no impact on small businesses is foreseen.

12. Monitoring & review

12.1 The Department for Education has committed to undertake an evidence gathering exercise to assess the impact of the extension of the duties to healthcare and social care funded or provided by early years education, schools and colleges and children's social care bodies, by the end of 2015. The Regulations will be reviewed based on the findings of this review.

13. Contact

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