Digital Economy Bill

House of Lords, Report Stage
Monday 20th & Wednesday 22nd March 2017

About the BMA
The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care.

The BMA urges Peers to support amendments 28AW and 28AX to ensure this Bill does not pass without a consistent exclusion of identifiable healthcare data from its information disclosure powers, and with protection for the common law duty of medical confidentiality upheld.

Amendments 28AW & 28AX
Clause 36, page 34, line 30, at end insert—
“( ) contravenes the common law duty of medical confidentiality.”

Clause 36, page 34, line 30, at end insert—
“( ) In its application to a specified person with functions relating to the provision of health services, section 31 does not authorise the disclosure of identifiable health information held by that person in connection with those functions.”

Key points
The BMA recognises, and is supportive of, the many benefits in using healthcare data appropriately, such as for medical research and health service planning purposes. However, this must not be achieved at the cost of undermining confidentiality and must be in line with patient expectations about how their information is handled. It is imperative that patients can trust the confidential nature of the health service, and feel confident in sharing sensitive information with healthcare professionals.

At Committee Stage, government spokesperson Lord Keen conceded in response to probing amendments that the government “may wish to bring such [health and social care] bodies within the scope of these powers in future”.1 This is extremely alarming given that (1) the Bill sets aside the common law duty of medical confidentiality, and (2) the potential scope of the Bill, in particular clause 31, could enable an inappropriate, and unprecedented, sharing of confidential data held by health bodies – including the vast database of personal health data held by NHS Digital – amongst other public bodies.

If the Bill is not amended at Report Stage, the relationship of trust between doctor and patient could be seriously undermined.

We urge peers to support amendments 28AW and 28AX to clarify, beyond doubt, that all current protections for patient confidentiality will be upheld now and in the future.

Clause 31: Disclosure of information to improve public service delivery

Scope of the Bill

Clause 31 seeks to improve public service delivery and wellbeing by allowing a ‘specified person’ to disclose information to another ‘specified person’ for the purposes of a ‘specified objective’.

A House of Lords select committee confirmed that this section would “very significantly” broaden the scope of existing information-sharing powers, which would be “inappropriate”. We acknowledge the government’s Report Stage amendments addressing this point, which provide for the list of ‘specified persons’ to be placed on the face of the Bill. However, this would not prevent a future addition of health bodies, including NHS Digital, to clause 31’s powers through secondary legislation.

The new schedule (amendment 33ZX) states, “specified persons for the purposes of section 31” include “A person providing services in connection with a specified objective (within the meaning of section 31) to a specified person who is a public authority.” The government has already acknowledged they may use these powers to include data from health bodies, such as GP practices and hospitals, in the Bill’s bulk information-sharing powers: “we may wish to bring such [health and social care] bodies within the scope of these powers in future”.

The BMA has repeatedly warned that the Bill appears to set aside the common law duty of confidentiality (clause 36, subsection (7)), which is especially concerning if these powers were to be used in relation to identifiable health data, permitting an inappropriate and unprecedented sharing of confidential information. The Bill states, “a disclosure under any of sections 31 to 35 does not breach (a) any obligation of confidence owed by the person making the disclosure or, (b) any other restriction on the disclosure of information (however imposed)”.

The BMA recognises the Bill’s intention to comply with the Data Protection Act (DPA) but this alone does not offer adequate protections for confidential healthcare information. The particular sensitivity of health information has long been afforded special legal status, over and beyond the DPA, in the form of the common law duty of confidentiality.

Cases before the courts have reaffirmed that society has an interest in maintaining a confidential health service, and, moreover, Article 8 of the Human Rights Act 1998 supports this common law duty of confidentiality. Without amendment 28AW to protect this duty, the Bill – if applied to health – will permit public bodies to share confidential health data without patient consent and in a very wide range of unspecified circumstances (far beyond the reasons for which the patient provided their information) without having to provide any public interest justification.

NHS Digital has a statutory role in the collection of data from across the health service. Therefore, should it be included at a future point in the new information-sharing powers, the government and other ‘specified persons’ would have a straightforward, and direct, route to request access to vast quantities of identifiable health data without patient consent or demonstrating it is in the public interest.

We must maintain all current legal protections that relate to confidential health information to ensure that it can only be shared with a patient’s consent (unless there are compelling reasons otherwise).

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4 Such reasons can include disclosures in the public interest to prevent serious harm or to prevent/detect serious crime, and where there is a specific and narrowly defined statutory basis for interference with rights to confidentiality.
Consistency across the Bill – amendment 28AX

Amendment 28AX would bring clause 31’s powers in line with the government’s stated intention to ensure that health data are kept safe in the Bill; as demonstrated by its own amendment to the powers in clause 60. This section, which addresses information-sharing specifically for research purposes, was amended by the government in the Commons (clause 61, subsection (4)) to prevent any erosion of the status quo for sharing healthcare data for research purposes.

The government has said that a similar amendment to clause 31 (regarding public service delivery) is not possible because health is a devolved issue, but no justification has been provided as to how “the legal framework is different” or the implications of this.

As such, we believe clause 61, subsection (4) sets a precedent to put in place similar health data protections to cover the information-sharing powers in clause 31.

Patient confidentiality
Maintaining trust between patient and doctor

The doctor-patient relationship is based on trust – in the course of consultation and treatment, patients will often disclose highly sensitive information to their doctor, which can be recorded and is vital to ensuring they get the appropriate care and treatment. This information is disclosed by patients on the understanding that it will not be shared inappropriately.

The Bill’s potential scope could undermine this basic principle of confidentiality and risk patients no longer feeling comfortable sharing sensitive information. Without this trust, patients may decide to withhold information from their doctors, or even choose not to access health services at all. This will not only have a detrimental impact on the ability of doctors to provide high standards of care to individual patients, it also presents significant risks to public health.

Furthermore, if patients withhold information from their doctors, or stop accessing health services due to concerns about confidentiality, these unintended consequences will impact the quality and usefulness of the information in medical records – the quality of these records is essential for the health service to function effectively and is used in important medical research. The BMA is supportive of the many benefits in using healthcare data, when it is done appropriately, but the combined impact of the unintended consequences outlined above would be to hamper effective public service delivery and achieve the opposite effect to the Bill’s intention.

Public trust in ‘the system’ has already been severely damaged as a result of the public controversy over the care.data programme, which was subsequently abandoned in 2016. The BMA believes a further loss of trust, as a result of government legislation that weakens the protection for patient confidentiality, would be extremely difficult to regain and should be avoided at all costs.

The law, as it stands, gives healthcare a special status of protection that goes above and beyond the Data Protection Act. This is in recognition of the sensitivity of information that is shared between patient and doctor, and the importance of maintaining trust in this relationship. The Bill appears to override existing safeguards for confidentiality and could be applied to health bodies in the future, which would seriously undermine the trust-based relationship between a doctor and his or her patient. As a result, patients may withhold information from their doctor or be fearful of seeking medical help. We urge peers to support amendments 28AW and 28AX to address this on the face of the Bill.

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