

**LIBERTY**

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's written evidence to the  
inspection of partnership working  
between the Home Office and other  
government departments by the  
Independent Chief Inspector of  
Borders and Immigration**

**May 2018**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at  
<http://www.libertyhumanrights.org.uk/policy/>

## **Contact**

Corey Stoughton  
Advocacy Director  
Direct Line: 0207 378 3667  
Email: [coreys@libertyhumanrights.org.uk](mailto:coreys@libertyhumanrights.org.uk)

Gracie Mae Bradley  
Advocacy and Policy Officer  
Direct Line: 0207 378 3654  
Email: [gracieb@libertyhumanrights.org.uk](mailto:gracieb@libertyhumanrights.org.uk)

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## Introduction: partnership working in the context of a hostile environment

1. Liberty welcomes the opportunity to submit evidence to this inspection of partnership working between the Home Office and other government departments by the Chief Inspector of Borders and Immigration. To fully understand the significance of partnership working between the Home Office and DHSC for purposes related to charges for NHS care, the Home Office and the Department for Education (DfE), and the Home Office, the Department for Work and Pensions (DWP), and Her Majesty's Revenue and Customs (HMRC), it is important to consider the cumulative impact of Government data-sharing practices on undocumented migrants and other people affected by these practices.
2. Since 2012, the Home Office has operated with a public commitment to creating a "hostile environment"<sup>1</sup> for undocumented migrants. The effects reverberate well beyond the Government's stated target group to affect migrants with regular status, and black and minority ethnic (BAME) communities. Requirements on public servants and private citizens to check people's entitlements to goods and services, as well as the racially discriminatory impacts routinely felt by people who are subjected to the checks, damages the very fabric of the society we live in.
3. In the context of a hostile environment, many aspects of the lives of undocumented migrants, such as working or driving, or simply being present in the UK without the requisite permission, are criminalised, primarily by sections 24 and 24A of the Immigration Act 1971. These offences include knowingly entering the UK without leave; overstaying leave; failure to observe reporting conditions; obtaining leave to enter or remain by deception, and avoiding immigration enforcement by deception.
4. The Government relies heavily on the existence of these criminal offences coupled with the crime exemption set out at Section 29 of the Data Protection Act 1998, in conjunction with a mix of statutory and common law powers to share data, to operate a series of bulk data-sharing agreements. These agreements see confidential personal information collected by essential public services shared with Home Office immigration enforcement teams, **without a person having the right to know about this sharing, or to consent or object to it**. The new and incredibly broad basis for data-sharing between Government departments and "specified persons" at Part 5 of the Digital Economy Act 2017 is cited as a further legal basis for data-sharing.
5. Known bulk data-sharing schemes currently operate between:
  - the Home Office, DHSC and NHS Digital with respect to patient medical records;<sup>2</sup>
  - the Home Office and DfE with respect to children's school records;<sup>3</sup>
  - the Home Office and Cifas (a third sector anti-fraud agency) with respect to bank accounts;<sup>4</sup>
  - the Home Office and the DVLA with respect to driving licences;<sup>5</sup> and

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<sup>1</sup> *The Telegraph*, 'Theresa May interview: 'We're going to give illegal migrants a really hostile reception'', May 2012 <http://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>

<sup>2</sup> 'Memorandum of Understanding Between Health and Social Care Information Centre and the Home Office and the Department of Health' 27 September 2016

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585928/MOU\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585928/MOU_v3.pdf)

<sup>3</sup> 'Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets' 7 October 2016 [http://defenddigitalme.com/wp-content/uploads/2016/12/20161016\\_DfE-HO-MoU-redacted-copy.pdf](http://defenddigitalme.com/wp-content/uploads/2016/12/20161016_DfE-HO-MoU-redacted-copy.pdf)

<sup>4</sup> Cifas is a third sector organisation that holds the UK's largest anti-fraud database. A data-sharing agreement between it and the Home Office is referenced at paragraph 2.6 in *Independent Chief Inspector of Borders and Immigration (ICIBI)*, 'An inspection of the 'hostile environment' measures relating to driving licences and bank accounts' October 2016 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf)

- the Home Office, DWP and HMRC<sup>6</sup> with respect to employment records and welfare benefits.
6. These agreements have shared features. They operate to facilitate Home Office demands for personal data from specific agencies, namely up-to-date addresses for individuals who are suspected of committing an offence under immigration laws which criminalise mundane daily activities (NHS Digital/DoH, DfE, Cifas, DWP/HMRC). They may also make provision for an agency to check a person's immigration status with the Home Office when they attempt to access a good or a service, and provide up-to-date contact details to the Home Office when informed that a person is not entitled (Cifas, DVLA, DWP/HMRC). Until recently, the Greater London Authority (GLA) also shared aggregated, sensitive personal data collected by homelessness outreach services with the Home Office in the form of a map showing the location of non-UK rough sleepers, to facilitate immigration enforcement against them.<sup>7</sup> Distressing ad hoc data-sharing practices by police on victims of crime have also been reported. In 2017, **a woman who was five months pregnant went to report being repeatedly raped to the police, but was subsequently arrested at a rape crisis centre on immigration grounds.**<sup>8</sup>
  7. Across the board, individuals are not informed when they interact with frontline services that their data may be used for immigration enforcement purposes, not least because many frontline workers are unaware of the existence of these data-sharing agreements. Their existence has been brought to light primarily through Freedom of Information Act (FOIA) requests. Public awareness of them remains low, and parliamentary scrutiny of them has been negligible.
  8. It is far from clear that the agreements are lawful. It is likely that some of them, in whole or in part, breach Articles 8 and 14 of the European Convention on Human Rights to the extent that they represent a disproportionate interference with individuals' right to privacy, and constitute a two-tier regime of confidentiality that is indirectly discriminatory on the basis of nationality. These agreements are also anathema to good government to the extent that **they subordinate legitimate public policy aims such as the protection of public health, the prevention of serious crime, homelessness support, and child safeguarding, to immigration enforcement priorities.**

## Health

*The impact of the data-sharing MOU between NHS Digital, DHSC and the Home Office on migrants' health-seeking behaviours*

9. It is clear from the evidence presented to the Health Committee inquiry into the tracing MOU between the Home Office, NHS Digital, and DHSC, as well as independent research,<sup>9</sup> that

<sup>5</sup> ICIBI, *ibid*.

<sup>6</sup> Agreements obtained by Liberty and journalists through FOI request, and referenced in *Vice Magazine*, 'Theresa May's 'Anti-Slavery' Agenda Is About Deporting Migrants' 21 September 2017 [https://www.vice.com/en\\_uk/article/8x8gbv/theresa-mays-anti-slavery-agenda-is-about-deporting-migrants](https://www.vice.com/en_uk/article/8x8gbv/theresa-mays-anti-slavery-agenda-is-about-deporting-migrants)

<sup>7</sup> Agreement obtained through FOIA by Liberty and reported on by *The Observer*, 'Home Office used charity data map to deport rough sleepers' 19 August 2017: <https://www.theguardian.com/uk-news/2017/aug/19/home-office-secret-emails-data-homeless-eu-nationals>

<sup>8</sup> Politics.co.uk, *Woman reports rape to police - and is arrested on immigration charges*, 28 November 2017 <http://www.politics.co.uk/news/2017/11/28/woman-reports-rape-to-police-and-is-arrested-on-immigration>; Politics.co.uk, *Met police hands victims of crime over to the Home Office for immigration enforcement*, 5 April 2017: <http://www.politics.co.uk/news/2017/04/05/met-police-hands-victims-of-crime-over-to-the-home-office>

<sup>9</sup> Karen Hacker, Maria Anies, Barbara L Folb, Leah Zallman, 'Barriers to health care for undocumented immigrants: a literature review', Risk Management and Healthcare Policy, (Dove Medical Press: 30 October 2015). *This literature review of global*

fear of immigration enforcement has a significant negative impact on undocumented migrants' health-seeking behaviours. The impact of the MOU is bound up with other measures that have a negative impact on migrants' health-seeking behaviours, such as charges for non-urgent secondary care, and wider Government policy falling under the "hostile environment" agenda.<sup>10</sup> These policies are discussed further below. The Doctors of the World UK case studies quoted at paragraphs 4-8 focus on the issue of immigration enforcement and deterrence in healthcare in general, because it is difficult to abstract the effect of the MOU from more general policies of deterrence and the fears that they engender.

10. Doctors of the World UK is a charity that runs clinics providing healthcare to people who are excluded from mainstream services, including people without regular immigration status. They report that they have seen significant changes to patient behaviour in their clinics since they began notifying patients that their information may be shared with the Home Office for immigration enforcement purposes following publication of the MOU in January 2017.<sup>11</sup> Given that DOTW is the only care provider systematically notifying their patients that the MOU is in force, it is vital that this evidence is given substantial weight.<sup>12</sup> Their findings show that since details of the MOU were made public, the result has been a "significant increase in deterrence from NHS care".<sup>13</sup>

**Case studies submitted by Doctors of the World UK as written evidence into the Health Committee's inquiry into the MOU<sup>14</sup>**

11. A woman from Eritrea went to a Doctors of the World UK clinic. She had been living in this country for seven years. She was being kept as a domestic slave and was subjected to sexual violence. Despite her experiences, she did not feel comfortable enough to visit a GP or report the abuse, as she was afraid that medical professionals would pass on her details to the Home Office.
12. A female domestic worker was diagnosed in hospital with Bell's palsy, a type of facial paralysis that results in an inability to control the affected facial muscles. When she went for a check-up, she was questioned in the hospital about her immigration status. She immediately ran out of the hospital and did not seek any further medication for her condition. NHS guidance suggests that for patients with this illness, it is important to see a GP as soon as possible after developing the symptoms because treatment for Bell's palsy is more effective if started earlier (within 72 hours). The woman eventually went to Doctors of the World UK after the illness had already intensified, and told support workers how scared she was to go to hospital again, because she did not want to be interrogated about her immigration status.
13. Domestic workers are a particularly vulnerable group. In one case, a woman died after refusing to seek help for an undiagnosed disease due to the fear that she would be reported

barriers to healthcare for undocumented migrants found that in 65% of reviewed articles, fear of deportation was a barrier to healthcare.

<sup>10</sup> Liberty and partners, *A Guide to the Hostile Environment*, April 2018

<https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf>

<sup>11</sup> <https://www.theguardian.com/uk-news/2017/jan/24/nhs-hands-over-patient-records-to-home-office-for-immigration-crackdown>

<sup>12</sup> Doctors of the World, 'NHS Digital and DHSC refuse to suspend migrant data-sharing agreement with the Home Office, despite concerns raised by MPs and Doctors', 28 February 2018, <https://www.doctorsoftheworld.org.uk/news/nhsdigital-and-dhsc-refuse-to-suspend-migrant-data-sharing-agreement-with-the-home-office->

<sup>13</sup> Written evidence from National Aids Trust and Doctors of the World, 23 January 2018, p.3 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/written/77403.pdf>

<sup>14</sup> Health Select Committee, Oral Evidence: Memorandum of understanding on data-sharing between NHS Digital and the Home Office, HC 677, 16 January 2019,

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.html>

to immigration services. This woman was also violently abused by her employer and in one instance, scalded with hot water. Again, she did not report her injuries or the incident as she was too afraid to alert the authorities. Ultimately, the abuse was not what killed her – it was the fact that her disease went untreated because she was too frightened to access healthcare.

14. In one case, a man from the Democratic Republic of Congo attended a Doctors of the World UK clinic and disclosed to them that on account of his political opinions, he had been imprisoned and tortured in his country of origin. When he presented to the organisation, he was suicidal, and had not accessed mental health services or sought any other medical help. He was worried that medical professionals would notify the Home Office of his whereabouts, and that he would be sent back to the Democratic Republic of Congo, where he would be subject to further violence.
15. One woman in the Doctors of the World UK service group had suffered extreme violence in her home country. As a result, she was experiencing severe physical and mental health problems. The organisation could not persuade her to see her GP about these issues, despite the fact that she was very unwell. Her fear of immigration enforcement overrode her desire to seek urgent medical help.

16. The office of the National Data Guardian has argued that the data sharing agreement has “obvious consequences” for undocumented migrants and for wider health.<sup>15</sup> Public Health England has also acknowledged that “*there is a strong suspicion that fears in general about confidentiality do have an effect*”.<sup>16</sup> Yet, as the National Data Guardian observed in evidence to the Health Select Committee, the Home Office appears “*unable to provide specific evidence about the benefit of these disclosures from NHS Digital beyond the general point that addresses are very valuable for immigration enforcement.*”<sup>17</sup>

#### *Access to healthcare without fear of deportation: a human rights issue*

17. The evidence considered above, alongside the evidence that has already been submitted to the Health Committee, suggests that the MOU—alone or in conjunction with other measures—deters migrants from seeking appropriate and timely healthcare, and infringes upon the ability of medical professionals to conduct their work in a safe, trusting and confidential environment. Furthermore, the data sharing agreement undermines fundamental rights.
18. As illustrated by the examples above, making the sharing of patient information with immigration enforcement officials a condition of receiving healthcare is a public health policy and a structural barrier that can have fatal consequences, raising concerns under Article 2 of the European Convention on Human Rights (ECHR), the right to life, or leading to pain and suffering which could breach the Article 3 prohibition on inhuman or degrading treatment.<sup>18</sup>

<sup>15</sup> Dr Joanne Bailey, Member of the Advisory Panel, National Data Guardian, Oral Evidence to the Health Select Committee, 16 January 2018 [Q3], <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.htm>

<sup>16</sup> Professor Newton, *Ibid*, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.html>

<sup>17</sup> Dame Fiona Caldicott, National Data Guardian, Written evidence from the National Data Guardian, MOU0011, 25 January 2018, p.2 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/written/77475.pdf>

<sup>18</sup> European Convention on Human Rights, Article 3, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Fear of an intervention by the immigration authorities if medical help is sought may further trap vulnerable people in situations of exploitation and abuse in the UK, implicating their right to be free from forced labour under Article 4.

19. The data sharing agreement further does not properly consider the fundamental right to privacy. NHS Digital has argued that the sharing of 'non-clinical information' passes the lower threshold for the public interest test. However, the significance of a data item to an individual is to some extent subjectively determined and dependent on the context of the disclosure. An undocumented migrant's address may in certain cases, due to a person's fear of immigration enforcement, be perceived by the data subject as a more sensitive piece of data than, for example, the fact that they have been treated for a minor injury, particularly when the information is disclosed to immigration enforcement officials for the purposes of immigration control.
20. This principle is also enshrined in case law. The European Court of Human Rights held in Z v Finland (1998) 25 EHRR 371 that protecting personal medical data is of fundamental importance to an individual's Article 8 rights.<sup>19</sup> Taking this further, the domestic case of R (W) v Secretary of State for Health [2015] EWCA Civ 1034, concluded that all information provided in the context of the doctor-patient relationship, including non-clinical information, is inherently private.<sup>20</sup> The case also outlined that there is a breach of Article 8 rights where a person is not alerted to the fact that their private information may be shared with the Secretary of State.<sup>21</sup> As a result, it is highly likely that the MOU unjustifiably interferes with, and thus breaches Article 8 because, (i) there is an established relationship of trust between the doctor and the patient, (ii) key information is shared with a state body, and (iii) this is done without the knowledge and/or consent of the patient.
21. While it clearly has significant implications for everyone who uses NHS services for the reasons discussed below, the data sharing agreement establishes a privacy regime that provides significantly inferior protection for undocumented migrants in comparison with people with regular status. This constitutes an unjustified discriminatory interference with undocumented migrants' right to privacy on the grounds of "other status"; namely their immigration status,<sup>22</sup> meaning it is highly likely for this reason to be incompatible with Articles 8 and 14 of the ECHR taken together.
22. In addition, the MOU's information sharing provisions are indirectly discriminatory because they apply without distinction to anyone without immigration status, but put people with certain protected characteristics at a "particular disadvantage". Migrants with disabilities (such as HIV and AIDS, PTSD, diabetes and tuberculosis) and pregnant women or new mothers are at a "particular disadvantage" when compared to other migrants because they are discouraged from accessing healthcare which is essential for (i) treatment of their disability or (ii) the health of mothers and their new babies. Members of these groups are at a particular disadvantage due to their heightened need to access primary healthcare.<sup>23</sup>
23. This indirect discrimination is incapable of justification as a proportionate means of achieving any of the aims identified by the MOU, given the serious impact on disabled people, pregnant women and new mothers.

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<sup>19</sup> Para 95 of judgment, <http://www.worldlii.org/eu/cases/ECHR/1997/10.html>

<sup>20</sup> Para [34] of judgement, <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/w-x-y-z.pdf>

<sup>21</sup> Paras [43 – 44] of judgment, <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/w-x-y-z.pdf>

<sup>22</sup> See *Bah v United Kingdom* (2011) 54 EHRR 21 at [45]-[46] and *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 per Lady Hale at [26].

<sup>23</sup> Equality Act 2010, s6 and s11 for protected characteristics of disability and sex respectively.



24. NHS Digital states that its aim is to “improve health and social care in England by putting technology and information to work in the interests of citizens.”<sup>24</sup> It is interesting that this aim is limited to “citizens”, which excludes many migrants and of course undocumented migrants, rather than England’s inhabitants more generally. In any event, in its approach to data sharing with the Home Office, NHS Digital is clearly not using technology and information to support the public’s interest in maintaining good health and a confidential health service. Rather it is serving the public’s apparent interest in tracing “immigration offenders”, which seems in fact to be a proxy for the Government’s own interest in immigration enforcement.

#### *Undermining patient-doctor confidentiality*

25. Doctor-patient confidentiality begins when a person hands over their details to their clinic or general practice. It is clear from this perspective that doctor-patient confidentiality has been breached by the data sharing agreement. The medical profession has roundly denounced the impact of the MOU on doctor-patient confidentiality. The Royal College of General Practitioners (‘RCGP’) strongly condemned NHS Digital’s decision to ignore recommendations that it should suspend the MOU with the Home Office. The professional membership body, which represents over 50,000 GPs in the UK, has written to the Chief Executive of NHS Digital, outlining their concerns that the agreement may detrimentally impact patient-doctor confidentiality.<sup>25</sup> Professor Helen Stokes-Lampard, Chair of the RCGP council, stressed that patient-doctor confidentiality is a fundamental principle in a medical professional’s practice, and without trust, vulnerable people will be deterred from seeking vital clinical assistance.<sup>26</sup> Similarly, the National Data Guardian, the British Medical Association and General Medical Council have voiced their deepening concerns about how the data sharing agreement will impact doctor-patient relationships, confidentiality and wider public health.<sup>27</sup>

26. Although the General Medical Council has advised medical practitioners not to provide information to immigration authorities if directly approached<sup>28</sup>, direct approaches are no longer necessary. Now that the MOU is fully operational, NHS Digital can pass any details that doctors have collected to the Home Office if the patient is suspected of an immigration offence. Kingsley Manning, former chair of NHS Digital, himself acknowledged: “*the lack of transparency in the decision to share any patient data between the NHS and the Home Office threatens [...] the integrity of the NHS as a safe haven for personal data.*”<sup>29</sup> The National Data Guardian supports this view, and argues that the importance of confidentiality to healthcare services is reflected in the high threshold that has traditionally been set for determining the circumstances of disclosure.<sup>30</sup> The data sharing agreement goes against these fundamental standards and principles of general practice. It destroys patient confidentiality, alters doctors’ ethical approaches and lowers the threshold for disclosure of patient information.

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<sup>24</sup> Memorandum of Understanding Between Health and Social Care Information Centre, the Home Office and the Department of Health, 1 January 2017 [Para 5.2],

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585928/MOU\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585928/MOU_v3.pdf)

<sup>25</sup> Royal College of General Practitioners, ‘RCGP condemns NHS Digital decision to ignore recommendations to suspend MOU with Home Office’, 7 March 2018, <http://www.rcgp.org.uk/about-us/news/2018/march/rcgp-condemns-nhs-digital-decision-to-ignore-recommendations-to-suspend-mou-with-home-office.aspx>

<sup>26</sup> Professor Helen Stokes-Lampard, Chair of RCGP council, Letter to Sarah Wilkinson CEO of NHS Digital, 7 March 2018.

<sup>27</sup> Royal College of General Practitioners, ‘RCGP condemns NHS Digital decision to ignore recommendations to suspend MOU with Home Office’, 7 March 2018, <http://www.rcgp.org.uk/about-us/news/2018/march/rcgp-condemns-nhs-digital-decision-to-ignore-recommendations-to-suspend-mou-with-home-office.aspx>

<sup>28</sup> Yusef Azad, Oral Evidence, Health Select Committee, 16 January 2018, [Q4],

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.html>

<sup>29</sup> Fabien Cante, ‘MRN Legal Challenge against NHS Data-Sharing Deal – Press Release’, December 2017

<https://migrantsrights.org.uk/blog/2017/11/09/mrn-legal-challenge-nhs-data-sharing-deal-press-release/>

<sup>30</sup> Dr Bailey, Oral Evidence to the Health Select Committee, 16 January 2018 [Q3]

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.html>

27. NHS Digital has a duty to show due regard to confidentiality and prioritise this over other considerations. It has not fulfilled this duty, and has in fact prioritised immigration enforcement policy over patient confidentiality. The Health and Social Care Act 2012 s.253(1)(ca) expressly confers upon NHS services the duty to *respect* and *promote* privacy of medical patients. NHS Digital must consider the possible harm to confidence in public health services if they make a disclosure. There is no evidence that they have done so. In disrespecting patients and sharing information without consent from either patients or their doctors, and for reasons different from that for which the information was originally obtained, NHS Digital is risking the health of individuals and lowering the trust and confidence in the medical profession as a whole.
28. Liberty is further concerned by the way in which NHS Digital, the Department of Health and Social Care and the Home Office have approached the public interest test to disclosure. According to medical professionals' guidelines, particularly General Medical Council guidance<sup>31</sup> and the NHS Code of Practice,<sup>32</sup> there is a high threshold for sharing patient information on crime grounds that must be satisfied. The test is whether serious harm has been caused to an individual, or whether a serious offence such as rape, murder or manslaughter has been committed.<sup>33</sup> Indeed the criterion of serious crime is a requirement for disclosure of information to police, and even in the case of serious crimes, tracing requests are automatically rejected when the crime is over five years old.<sup>34</sup> A criminal who had committed murder over six years ago would not have their address disclosed without their consent. A person who has overstayed their visa would.
29. All the MOU requires for disclosure of the address of a suspected immigration offender to the Home Office is the suspicion that an individual is an immigration offender. Crimes associated with a person's immigration status are manifestly not serious crimes. The majority of offences under Section 24 or 24A of the Immigration Act 1971 carry a maximum penalty on summary conviction of a two year prison sentence, a fine, or both. Sarah Wilkinson, CEO of NHS Digital, accepts there are significant differences between the standard for disclosure in a criminal context, and the standard for disclosure in an immigration context.<sup>35</sup> Given that the immigration matters at issue under the MOU are also crimes, it is not at all clear why a separate disclosure regime is required whatsoever. In any event, the disparity between the disclosure regimes is worrying.
30. Sarah Wilkinson has also disclosed that NHS Digital did not seek any medical ethical advice on patient privacy issues when drafting the data sharing agreement,<sup>36</sup> which is clearly incompatible with the general guidelines on confidentiality set down by the GMC and NHS. By concluding such an agreement, NHS Digital is setting a dangerous precedent for patient privacy, not only for the migrants but for the general public.

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<sup>31</sup> GMC Confidentiality: good practice in handling patient information 2017 at paras 63-65: [https://www.gmc-uk.org/static/documents/content/Good\\_medical\\_practice\\_-\\_English\\_1215.pdf](https://www.gmc-uk.org/static/documents/content/Good_medical_practice_-_English_1215.pdf)

<sup>32</sup> Confidentiality NHS Code of Practice at paras 30-33: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/200146/Confidentiality\\_-\\_NHS\\_Code\\_of\\_Practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200146/Confidentiality_-_NHS_Code_of_Practice.pdf)

<sup>33</sup> Yusef Azad, Oral Evidence to the Health Select Committee, 16 January 2018 [Q2] <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/77354.html>

<sup>34</sup> NHS Digital, National Back Office Tracing Service review: Technical Annex, November 2017, pg 36-37.

<sup>35</sup> Health and Social Care Committee, Oral Evidence: MOU on data-sharing, HC 677, 15 March 2018, [Q104 - Q110] <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/oral/80609.html>

<sup>36</sup> *Ibid*, [Q120 – Q121].

31. The general stance that the Government now appears to have adopted in relation to patient confidentiality is incredibly alarming. In a letter to Dr Sarah Wollaston, it argues:  
 “We do not consider that a person using the NHS can have a reasonable expectation when using this taxpayer-funded service that their non-medical data, which lies at the lower end of the privacy spectrum, will not be shared securely between other officers within government in exercise of their lawful powers in cases such as these.”<sup>37</sup>
32. This is a striking departure from the stringent safeguards against unnecessary disclosure set down by the GMC and the NHS Code of Confidentiality. If the Government does not urgently revoke the MOU and reconsider its broader position on confidentiality, patient data could in future be disclosed without consent not only for non-serious criminal purposes, but to aid other public policy objectives such as the administration of welfare benefits. The effects of such an approach on patient trust in the health service cannot be underestimated, and will likely lead to people avoiding seeking medical treatment in a broad range of circumstances, exponentially amplifying the public health effects that have already been attributed to this MOU.

## Primary and secondary education

### *Nationality and country of birth controversy*

33. In September 2016, the Department for Education (DfE) began requiring schools to collect children’s nationality and country of birth through the School Census, which happens three times each year. Guidance to schools on how to collect this data was initially very poor, and led in some cases to clearly discriminatory and stigmatising practices, such as only BAME pupils being asked for the information.<sup>38</sup> Numerous schools also asked children to show their passports even though this was not required by the guidance,<sup>39</sup> and others asked children for their nationality directly, rather than requesting the information from their parents. There was a widespread and systemic failure to inform parents of their right to refuse to give nationality or country of birth information.<sup>40</sup> These data collection practices are the direct result of poor guidance from the DfE, and raise serious equality and privacy concerns. Although Liberty and Against Borders for Children (ABC) wrote in January 2017<sup>41</sup> to every school in England explaining parents’ rights and schools obligations, this was be no substitute for clear, accurate guidance from central Government and local authorities.
34. In addition to concerns about how the data has been collected to date, Liberty and other groups are not satisfied that the collection has been for educational purposes. Before the data collection began, Nick Gibb in July 2016 stated that its purpose was to measure “the impact of pupil migration on the education sector”<sup>42</sup>. However, letters between Nicky Morgan, Theresa May, then Home Secretary, and David Cameron, then Prime Minister, reveal that the nationality and country of birth data collection was introduced as a compromise on harsher

<sup>37</sup> Caroline Nokes and Lord Shaughnessy, Letter to Dr Sarah Wollaston regarding the Memorandum of Understanding between NHS Digital, Department of Health and Social Care and the Home Office, 23 February 2018.

<https://www.parliament.uk/documents/commons-committees/Health/Correspondence/2017-19/Letter-to-Chair-of-Committee-from-Caroline-Nokes-MP-and-Lord-O'Shaughnessy-MoU-on-data-sharing-23-02-18.pdf>

<sup>38</sup> Freddie Whittaker and Billy Camden, *Pupils who were not white British told to send in birthplace data*, 23 September 2016 <http://schoolsweek.co.uk/pupils-who-were-not-white-british-told-to-send-in-birthplace-data/>

<sup>39</sup> Ibid.

<sup>40</sup> Niamh McIntyre, *Human rights campaigners attack Government’s ‘foreign children list experiment’* 16 January 2017

<http://www.independent.co.uk/news/uk/home-news/human-rights-charity-liberty-oppose-school-census-government-foreign-children-list-a7529961.html>

<sup>41</sup> Ibid.

<sup>42</sup> Nick Gibb, *Written Answer 42942*, 25 July 2017 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-07-15/42942/>

measures that Theresa May had wanted to include in the 2015 Immigration Bill, which would have required schools to check a child's immigration status and allowed them to 'deprioritise' the children of undocumented migrants for school places.<sup>43</sup>

35. An early version of a data sharing agreement between the Home Office and the DfE showed that children's nationality data, once collected, was also to be shared for immigration enforcement purposes, until the agreement was amended following public outcry.<sup>44</sup> The DfE has consistently failed to produce any evidence to support its claim that the data is being collected for the benefit of migrant children. In light of the contents of the leaked letters outlined above, that claim is wholly discredited.

36. The collection of nationality and country-of-birth data was widely condemned by parents, teachers and Parliamentarians, including by Sir Michael Wilshaw, outgoing head of Ofsted, who "schools shouldn't take the place of the borders agency".<sup>45</sup> A motion regretting the data collection was agreed by the House of Lords in October 31 2016. As Lord Storey said at the time,

"Children are children, and to use their personal information for immigration enforcement is disingenuous, irresponsible, and not the hallmark of a tolerant, open and caring society."<sup>46</sup>

The National Union of Teachers (NUT) also opposed the new measures, reminding the Home Office that "schools are not part of policing immigration"<sup>47</sup>, and passed a motion against the data collection at its annual conference in 2017.<sup>48</sup> In addition to the public boycott called by ABC, a wide coalition of migrants' rights and anti-racism groups has lobbied for the data collection to end since it was first due to be collected in October 2016.<sup>49</sup>

37. In December 2017, it was revealed that approximately 200 000 children and parents had actively boycotted the nationality and country of birth questions in the census by entering 'refused' in the relevant form fields.<sup>50</sup> In total, 25% of schools failed to record nationality or country of birth data on children, with 'refused' or 'not yet obtained' entered for two million pupils. If the aim of the data collection was to elicit information to provide a statistical basis for policy development (either by the DfE or, as previous correspondence would suggest, the Home Office) then the 25% failure rate suggests that this aim has not been achieved. If, however, the aim of the data collection was to create a hostile environment for migrant children in schools, as ABC and Liberty have argued, then the stigmatising and discriminatory impacts of the data collection may have come closer to achieving that aim.

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<sup>43</sup> Laura Kuenssberg, *Theresa May had plan to 'deprioritise illegal migrant pupils*, 1 December 2016 <http://www.bbc.co.uk/news/uk-politics-38165395>

<sup>44</sup> Freddie Whittaker, *DfE had agreement to share pupil nationality data with Home Office*, 15 December 2016, <http://schoolsweek.co.uk/df-e-had-agreement-to-share-pupil-nationality-data-with-home-office/>

<sup>45</sup> Freddie Whittaker, *Wilshaw: I would have refused pupil immigration checks as head*, 1 December 2016, <http://schoolsweek.co.uk/wilshaw-i-would-have-refused-pupil-immigration-checks-as-head/>

<sup>46</sup> Lord Storey, *That this House regrets that information about pupils' nationality and country of birth collected under the Education (Pupil Information) (England) (Miscellaneous Amendments) Regulations 2016 (SI 2016/808) could be used to help determine a child's immigration status.*, 31 October 2016 [https://hansard.parliament.uk/lords/2016-10-31/debates/6D06F8D5-7709-43DF-87ED-33CBBC7324FF/Education\(PupilInformation\)\(England\)\(MiscellaneousAmendments\)Regulations2016](https://hansard.parliament.uk/lords/2016-10-31/debates/6D06F8D5-7709-43DF-87ED-33CBBC7324FF/Education(PupilInformation)(England)(MiscellaneousAmendments)Regulations2016)

<sup>47</sup> National Union of Teachers, *School Census Data*, 27 October 2016 <https://www.teachers.org.uk/news-events/press-releases-england/school-census-data>

<sup>48</sup> Richard Adams, *NUT urges parents not to give details of children's nationality and birthplace*, 17 April 2017 <https://www.theguardian.com/education/2017/apr/17/nut-to-tell-parents-not-to-give-details-of-childrens-nationality-and-birthplace>

<sup>49</sup> Damien Gayle, *Parents urged to boycott requests for children's country of birth information*, 26 September 2016 <https://www.theguardian.com/uk-news/2016/sep/26/parents-boycott-requests-childrens-country-of-birth-information>

<sup>50</sup> Freddie Whittaker, *Schools fail to obtain nationality data on quarter of pupils*, 7 December 2018 <https://schoolsweek.co.uk/schools-fail-to-obtain-nationality-data-on-quarter-of-pupils/>

38. In April 2018 it was widely reported that the Department for Education would no longer require schools to collect nationality and country of birth data.<sup>51</sup> The DfE had been facing legal action initiated by ABC in December 2017, represented by Liberty.<sup>52</sup> ABC had argued that the data collection had no basis in law, and breached children's rights to privacy and non-discrimination. The DfE should delete any nationality and country of birth data that it still holds as a matter of urgency.

*Home Office – DfE agreement to trace undocumented children and families*

39. In December 2016 it emerged<sup>53</sup> that for over a year the DfE has been party to a secret agreement<sup>54</sup> to share data from the National Pupil Database, collected through the School Census, with the Home Office for immigration enforcement purposes. The agreement envisages that the personal information of up to 1500 children will be shared each month in cases where the Home Office has lost contact with them or a family member, suspects that an immigration offence has been committed, and believes the child and/or family member is still in the UK.
40. The DfE in December 2017 for the first time ever published statistics on external data shares, including with the Home Office.<sup>55</sup> That document shows that between July 2015 and September 2017, the Home Office requested the records of 4296 people from the DfE. For the same time period, 1051 records were transferred by the DfE to the Home Office. In a mere 24.5% of cases in which a tracing request was made, information was transferred by the DfE to the Home Office. It is not set out in the spreadsheet in how many of those 1051 cases, the data transferred by the DfE was data that the Home Office did not already hold, i.e. in how many cases the MOU actually resulted in the Home Office obtaining an address that it did not already have.
41. The use of children's school records for immigration enforcement purposes is likely to continue, if not intensify, facilitated by a new immigration control exemption to data protection rights proposed in the Data Protection Bill 2017. During the Committee Stage debate in the House of Commons, Government minister Victoria Atkins stated when asked how the Government planned to use the exemption:

"There may be occasions when there is a person we have lost track of whose status is irregular. If we know they have a child, we will seek from the Department for Education assistance to find the whereabouts of the child. That child has not committed a criminal offence, so I would be very concerned to ensure that the Home Office, Border Force or whoever else acted lawfully when seeking that data in order to enable them to find the parent or whoever is the responsible adult, as part of the immigration system."<sup>56</sup>

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<sup>51</sup> Freddie Whittaker, *DfE ends divisive pupil nationality data collection*, 9 April 2018 <https://schoolsweek.co.uk/dfe-ends-divisive-pupil-nationality-data-collection/>

<sup>52</sup> Freddie Whittaker, *Campaigners launch judicial review proceedings to stop collection of pupil nationality data*, 7 December 2017 <https://schoolsweek.co.uk/campaigners-launch-judicial-review-proceedings-to-stop-collection-of-pupil-nationality-data/>

<sup>53</sup> Damien Gayle, *Pupil data shared with Home Office to 'create hostile environment' for illegal migrants*, 15 December 2016 <https://www.theguardian.com/uk-news/2016/dec/15/pupil-data-shared-with-home-office-to-identify-illegal-migrants>

<sup>54</sup> *Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange of Information Assets*, published December 2016 [https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf?cookie_passthrough=1)

<sup>55</sup> Department for Education, *External organisation data shares*, December 2017 <https://www.gov.uk/government/publications/dfe-external-data-shares>

<sup>56</sup> Victoria Atkins MP in Data Protection Bill Committee Stage, Hansard col. 72 [https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153\\_Combined\\_1-6\\_20\\_03\\_2018.pdf](https://publications.parliament.uk/pa/cm201719/cmpublic/DataProtection/PBC153_Combined_1-6_20_03_2018.pdf)

42. Like the nationality and country-of-birth data collection, the Home Office-DfE data sharing scheme has been widely condemned by parents, teachers and migrants' rights groups, who recognise that it is deeply inappropriate for teachers to carry out or support the functions of immigration officers, especially without the knowledge of those teachers or pupils. It can only undermine any attempt to create inclusive educational environments for children, as many teachers and local authorities strive to. At best the scheme undermines trust between children, parents and teachers, encouraging teachers to view migrant pupils as objects of suspicion. At worst, the scheme has the potential to lead to the children of undocumented migrants being removed from school due to fear of immigration enforcement, exacerbating the already significant barriers to health and development that they and their families already face. And setting the wider ethics and human rights concerns raised by the scheme aside, with a match rate of only 24.5% and an unknown success rate in providing the Home Office with information that it does not already hold, it is clearly an insufficiently effective arrangement for it to plausibly justify deterring children from accessing an education and undermining wider confidence in our school system.

### **Conclusion: an attack on the human rights of undocumented people, privacy rights, and our public services**

43. **It is clear that the majority of offences relating to a person's immigration status are not serious crimes.** For the most part, they are the mundane activities of people doing what they must to survive. **The effect of Home Office data sharing, by contrast, is to force undocumented migrants to avoid sending their children to school, visiting the GP, presenting to homelessness services or seeking social support for fear that they risk detention and removal - of themselves, or someone in their family, by doing so.** That impact will be indirectly discriminatory across race and class, given that it is mainly poorer BAME people who fall foul of our labyrinthine immigration system.
44. Liberty is very concerned about the general direction of travel of the Government's approach to data protection and privacy. As the British Medical Association notes, it is one in which, "data-sharing arrangements are justified or rationalised on a political basis [which] wholly undermines the ethical framework in place to ensure there is a balanced judgment made in situations of competing priorities."<sup>57</sup> The Government's capacity to repurpose data without a person's consent is not only increasingly feasible from a technological point of view, it is also now bolstered by legislation. Part 5 of the Digital Economy Act 2017 outlines the powers of 'Digital Government' and the wide-ranging circumstances in which disclosure of information by a specified authority to another specific authority can be permitted in the name of improving public service delivery.<sup>58</sup>
45. Data-sharing between Government departments for immigration purposes is likely to extend – a development Liberty is deeply concerned about. The Data Protection Bill currently before the House of Commons contains a wide-ranging "immigration control exemption" at Schedule 2, part 1, paragraph 4, that would facilitate secret data sharing for the maintenance of effective immigration control – with no requirement for a person to be suspected of committing an offence - by removing their right to be notified that their information has been passed by a controller to the Home Office, as well as their right to object to it being used in this way.<sup>59</sup>

<sup>57</sup> British Medical Association, Written Evidence, MOU0015, 15 March 2018, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/memorandum-of-understanding-on-datasharing-between-nhs-digital-and-the-home-office/written/80358.html>

<sup>58</sup> Part 5, Digital Economy Act 2017, Royal Assent on 27 April 2017, [https://www.legislation.gov.uk/ukpga/2017/30/pdfs/ukpga\\_20170030\\_en.pdf](https://www.legislation.gov.uk/ukpga/2017/30/pdfs/ukpga_20170030_en.pdf)

<sup>59</sup> See Liberty's briefing on the Data Protection Bill for Second Reading in the House of Commons, p9-21

46. The agreements that the Home Office has concluded in order to trace undocumented migrants using personal data collected by essential public services constitutes a step away from the independent, indiscriminate public services that underpin every person's ability to enjoy their human rights and lead a dignified life, and another step towards a general principle that Government may repurpose data collected by any trusted service without a person's consent to meet another public policy aim. Creating an atmosphere of hostility and fear naturally undermines people's trust in public services. This is particularly concerning for the NHS, the primary function of which is to provide high quality, safe and confidential care to all patients, regardless of their background, origin or residency status. It is also of particular concern in education, the primary function of which is to provide children with a high quality education in a safe environment, without discrimination on any basis.
47. The operation of these data sharing agreements within the wider policy framework of the hostile environment is cause for significant concern. So is the broader principle that these agreements entrench for Government data processing and regard for privacy rights. By prioritising immigration enforcement needs over the protection of essential public service data, the Government is risking individuals' fundamental human rights, and the future confidentiality of our public services. A firewall between Home Office immigration control and other Government departments must be implemented before these crucial objectives are jeopardised any further.