

LIBERTY

PROTECTING CIVIL LIBERTIES
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**Liberty's written evidence to the Public
Health England consultation on the public
health impact of the Memorandum of
Understanding on data sharing between
NHS Digital, the Home Office, and the
Department of Health and Social Care**

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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
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Introduction

1. Liberty welcomes the opportunity to provide evidence on the impact of the Memorandum of Understanding (MOU) on data sharing between NHS Digital, the Home Office and the Department of Health and Social Care, which allows patient information to be shared with the Home Office for immigration enforcement purposes. Nevertheless, it is important to state at the outset that we have significant reservations as to what this consultation can achieve. A wealth of evidence has already been submitted to the Health Select Committee inquiry¹ on the MOU. In their joint submissions, the National Aids Trust and Doctors of the World UK explain that they remain:

“Unconvinced of the need for a review of the possible deterrent impact of tracing, given the ‘wealth of evidence’ cited by [Public Health England], the academic literature, our own daily experiences in Doctors of the World UK services and the lack of information as to what new evidence would change the Government’s mind. The onus should be on the Government to demonstrate there is no deterrent effect.”²

Dr Sarah Wollaston, Chair of the Health Committee has gone further. She is concerned that this consultation may amount to “*little more than window dressing*.”³ These concerns aside, the rest of this submission sets out why, in Liberty’s view, the MOU is discriminatory and incompatible with fundamental human rights, and should be revoked immediately.

Impact on migrants’ health-seeking behaviours

Too frightened to seek help

2. It is clear from the evidence presented to the Health Committee inquiry into the MOU, as well as independent research,⁴ that 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.⁵ 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.
3. 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 2017.⁶ 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.⁷

¹ Health and Social Care Committee, Memorandum of understanding on data-sharing inquiry – publications, see all oral and written evidence to the committee, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/inquiries/parliament-2017/mou-data-sharing-nhs-digital-home-office-inquiry-17-19/publications/>

² Dr Sarah Wollaston MP, Chair of the Health Select Committee, letter to NHS Digital, 29 January 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmhealth/Correspondence/Wilkinson-2018-01-29.pdf>

³ *Ibid.*

⁴ 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 barriers to healthcare for undocumented migrants found that in 65% of reviewed articles, fear of deportation was a barrier to healthcare.*

⁵ Liberty and partners, *A Guide to the Hostile Environment*, April 2018 <https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf>

⁶ <https://www.theguardian.com/uk-news/2017/jan/24/nhs-hands-over-patient-records-to-home-office-for-immigration-crackdown>

⁷ 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->

Their findings show that since details of the MOU were made public, the result has been a “*significant increase in deterrence from NHS care*”.⁸

Case studies submitted by Doctors of the World UK as written evidence into the Health Committee’s inquiry into the MOU⁹

4. 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.
5. 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.
6. 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 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.
7. 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.
8. 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.

9. The office of the National Data Guardian has argued that the data sharing agreement has “obvious consequences” for undocumented migrants and for wider health.¹⁰ Public Health England has also

⁸ 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>

⁹ 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>

¹⁰ 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>

acknowledged that “*there is a strong suspicion that fears in general about confidentiality do have an effect*”.¹¹ 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*.”¹²

10. NHS Digital has claimed that the tracing scheme does not target ‘undocumented migrants’; rather that all migrants who are targeted for tracing under the MOU are technically ‘documented’. This claim is misguided and inaccurate. Rather than meaning literally ‘without documents’ or that a person is wholly unknown to the Home Office, the term ‘undocumented’ is widely understood to mean a person who requires leave to enter or remain in the UK, but does not have it, or alternatively, a person who has leave to enter or remain in the UK, but is unable to prove it. Any person without settled status in the UK could be considered to be ‘undocumented’ by the Home Office for a broad range of reasons. The MOU explicitly targets people who have committed, or who are suspected of committing an offence under section 24 or 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. These people fall within the commonly-held understanding of “undocumented” migrants. In any event, to the extent that every person should enjoy the rights to privacy and data protection without discrimination, how NHS Digital chooses to define the immigration status of those targeted by the MOU is clearly a secondary issue.

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

11. 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.
12. 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.¹³ 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.
13. 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.
14. 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

¹¹ 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>

¹² 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>

¹³ European Convention on Human Rights, Article 3, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 8 rights.¹⁴ 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.¹⁵ 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.¹⁶ 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.

15. 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,¹⁷ meaning it is highly likely for this reason to be incompatible with Articles 8 and 14 of the ECHR taken together.

16. 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.¹⁸

17. 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.

The impact of the MOU on migrants' health-seeking behaviour, public health, and wider society in the context of a "hostile environment"

Part of a "hostile environment"

18. Since 2012, the Home Office has operated with a public commitment to creating a "hostile environment"¹⁹ for undocumented migrants. Its effects reverberate well beyond its stated target group to affect migrants with regular status, settled black and minority ethnic (BAME) communities, and indeed the very fabric of the society in which we live through the requirement it imposes on public servants and private citizens to check individuals' entitlements to goods and services, as well as the racially discriminatory impacts routinely felt by individuals who are subject to such checks.²⁰

¹⁴ Para 95 of judgment, <http://www.worldlii.org/eu/cases/ECHR/1997/10.html>

¹⁵ Para [34] of judgement, <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/w-x-y-z.pdf>

¹⁶ Paras [43 – 44] of judgment, <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/w-x-y-z.pdf>

¹⁷ 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].

¹⁸ Equality Act 2010, s6 and s11 for protected characteristics of disability and sex respectively.

¹⁹ 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-areally-hostile-reception.html>

²⁰ A 2017 report by the Joint Council for the Welfare of Immigrants, *Passport Please*, found that an enquiry from a British Black Minority Ethnic (BME) tenant without a passport was ignored or turned down by 58% of landlords, in a mystery shopping exercise. Available here: https://www.jcwi.org.uk/sites/default/files/2017-02/2017_02_13_JCWI%20Report_Passport%20Please.pdf

19. 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. 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.
20. In addition to the MOU currently under discussion, known bulk data-sharing schemes currently operate between:
- the Home Office and the Department for Education (DfE) with respect to children's school records;²¹
 - the Home Office and Cifas (a third-sector anti-fraud organisation) with respect to bank accounts;²²
 - the Home Office and the DVLA with respect to driving licences; and
 - the Home Office, the Department for Work and Pensions (DWP) and HMRC²³ with respect to employment records and welfare benefits.
21. 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 an individual'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.²⁴ 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.²⁵
22. 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.
23. The cumulative effect of Home Office data sharing under the hostile environment is to force undocumented migrants to avoid sending their children to school, visiting the GP, presenting to

²¹ '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

²² 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

²³ 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/8x8qbv/theresa-mays-anti-slavery-agenda-is-about-deporting-migrants

²⁴ 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>

²⁵ 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>

homelessness services or seeking social support for fear that they risk detention and removal 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.

24. This situation is likely to worsen. 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.²⁶
25. In healthcare more generally, policies to implement the hostile environment include a stringent charging scheme for overseas patients and wider denials of access to services.²⁷ Undocumented migrants, people on short-term visas and refused asylum seekers might be charged for hospital or community health services.²⁸ Temporary workers and students are charged a levy of up to £200 to access NHS treatment as part of the cost of their visa – a levy which the Government has announced will double.²⁹ Other migrants, if not exempt, are charged for treatment at an exorbitant 150 per cent of the cost to the NHS. New rules introduced in 2017 made ID checks and upfront charging of these migrants obligatory in hospitals and NHS-funded community health services (including those delivered by charities).
26. If a patient cannot pay, “non-urgent” care will be refused. In the widely reported case of Londoner Albert Thompson, the prostate cancer patient was asked to pay £54,000 for radiotherapy treatment because he did not have ‘sufficient evidence’ to prove his 44-year residency in the UK.³⁰ Ministers consistently justify these policies by arguing that ‘health tourism’ is draining our NHS. In reality only 0.3% of its budget is spent on overseas patients’ treatment – less than the NHS spends on stationery.³¹ This policy is therefore misguided, ineffective and likely costing lives.
27. Moving away from the hostile environment in general to consider the MOU specifically, it is worth noting that NHS Digital has argued that the data obtained by the Home Office under the MOU is simply used to re-establish contact with migrants without lawful status who are already known to the Home Office. The MOU itself gives further important information as to what happens next.³² It sets out that the role of Home Office Immigration Enforcement is to “reduce the size” of the “illegal” population through a range of interventions to maximise return of undocumented migrants.³³ The data sharing agreement is one intervention among these. As Dr Sarah Wollaston MP notes in her letter to NHS Digital, the purpose of tracing is clearly not to provide medical assistance, “*but to take enforcement action, presumably leading to deportation*”.³⁴
28. 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.”³⁵ It is interesting that this aim is limited to “citizens”, which

²⁶ See Liberty’s briefing on the Data Protection Bill for Second Reading in the House of Commons, p9-21

<https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Briefing%20on%20the%20Data%20%20Protection%20Bill%20017%20for%20Second%20Reading%20in%20the%20House%20of%20Commons.pdf>

²⁷ See Doctors of the World UK in *A Guide to the Hostile Environment*, p16-20

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

²⁸ *Ibid.*

²⁹ Department of Health and Social Care, ‘Health charge for temporary migrants will increase to £400 a year’, 15 February 2018,

<https://www.gov.uk/government/news/health-charge-for-temporary-migrants-will-increase-to-400-a-year>

³⁰ Amelia Gentleman, ‘Londoner denied NHS cancer care: ‘It’s like I’m being left to die’’, The Guardian, 10 March 2018,

<https://www.theguardian.com/uk-news/2018/mar/10/denied-free-nhs-cancer-care-left-die-home-office-commonwealth>

³² Sarah Wilkinson, Letter to Dr Wollaston, 23 February 2018, <https://www.parliament.uk/documents/commons-committees/Health/Correspondence/2017-19/Letter-to-Chair-from-Sarah-Wilkinson-NHS-Digital-MoU-on-data-sharing-23-02-18.pdf>

³³ *Ibid.*

³⁴ Dr Sarah Wollaston MP, Chair of Health Select Committee, Letter to Sarah Wilkinson, 29 January 2018

<https://publications.parliament.uk/pa/cm201719/cmselect/cmhealth/Correspondence/Wilkinson-2018-01-29.pdf>

³⁵ 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

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.

An attack on privacy rights

29. 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.³⁶ 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.³⁷ 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.³⁸
30. Although the General Medical Council has advised medical practitioners not to provide information to immigration authorities if directly approached³⁹, 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.*"⁴⁰ 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.⁴¹ 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.
31. 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

³⁶ 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>

³⁷ Professor Helen Stokes-Lampard, Chair of RCGP council, Letter to Sarah Wilkinson CEO of NHS Digital, 7 March 2018.

³⁸ 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>

³⁹ 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>

⁴⁰ 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/>

⁴¹ 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>

doctors, and for reasons different for 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.

32. 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 guidance⁴² and the NHS Code of Practice,⁴³ 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.⁴⁴ 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.⁴⁵ 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.
33. 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.⁴⁶ 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.
34. 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,⁴⁷ 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.
35. 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."⁴⁸

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

⁴² 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

⁴³ 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

⁴⁴ 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>

⁴⁵ NHS Digital, National Back Office Tracing Service review: Technical Annex, November 2017, pg 36-37.

⁴⁶ 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>

⁴⁷ *Ibid*, [Q120 – Q121].

⁴⁸ 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>

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.

36. 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."⁴⁹ 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.⁵⁰

Conclusion

37. The case studies highlighted in this submission are merely a sample of the harm people have suffered as a result of the data sharing agreement between NHS Digital, the Department of Health and Social Care and the Home Office. The vast majority of these stories will never emerge from the shadows. There will be many more unwell people who fear going to their doctor who have not told - and may not ever tell - anyone. The country's leading medical bodies and practitioners have spoken out in force against the MOU, emphasising its damaging impact on doctor-patient confidentiality. Liberty further has serious concerns about the impact of the agreement on fundamental rights, including the right to life, the prohibition on inhuman and degrading treatment, the right to a private life, and freedom from discrimination in the application of these rights.⁵¹
38. The MOU 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. The operation of the data sharing agreement within the wider policy framework of the hostile environment is cause for significant concern. So is the broader principle that the MOU is entrenching for Government data processing and regard for privacy rights. By prioritising immigration enforcement needs over the protection of patients' data, the Government is risking individuals' health and human rights, and the future confidentiality of our public services.

⁴⁹ 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>

⁵⁰ 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

⁵¹ European Convention on Human Rights provisions referred to: Art 2 (right to life), Art 3 (prohibition on torture, inhuman and degrading treatment, Art 8 (right to private life) and Art 14 (freedom from discrimination), https://www.echr.coe.int/Documents/Convention_ENG.pdf