

The Health and Care Bill

House of Lords, Committee of the whole House: Part 4 (The Health Services Safety Investigations Body)

NHS Providers is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS trusts and foundation trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in voluntary membership, collectively accounting for £92bn of annual expenditure and employing more than one million staff.

The majority of the Health and Care Bill (the Bill) is focused on developing system working, with integrated care systems (ICSs) being put on a statutory footing. It also formally merges NHS England and NHS Improvement (NHSE/I), and makes changes relating to public health, social care and patient safety.

We support the opportunity the Bill presents to design the right system architecture that will deliver sustainable, high-quality care for the future. However, we also believe there are improvements that can be made which will make this the transformative piece of legislation the government wants it to be. NHS Providers has commented extensively on the Bill since its publication. Our briefings and written evidence to date can be found [here](#) and detailed background about Integrated Care Systems (ICSs) can be found [here](#). This briefing examines a number of amendments to clauses and schedules included in Part 4 of the Bill.

Amendments, clauses and schedules covered in this briefing

- Amendment 308A (Schedule 13: The Health Services Safety Investigations Body, Part One, Constitution)
- Amendment 308 (New Clause after Clause 95: Pre-appointment scrutiny of HSSIB chair and Chief Investigator)
- Amendment 309 (Clause 97: Deciding which incidents to investigate)

- Amendment 310 (Clause 99: Final reports)
- Amendments 310A, 310B, 311, 311A, 312A (Clauses 109 & 111 and Schedule 14: Prohibition on disclosure of HSSIB material: exceptions)
- Amendments 312AA & 312AB (Clause 115: Failure to exercise functions)

Schedule 13: The Health Services Safety Investigations Body, Part One, Constitution

Amendment 308A

Member's explanatory statement

This amendment is intended to provide the HSSIB with financial stability over a three-year period in order to enhance its independence.

NHS Providers' view

There is widespread recognition about the value of moving from annual to longer funding cycles. It provides certainty for both government and the recipient, and facilitates proper financial planning that enables the Treasury to control public expenditure.¹ The Chartered Institute of Public Finance and Accountancy² has highlighted that local authorities are more financially stable when they can produce medium term financial plans via multi-year settlements. Multi-year allocations are also recognised by the Institute for Government³ as providing a reliable and efficient way of providing greater certainty for financial planning. We support this amendment because it will ensure that HSSIB has the financial stability it needs, and it strengthens their ability to be an independent investigations body.

After Clause 95: Pre-appointment scrutiny of HSSIB Chair and Chief Investigator

Amendment 308

Member's explanatory statement

¹ HM Treasury, *Managing Public Money*, May 2021

² Written evidence submitted by CIPFA, *Local authority financial sustainability and the section 114 regime: second report of sessions 2021-22*

³ Institute for Government, *The 2019 Spending Review: how to run it well*, September 2018

This reflects a recommendation of the Joint Select Committee, to provide pre-appointment scrutiny to the appointment of the HSSIB Chair and Chief Investigator.

NHS Providers' view

Pre-appointment scrutiny by select committees is an important part of the process for some of the most significant public appointments made by Ministers. It is designed to provide an added level of scrutiny to verify that the recruitment meets the principles set out in the Governance Code on Public Appointments. This scrutiny may involve the relevant select committee requesting and reviewing information from the Department and the Minister's preferred candidate. The select committee may also choose to hold a pre-appointment hearing.

We believe that the role of the HSSIB Chair and Chief Investigator meet the criteria used by the Government to assess whether a public appointment should be subject to pre-appointment scrutiny as part of the appointment process. Those criteria are:

1. posts which play a key role in regulation of actions by Government; or
2. posts which play a key role in protecting and safeguarding the public's rights and interests in relation to the actions and decisions of Government; or
3. posts in organisations that have a major impact on public life or the lives of the public where it is vital for the reputation and credibility of that organisation that the post holder acts, and is seen to act, independently of Ministers and the Government.

The Chair and Chief Investigator are very significant public appointments and we support this amendment to provide pre-appointment scrutiny by the House of Commons Health and Social Care Select Committee.

Clause 97: Deciding which incidents to investigate

Amendment 309

Member's explanatory statement

This amendment seeks to ensure that the HSSIB has sufficient resources at its disposal to mount investigations directed by the secretary of state.

NHS Providers' view

This amendment calls for the HSSIB to be able to request extra funding to carry out an investigation following a direction from the secretary of state. The aim of the HSSIB is to conduct a small number of investigations – if extra investigations are directed by the secretary of state, this could pose a challenge in terms of financial planning, capacity and resources for the HSSIB. A direction issued by the secretary of state could potentially disrupt planned investigations, and the benefit that could be derived from them, if resources have to be diverted. It is important therefore that sufficient additional funds are made available so that the HSSIB can carry out the direction properly and avoid any adverse impact on any investigations it has already scheduled.

Clauses 109 & 111 and Schedule 14: Prohibition on disclosure of HSSIB material: exceptions

Amendment 310A

Member's explanatory statement

This amendment would remove the ability of the secretary of state to make regulations authorising disclosure of protected material beyond that provided for in the Bill.

Amendment 310B

Member's explanatory statement

This amendment would remove the power for the secretary of state to create new exceptions to the prohibition on disclosing information held by HSSIB in relation to an investigation.

Amendment 311

[Relating to the Parliamentary and Health Service Ombudsman – no explanatory statement]

Amendment 311A

Member's explanatory statement

This amendment, along with another amendment to Clause 111 in the name of Baroness Young of Old Scone, would remove the provision allowing coroners to require the disclosure of protected material.

Amendment 312A

Member's explanatory statement

This amendment, along with another amendment to Schedule 14 in the name of Baroness Young of Old Scone, would remove the provision allowing coroners to require the disclosure of protected material.

NHS Providers' view

This group of amendments revises provisions for access to safe space. This includes:

- removing the ability of the secretary of state to make regulations authorising disclosure of protected material beyond that provided for in the Bill
- removing provision allowing coroners to require the disclosure of protected material.
- removing the power for the secretary of state to create new exceptions to the prohibition on disclosing information held by HSSIB in relation to an investigation
- giving access to safe space to the Parliamentary and Health Service Ombudsman (PHSO)

The impact assessment for HSSIB's provisions in the Health and Care Bill sets out that the intended effects of HSSIB are to:

- "[improve] public confidence in investigations arising from both the independence of HSSIB and the provision of 'safe space' to protect confidential information from disclosure;
- ...make recommendations that improve patient safety across the system;
- encourage a culture of learning and safety improvement throughout the healthcare system; and
- drive greater consistency in the quality investigations."⁴

Achieving these ambitions requires careful design of this new organisation. This includes:

- **A clear focus on learning and safety improvement** – there are multiple avenues and bodies which undertake incident investigations in the NHS. These have various objectives, but HSSIB stands alone in having an absolute focus on learning, not blame, and on systemic risk factors. The evidence and experience of the NHS and across other industries is clear that a learning culture leads to significant safety improvements. HSSIB has a key role to play in fostering and enabling a learning culture within the NHS.

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017152/health-services-safety-investigations-body-impact-assessment.pdf

- **Evidence gathered within a safe space** – this encourages and enables openness and learning. There is a strong connection between ‘psychological safety’ and a culture of learning – to open up and be candid, people need to feel confident that the information they share will not be used unfairly or passed on.
- **Clear criteria for considering an investigation** – while HSSIB may carry out an investigation into the same incident as another body, HSSIB will not be duplicating any other given investigation. It will have a systemic risk focus, grounded in a set of criteria used to determine whether there may be a pattern and whether an incident should become a reference event for an investigation.
- **Limiting the number of investigations per year** – HSSIB is expected to carry out around 30 investigations a year, which will ensure that it remains focused and prioritises effectively and that it carries out investigations to the appropriate depth.
- **Independent, expert-led investigations** – this enables objective and comprehensive analysis, and robust, credible, systemic-focused conclusions.

There is much to welcome in the ambition, innovation and drafting of safe space in the Bill – and much to improve. For HSSIB to be able to properly investigate the systemic causes of safety issues, and to harness the knowledge and insight of those involved, a legally protected and robustly respected safe space is essential. It is particularly notable that a core part of the design of safe space here is the protection people have in sharing information with HSSIB being counterbalanced by a compulsion to participate in HSSIB’s investigations.

It is paramount to respect those two aspects of compulsion and protection, and for participants to be aware of the basis on which they are taking part in an investigation and what the implications for them are. The exceptions to non-disclosure of safe space material, as currently drafted in the Bill, do not sufficiently maintain HSSIB’s safe space. The boundaries of safe space must be clear, consistent and constant. If those taking part in the HSSIB investigation do not have trust in the safe space provided, there is a high risk that they will feel unable to share information fully and fearlessly. This will undermine the investigations carried out by the HSSIB, and how the HSSIB is intended to stand apart from other bodies in the health system.

Therefore we do not support the current drafting of the Bill which would allow the secretary of state to make regulations authorising or requiring disclosure of protected material beyond that provided for in the Bill. Any ability for the secretary of state to change the boundaries of safe space would significantly undermine the trust of participants in the HSSIB’s investigations.

We are also opposed to allowing senior coroners to access safe space materials, as is currently provided for in the Bill. We do not agree that the case has been made for the necessity or appropriateness of their access. It is not the duty or purpose of HSSIB to act as a branch of the coroner. The coroner has multiple other avenues of information and powers of investigation, and it does not need access to the HSSIB's protected material simply thanks to the convenience of the HSSIB's existence. In 2019, the Joint Select Committee which reviewed the draft Health Service Safety Investigations Bill concluded: "We recommend that the draft Bill be amended to put beyond any possible doubt that the safe space cannot be compromised save in the most exceptional circumstances, and therefore that the prohibition on disclosure applies equally to disclosure to coroners".⁵

Provisions have also been made for the High Court to order disclosure (which can include onward disclosure). The bar for the High Court making such an order needs to be much higher. This includes only ordering disclosure in extremis and with appropriate safeguards around the interests of the public, patient and staff safety, current and future investigations and participants.

In the current drafting, the door to safe space has been left ajar. This has invited further applications for access to safe space, including from the Parliamentary and Health Service Ombudsman (PHSO). We would expect other organisations to make their own demands, whether on the face of the Bill or through the High Court, to obtain protect material in pursuit of their own investigations. To a considerable extent, investigations of incidents in the NHS to date have been focused on attributing blame and fault. While it is understandable that investigating organisations will want to develop their own robust conclusions, such calls in fact underline the importance of HSSIB having a safe space. A safe space for participant in investigations focused on learning it is a fundamental part of the careful design of HSSIB. It should not be co-opted towards objectives contrary to this. HSSIB has no role in determining blame or liability, or in regulatory action.

It must be remembered that all usual information and investigation channels continue, and HSSIB's final reports – which set out in detail its narrative of events – are publicly available. The convenience of HSSIB's existence is not a compelling reason to require it to disclose information, and it is not the role of HSSIB to act as a branch of the coroner or any other organisation. Finally, it is right for participants to know and be sure of the basis on which, and to what ends they are taking part in an HSSIB investigation.

⁵ https://publications.parliament.uk/pa/jt201719/jtselect/jthssib/1064/106406.htm#_idTextAnchor024

Clause 115: Failure to exercise functions

Amendment 312AA

Member's explanatory statement

This amendment will avoid a permanent assumption of direction of HSSIB by the secretary of state

Amendment 312AB

Member's explanatory statement

This amendment is intended to provide transparency and robustness in the reasons why the secretary of state considers it necessary to assume direction of an independent body.

NHS Providers' view

Clause 115 as currently drafted is concerning as it is unclear what criteria the secretary of state would apply to judge whether the HSSIB was failing. The HSSIB should be a body standing separate from the rest of the health system, and its recommendations may well be challenging the rest of the system. While we are fully alive to the importance of organisational accountability, the clause as it stands may nevertheless be a route to undermining the HSSIB's independence and its ability to contribute to improvements in patient safety

We support amendment 312AA as it would ensure that the secretary of state would be required to specify an end date to such a direction, while allowing the extension for a further defined period. We also support amendment 312AB as it would require the secretary of state to set out in writing why the HSSIB is considered to be failing or to have failed in the exercise of any of its functions, and how the failure is significant and requires the HSSIB to set out its response to that statement within seven days. These amendments taken together would increase transparency and mitigate against the potential for this clause to undermine the core function of the HSSIB.

Clause 153: Commencement

Amendment 319

Member's explanatory statement

This amendment will enable the secretary of state's powers to direct the HSSIB to carry out an investigation to be limited to a transitional period to facilitate the transfer of responsibilities from the existing regimes to the HSSIB.

NHS Providers' view

Clause 97(2) gives the secretary of state a power to direct the HSSIB to carry out an investigation of a particular qualifying incident that has occurred, or group of qualifying incidents that have occurred and are of a particular description, and to specify the date by which the HSSIB must publish its final report. The secretary of state may also issue a further direction specifying a later date (for example, to grant an extension).

It is key that this provision does not compromise the independence of the HSSIB. Any intention for the secretary of state to direct the HSSIB would be highly concerning. It is critical to the effectiveness of the HSSIB that they are independent and able to investigate the health system, and make recommendations in support of improving patient safety, without fear or favour. This is what makes the HSSIB distinct from other national bodies, and it must be preserved for the sake of their credibility and integrity. We therefore support this amendment which would see this power expire eighteen months after the HSSIB is established.