

## **MENTAL HEALTH UNITS (USE OF FORCE) BILL**

### **Memorandum from the Department of Health and Social Care to the Delegated Powers and Regulatory Reform Committee**

#### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Mental Health Units (Use of Force) Bill (“the Bill”). The Bill was brought from the House of Commons on 9 July 2018. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **B. PURPOSE AND EFFECT OF THE BILL**

2. The purpose of the Mental Health Units (Use of Force) Bill is to increase the oversight and management of the use of force in mental health units in England. The Bill contains 17 clauses.
3. The Bill provides for relevant health organisations that operate mental health units to appoint a responsible person. The responsible person has a duty to publish a policy on the use of force by staff in the mental health unit, and information for patients about the use of force. The responsible person must also provide training for staff relating to the use of force, keep a record of any use of force by staff who work in the unit, and have regard to relevant guidance whenever a patient dies or suffers a serious injury in a mental health unit. The Bill requires the Secretary of State to ensure that statistics about the use of force in mental health units are published annually, and to publish an annual report following a review of relevant reports relating to the use of force in mental health units. The Bill also requires police officers to wear and operate body cameras when attending a mental health unit in England.

## C. DELEGATED POWERS

3. The Bill contains five regulation-making powers:

- a. Guidance about meaning of “negligible” use of force (clause 6(3))
- b. Power to prescribe person whose guidance a responsible person must have regard to (clause 9(e))
- c. Guidance about functions (clause 11)
- d. Transitional provision (clause 14)
- e. Commencement (clause 17(3))

### **Clause 6(3): Recording of use of force**

*Power conferred on:* Secretary of State

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

#### Context and Purpose

4. This clause makes provision for the Secretary of State to publish guidance about the meaning of a “negligible” use of force. (A “negligible” use of force does not need to be recorded under clause 6(1)). Under clause 6(3), whether a use of force is “negligible” is to be determined in accordance with this guidance. The Secretary of State is required to consult before publishing or substantially revising the guidance.

#### Justification for taking the power

5. The guidance about what uses of force will be “negligible” will require a level of practical detail which the Government considers would not be appropriate for primary legislation, for example whether and when it will be appropriate to lead a person by the elbow down a corridor so they arrive safely at their destination. In addition the Government considers that guidance, rather than regulations, is the

more appropriate form of delegation given the subject matter of the guidance. In particular, the guidance will need to be revised and updated over time, for example, to reflect evolving practice in the health and care sector, perhaps driven by changes in research. It is noted that this is the approach taken in section 23 of the Health and Social Care Act 2008 and in section 118 of the Mental Health Act 1983 (under which specified persons must have regard to statutory guidance when performing statutory functions or complying with statutory requirements).

#### Justification for the procedure

6. No parliamentary procedure is proposed, given that the Bill includes other constraints on the issue of the guidance and detail of the subject matter of the guidance, which will already have been considered by Parliament during the passage of the Bill.
7. The Bill follows the approach of section 23 and 24 of the Health and Social Care Act 2008, under which there is no parliamentary procedure in relation to guidance issued by the Care Quality Commission. It is considered that this is appropriate for the guidance-making power in this Bill too. This will also help to ensure consistency with the regulatory regime in the 2008 Act.
8. The Bill imposes a number of constraints on the issue of the guidance. First, the Bill requires that the Secretary of State must consult any person he or she considers appropriate. Secondly, the Secretary of State will publish any formal guidance issued. Thirdly, it is anticipated that the guidance will often address subject matter of a practical and detailed nature, for example the range of different uses for a mechanical restraint such as a lap belt.

#### **Clause 9(e): Investigation of deaths or serious injuries**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure: Negative procedure*

Context and Purpose

9. This is a power for the Secretary of State to prescribe in regulations a person whose guidance a responsible person must have regard to when a patient dies or suffers a serious injury in a mental health unit.

Justification for taking the power

10. The power relates to regulatory bodies whose identity and functions are subject to regular change. For example, responsibility for publishing the *Serious Incident Framework* guidance has recently passed from the National Health Service Commissioning Board to the National Health Service Trust Development Authority.
11. The Bill already specifies four bodies whose guidance a responsible person must have regard to, but the Government considers it prudent to ensure that the legislation can be updated to specify an additional person in the event that identities and responsibilities in the sector change in the future.

Justification for the procedure

12. The Government considers that the negative parliamentary procedure is appropriate and sufficient for this measure. The substance of the duty will to a significant degree already have been scrutinised by Parliament during the passage of the Bill and the power can only be used to add additional people or bodies to the list of those who can issue guidance that a responsible person should have regard to.

**Clause 11: Guidance about functions under this Act**

*Power conferred on: Secretary of State*

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

### Context and Purpose

13. This clause makes provision for the Secretary of State to publish guidance about the exercise of functions under the Act. In combination with the duty imposed by clause 11(2), responsible persons and relevant health organisations must have regard to this guidance in the exercise of their functions. The Secretary of State is required to consult before publishing or substantially revising the guidance.

### Justification for taking the power

14. The guidance about the exercise of functions under the Act will often be technical and will require a level of detail which it is not thought appropriate for primary legislation, for example setting out training standards or guidance on how to record information securely. In addition it is considered that guidance, rather than regulations, is the more appropriate form of delegation given the subject matter of the guidance. In particular, the guidance will need to be revised and updated over time to reflect developments in technology (for example, in the way that uses of force are recorded and how those records are retained) and evolving practice in the health and care sector (for example, in relation to training on different types of restraint, which might evolve to reflect developments in research).

### Justification for the procedure

15. No parliamentary procedure is proposed, given that the Bill includes other constraints on the issue of the guidance and detail of the subject matter of the guidance, which will already have been considered by Parliament during the passage of the Bill.

16. The purpose of the guidance is to aid policy implementation by supplementing legal rules. There is a vast range of statutory guidance issued each year and it is

important that guidance can be updated rapidly to keep pace with events. The Government accepts that in certain circumstances it may be appropriate for guidance to be laid before Parliament or subject to the negative procedure. However, in this case the Government does not consider this appropriate as the Bill already imposes sufficient constraints on the issue of the formal guidance: addressed below.

17. The Bill follows the approach of section 23 and 24 of the Health and Social Care Act 2008, under which there is no parliamentary procedure in relation to guidance issued by the Care Quality Commission. It is considered that this is appropriate for the guidance-making power in this Bill too. This will also help to ensure consistency with the regulatory regime in the 2008 Act.

18. The Bill imposes a number of constraints on the issue of the guidance. First, the Bill requires that the Secretary of State must consult any person he or she considers appropriate. Secondly, the Secretary of State will publish any formal guidance issued. Thirdly, it is anticipated that the guidance will often address subject matter of a practical nature, for example, guidance on training standards.

#### **Clause 14: Transitional provision**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Negative procedure

#### **Context and Purpose**

19. This is a power for the Secretary of State to make transitional or saving provision in connection with the coming into force of the Bill. In particular, it is expected that these regulations will deal with the situation of people who are already in a mental health unit when the Bill comes into force, and to allow for any duties that

are carried out before a responsible person is appointed to be treated as though they were carried out by the responsible person.

#### Justification for taking the power

20. The Bill will create a substantial change in the way that uses of force are dealt with in mental health units. It is prudent to enable provisions that allow for a smooth commencement of the Bill's provisions, and ensure clarity about the status of existing arrangements.

21. It is important for mental health units to be able to treat duties carried out before the responsible person is appointed as having been carried out by the responsible person in order to avoid duplication and cost. In order to implement the Bill's provisions effectively, mental health units may need to begin preparing to carry out their obligations under the Bill before the responsible person is appointed. This will also avoid disruption for patients who are already in a mental health unit when the Bill comes into force. Regulations may also provide for how uses of force that begin before the Act comes into force are to be recorded.

#### Justification for the procedure

22. The Government considers that the negative procedure is appropriate as the regulations deal with procedural matters which are concerned with how the new legislation will be brought into effect in order to ensure a smooth transition to the new law.

#### **Clause 17(3): Commencement**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* None

## Context and Purpose

23. This clause deals with the commencement of the provisions of the Bill. Clause 17(3) provides that the provisions in the Bill come into force on such day as the Secretary of State may appoint by regulations. This includes provision to appoint different days for different purposes or areas.

## Justification for taking the power

24. Delegating the power provides flexibility to ensure that the provisions in the Bill come into force at suitable dates, which cannot yet be predicted. This will ensure a period of time for preparation for all the various bodies affected. It is, for example, possible that provisions might need to be brought into force at different times for different types of health organisations.

## Justification for the procedure

25. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. The detail of the provision to be commenced will already have been scrutinised by Parliament during the passage of the Bill; commencement regulations enable the provisions to be brought into force at the appropriate time.

**Department of Health and Social Care**

**9 July 2018**