MENTAL HEALTH UNITS (USE OF FORCE) BILL

Memorandum from the Department of Health and Social Care
to the Joint Committee on Human Rights

Introduction

1. This memorandum addresses issues in relation to the Mental Health Units (Use of Force) Bill (“the Bill”) arising under (a) the European Convention on Human Rights (“ECHR” or “the Convention”) and (b) human rights contained in other international obligations of the United Kingdom. The memorandum has been prepared by the Department of Health and Social Care (“the Department”).

2. The Bill is a Private Member’s Bill which is supported by the Government. Accordingly, a statement of compatibility with the European Convention on Human Rights, in accordance with section 19(1)(a) of the Human Rights Act 1998, is not required.

3. This memorandum deals only with those provisions of the Bill which raise issues arising under the ECHR or relating to human rights contained in other international obligations of the United Kingdom.

Overview of the Bill

4. 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.

5. 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 where practicable when attending a mental health unit in England.

A. European Convention on Human Rights

6. The Department considers that the Bill engages, or potentially engages, Articles 2, 3 and 8 of the ECHR, and Article 1 of the First Protocol. The Department does not consider that the provisions of the Bill infringe these rights.

Article 2 (right to life) and Article 3 (prohibition of torture)

7. Clause 9 of the Bill requires a responsible person to have regard to specified guidance relating to the investigation of deaths or serious injuries whenever a patient dies or suffers a serious injury in the mental health unit.

8. Article 2 will be engaged where a person is detained under the Mental Health Act 1983 at the time of their death, and may be engaged more generally when patients die in the care of the medical profession. Article 2 imposes a procedural obligation on the state to initiate an effective, independent and public investigation into a death where it has occurred in circumstances in which it appears that the state’s Article 2 obligations may have been violated.\(^1\) Similarly, under Article 3, there is a procedural obligation to carry out an effective investigation where there are credible allegations of serious ill-treatment.\(^2\) The requirement to have regard to guidance relating to the investigation or deaths or serious injuries will not be used to satisfy the Article 2 or 3 duty to investigate deaths or serious ill-treatment and therefore need not, itself, meet the requirements set out in case law for such an investigation.\(^3\) The Department further considers that a need to have regard to the specified guidance would not prevent an Article 2 or 3 investigation being able to fulfil the requirements set out in case law.

Article 8 (right to respect for private and family life)

\(^1\) European Court of Human Rights case law establishing this point is summarised in \textit{R (Middleton) v SSHD} [2003] UKHL 51, at para 20.


\(^3\) See, for example, \textit{R (Amin) v SSHD} [2003] UKHL 51 and \textit{Jordan v UK} (2001) 37 EHRR 52.
9. Clause 6 requires a responsible person to keep a record of any use of force (except a “negligible” use of force) on a patient by staff who work in the unit, and to retain the record for 3 years. Clause 6(5) specifies the information that must be recorded.

10. Clause 12 requires police officers to wear and operate a body-worn camera when called to a mental health unit while on duty, where it is reasonably practicable to do so.

11. Article 8 may be engaged in relation to an individual who has provided information or in relation to an individual who is the subject of disclosed information. Patients who attend a mental health unit will have an expectation of privacy due to its private nature and the doctor-patient relationship of confidentiality. Information recorded particularly on body-worn video may also relate to the private life of other individuals, including both other patients and staff present at the units. The privacy interest in information relating to a member of staff or police officer who is acting in the course of their duties at a mental health unit is not expected to be as high as information relating to the physical and mental condition of a patient at that unit. These measures potentially engage Article 8(1) on the basis that they require or authorise any new processing or disclosure of personal data. Taking video images in a person’s home, where they sleep, or where there is a particularly high expectation of privacy (such as in a medical/hospital setting) may be seen as a more grave interference with Article 8 than where this takes place in public. Article 8 issues will also be more acute in the cases of persons under 18 years old.

12. The EU General Data Protection Regulation and Data Protection Act 2018 are also engaged insofar as the Bill makes provision for the personal data of living individuals to be recorded and retained.

13. An interference with Article 8 is justified under Article 8(2) if it is in accordance with the law, it meets a legitimate aim and is necessary in a democratic society (i.e. it is proportionate). Both the requirement to record and retain information under clause 6, and the requirement to operate a body-worn camera where practicable, are in accordance with the law (being prescribed in the Bill). The recording and retention of information relating to the use of force, and the use by policy of a body camera, are justifiable for the prevention and detection of crime, and to protect the rights and freedoms of others. Record-keeping and body camera footage can collect valuable evidence for use in criminal prosecutions, ensure mental health unit staff and the police act with integrity,
provides objective evidence of controversial events and offers protection for the police, staff and patients.

14. The Department considers that the measures in clause 6 and clause 12 are also necessary and proportionate. In the case of clause 6, the record-keeping requirement does not apply in respect of uses of force that are “negligible”. Clause 6(8) also provides that the responsible person is not permitted to do anything which would otherwise be inconsistent with data protection legislation or the common law duty of care or confidence. This ensures that ordinary data protection law continues to apply, and that an individual’s legal rights in respect of their information are preserved.

15. In the case of the requirement to operate a body camera in clause 12, the duty to operate the body camera does not apply if there are special circumstances at the time that justify not wearing the camera or keeping it operating. This means police officers do not need to operate the camera where it is not relevant to the incident or necessary for gathering evidence, or where doing so would be particularly intrusive.

16. The common law duty of confidence⁴ and the GDPR or Data Protection Act 2018 will apply to personal data contained in a record of a use of force and in police body camera footage. These provide important controls on the use and disclosure of personal information. The GDPR framework requires that any processing of personal data needs to be in accordance with its provisions, including the requirement that personal data must be processed fairly, lawfully and transparently; and that processing shall be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed (i.e. proportionate). Importantly, the GDPR itself is compliant with Convention rights and Article 8 of the Convention particular. The Bill therefore does not change any of the existing legal safeguards governing the use or disclosure of information and the Department considers that this adequately protects Article 8 rights.

17. The provision relating to publication of use of force statistics (in clause 7) will not normally engage Article 8 or data protection legislation, as “personal data” must relate to an identified or identifiable individual.

Article 1 of the First Protocol (protection of property)

⁴ Which, since Campbell v MGN [2004] UKHL 22, expressly incorporates Article 8.
18. The Bill requires mental health unit operators to comply with various new requirements, including an additional component for staff training; record-keeping; information provision; and having regard to statutory guidance to be issued by the Secretary of State. A failure to comply with these requirements could have regulatory consequences, including suspension or cancellation of the registration required to operate. These could potentially engage Article 1 of the First Protocol to the extent that they interfere with the peaceful enjoyment, or use, of the property of a provider of a mental health unit service (so far as that provider is a private individual). The definition of a “mental health unit” includes both public and private providers. The Department considers that the requirements placed on operators of mental health units are only such as are necessary in the general interest and proportionate to ensure such services are provided in a safe way for service users.

B. EU / international issues

General Data Protection Regulation

19. Please see analysis under Article 8, above.

Convention on the Rights of Persons with Disabilities

20. The Department has considered the CRPD, which the United Kingdom has ratified but not incorporated. Article 22 provides that “No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation.” The provisions in the Bill relating to the use of body-worn video in mental health units and data retention may engage this provision. The Department considers that the purpose of any interference is to prevent harm to those attending mental health units, which will include persons with disabilities, and that the interference with privacy rights is proportionate to this aim.