

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

33rd Report of Session 2017–19

Trade Bill

**Mental Health
Units (Use of Force)
Bill: Government
Response**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hlddelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Thirty Third Report

TRADE BILL

1. The Trade Bill, which was brought from the House of Commons on 18 July, makes provision for a UK trade policy when the UK leaves the European Union.
2. Clause 2 allows the Government to make regulations so that the UK can transition trade agreements (not relating to taxes and duties¹) that currently exist between the EU and other countries, and to which the UK is a party through its EU membership. The aim of clause 2 is to establish UK trade agreements with third countries that are based as closely as possible² on maintaining the effects of the current trade agreement which that country has with the EU.
3. The Government acknowledge that textual changes, consolidation, substantial amendments and new obligations may be needed when these agreements with third countries are entered into.³ The Government also acknowledge that clause 2 has been drawn widely.⁴ This is certainly true. Clause 2(5) grants Ministers a Henry VIII power to amend retained direct EU legislation or primary legislation that is retained EU law. It also allows Ministers to impose unlimited penalties for breach of the regulations, to confer functions on anyone and to delegate functions.
4. Under the Bill as introduced in the House of Commons, most regulations under clause 2 would have been subject only to the negative procedure. **As a result of an amendment in the House of Commons, all regulations made under clause 2(1) must be made by the affirmative procedure. We welcome this development.** There is nothing more in the Bill relating to delegated powers that we would draw to the attention of the House.

MENTAL HEALTH UNITS (USE OF FORCE) BILL: GOVERNMENT RESPONSE

5. We considered this Bill in our 31st Report of this Session.⁵ The Government have now responded by way of a letter from Lord O'Shaughnessy, Parliamentary Under Secretary of State for Health (Lords) at the Department of Health, printed at Appendix 1.

1 Provisions dealing with taxes and duties will be subject to the Taxation (Cross-border Trade) Bill: clause 2(4) of the Trade Bill.

2 [Explanatory Notes to the Trade Bill](#) [HL Bill 127-EN] para 41

3 Department for International Trade, [Trade Bill Delegated Powers Memorandum](#), para 56

4 *Ibid*, para 65

5 Delegated Powers and Regulatory Reform Committee (31st Report, Session 2017-19, [HL Paper 177](#))

APPENDIX 1: MENTAL HEALTH UNITS (USE OF FORCE) BILL: GOVERNMENT RESPONSE

Letter from Lord O’Shaughnessy, Parliamentary Under Secretary of State for Health (Lords) at the Department of Health, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee

1. The Delegated Powers and Regulatory Reform Committee reported on the Mental Health Units (Use of Force) Bill in its 31st Report, published 24th July 2018.
2. The Committee’s comments and recommendations on particular powers in the Bill are set out below, together with the Government’s response.

Clause 6—recording the use of force

3. The Committee noted that under clause 6(3), the Secretary of State’s guidance will determine whether a use of force is “negligible” and thus affect the legal obligations of responsible persons in mental health units. The guidance is not subject to a parliamentary procedure. In the Committee’s view, the subject matter should be contained in subordinate legislation made by statutory instrument, with the negative procedure offering an appropriate level of parliamentary scrutiny.

Government response

4. The Government has carefully considered the Committee’s recommendation, and thanks Members for their helpful analysis.
5. On this occasion, the Government has concluded that negative procedure regulations would limit the sort of guidance that could be provided, and would be disproportionate to the nature of the guidance. However, to make the limited scope of the guidance clearer, the Government sets out more detail below about how it is intended to work.
6. The Government notes that both the relevant obligation on responsible persons to make a record of a use of force, and the exception to that obligation where the use of force is “negligible”, are set out on the face of the Bill. The guidance under clause 6(3) will not impose any new obligations on responsible persons or conditions with which they must comply.
7. The Government considered carefully whether the meaning of a “negligible” use of force could be set out in regulations, or indeed on the face of the Bill. However, the range of techniques that may be used for physical interventions alone is many and varied - from the most serious such as prone restraint, to something as simple as guiding a patient by the elbow down a corridor, or through the right doorway. Further, what is “negligible” will generally be a matter of degree rather than kind. It was concluded that the meaning would be more effectively illustrated through example case studies in guidance. This would also allow for more rapid revision to take account of changes in practice.
8. The decision to require “negligible” to be determined in accordance with the guidance (rather than requiring responsible persons simply to “have regard to” the guidance) was taken to ensure consistency of approach to recording

uses of force across the sector. The information recorded under clause 6 is used for the preparation of national statistics about the use of force under clause 7. If responsible persons take a different approach to recording of information - which is a problem currently- this will affect the interpretation and value of the statistics.

9. The Government accepts the Committee's concerns about the sensitive nature of the subject matter. This is why the Bill imposes constraints on the issue of the guidance - one of which is to require the Secretary of State to consult any person he or she considers appropriate. In practice this will mean consulting with experts in the field of restrictive interventions and those with lived experience, which the Government considers is appropriate for this type of guidance.
10. The Government is happy to commit to laying the guidance in Parliament.

7 September 2018

APPENDIX 2: MEMBERS INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.