

Mental Health Units (Use of Force) Bill

House of Commons

Briefing for Report Stage and Third Reading

Friday 15 June 2018

Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

The Commission warmly welcomes the opportunity to contribute to the debate on amendments to the Mental Health Units (Use of Force) Bill (the Bill). We think the Bill presents an important opportunity to ensure service providers meet their obligations under the Equality Act 2010 and Human Rights Act 1998, and protect the dignity and autonomy of those under their care. In particular, we welcome the broad definition of the use of force and the training, monitoring and reporting provisions. We think they will create a clearer understanding of the equality and rights issues in relation to the use of restraint in mental health units. The Bill, once enacted, should also facilitate conversations between service providers, patients and their families at a local level, and parliamentarians and civil society at a national level, about human rights based approaches to the use of restraint.

Executive Summary

The Commission supports amendments that will:

- Guarantee the independence of investigations into deaths

- Ensure that information provided to patients is understood by those with different access requirements¹
- Ensure the annual report of the Secretary of State includes reference to statistics on the use of force disaggregated by patients' protected characteristics and that the Secretary of State makes a statement before Parliament shortly after its publication.

We would also welcome future amendments to ensure that the requirement to record the relevant characteristics of a patient following the use of force under the Bill includes a record of gender reassignment status.

Independent Investigation of Deaths

Commission's recommendation

Support Amendment NC1

Explanation

This amendment adds a Clause requiring an independent investigation when a patient dies in a mental health unit. Clause 10 of the Bill currently provides that 'when a patient dies or suffers a serious injury in a mental health unit, the responsible person for the mental health unit must have regard to any guidance relating to the 'investigation of deaths or serious injuries' published by a range of prescribed sources.'²

This provision appears to dilute the commitment in previous drafts of the Bill, which explicitly stated that investigations must be independent.

Analysis

Clause 10 as currently drafted does not meet the requirements under UK and international law to conduct an effective investigation into a death in a detention context where an Article 2 breach may have occurred.

The Commission's Adult Deaths Inquiry³ examined deaths in detention of adults with mental health conditions in different detention settings, including in mental health units. It found that, unlike police custody or prison, there was no independent body in mental health detention that

¹ Equality Act 2010 s20 and 21.

² This includes: '(a) the Care Quality Commission (see Part 1 of the Health and Social Care Act 2008); (b) Monitor (see section 61 of the Health and Social Care Act 2012); (c) the National Health Service Commissioning Board (see section 1H of the National Health Service Act 2006); (d) the National Health Service Trust Development Authority (which is a Special Health Authority established under section 28 of the National Health Service Act 2006); (e) a person prescribed by regulations made by the Secretary of State.'

³ EHRC, 'Preventing deaths in detention of adults with mental health conditions', 2015, online: <https://www.equalityhumanrights.com/en/preventing-deaths-detention-adults-mental-health-conditions>.

would investigate deaths, except coroners. This amendment helps fill that gap.

The Commission has produced a Human Rights Framework for Adults in Detention⁴ (the Framework), based on human rights case law, to assist those holding adults in detention to meet their legal obligation to investigate deaths. The Framework is based on case law concerning the right to life⁵.

The Framework clearly sets out a requirement to appoint an investigator independent of those implicated in the death or injury⁶. In addition, the investigation must be prompt and timely⁷; it must take all reasonable steps to secure relevant evidence, and hold to account those that it finds are responsible. The next of kin should be involved, and the investigation and its results should be open to public scrutiny.

We are making similar recommendations in respect of the Health Service Safety Investigations Bill and there needs to be some synergy between the two Bills. However, the Mental Health Unit (Use of Force) Bill must be able to stand on its own merits. Otherwise, its effectiveness rests on the outcome of an entirely separate Bill process.

The Commission would also have supported a provision to investigate situations where there was serious injury that presented a risk to life, as required under ECHR Article 2, and serious ill-treatment to mirror the identical investigative requirements under ECHR Article 3. We will support any future amendment of the Bill to align it with these requirements.

Accessibility of information provided to patients

Commission's recommendation

Support Amendment 2 to Clause 4

Explanation

This amendment provides that the responsible person in the mental health unit takes whatever steps are reasonably practicable to ensure that the patient understands the information about their rights in relation to the use of force.

⁴ EHRC, 'Human Rights Framework for Adults in Detention', 2015, online:

<https://www.equalityhumanrights.com/en/publication-download/human-rights-framework-adults-detention>.

⁵ European Convention on Human Rights, Article 2, effective in domestic law through the Human Rights Act 1998.

⁶ NB Sub clauses (3) and (4)

⁷ NB Sub clauses (3) and (5)

This replaces a sub clause which places a duty on the responsible person only to make information accessible ‘having regard to the patient’s ability to understand the information’, which is a loose construction that may not meet the obligation to make reasonable adjustments under the Equality Act 2010.

Analysis

For rights to be effective, people must be able to exercise them. It is essential that patients and their families understand the information that is given to them about the use of force if they are to exercise those rights.

This amendment will help ensure that rights are effective by requiring that patients should understand the information on their rights in relation to the use of force, as far as is reasonably practicable.

The amendment covers disabled people and individuals who, because of other factors such as language or literacy barriers, may not be able to access the information as readily as others. It therefore accords with the requirement that rights under the European Convention on Human Rights must be practical and effective and enjoyed by all equally⁸.

The amendment is closely aligned to the statutory language in the Equality Act 2010, which sets out the duty to make reasonable adjustments⁹ and the explanation in the statutory Code of Practice, which accompanies it. This duty extends to the provision of information in accessible formats (e.g. BSL, Easy Read etc.), if it is reasonable to do so.¹⁰

In this context, reasonableness includes what is ‘reasonably practicable’¹¹. The provision that the responsible person must ensure the patient ‘understands’ the information conforms with the principle that a reasonable adjustment should be ‘effective’, which in turn reflects human rights law.¹²

⁸ [Clift v The United Kingdom ECHR 13 Jul 2010](#). See para 60.

⁹ [Equality Act 2010 s20 and 21 in conjunction with Schedule 2](#)

¹⁰ S.20(6) Equality Act 2010, and [EHRC \(2011\) Code of Practice Equality Act 2010 Services, Public Functions and Associations. \[ONLINE\] \(Accessed 11 June 2018\)](#), paragraph 7.10 The Act states that where the provision, criterion or practice, or the need for an auxiliary aid or service, relates to the provision of information, the steps which it is reasonable to take include steps to ensure that the information is provided in an accessible format.

¹¹ Code of Practice Equality Act 2010 Services, Public Functions and Associations. Paragraph 7.4 explains that the purpose of the duty is “so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public”.

¹² Ibid Paragraph 7.30

Because of the close alignment between this amendment and the duty to make reasonable adjustments, and the right to non-discrimination, we urge support for this amendment.

Annual report by Secretary of State

Commission Recommendation

Support amendments 82, 83, 84 and 85 to Clause 9.

Explanation

Amendment 82 would require the Secretary of State's annual report under Clause 9 to include reference to the statistics collected under Clause 7 regarding the use of force by staff who work in mental health units, with reference to the relevant characteristics of the patient.

Amendment 83 will ensure that the Secretary of State makes a statement to Parliament soon after the publication of the report. This will increase the visibility of the report and encourage parliamentary scrutiny of its conclusions, enhancing the impact that this Bill will have if enacted.

Amendments 84 and 85 are consequent on the previous two amendments.

Analysis

Clause 9 currently requires the Secretary of State to conduct an annual review of any reports or findings published during that year relating to the death of a patient as a result of the use of force in a mental health unit by staff who work in that unit. The review is to include but not be limited to reports made under paragraph 7 of Schedule 5 to the Coroners and Justice Act 2009. The Secretary of State is required to publish an annual report that includes the conclusions arising from that review.

As Clause 9 is currently drafted, the report will not reference the information on the use of force, collected under Clause 7, disaggregated by protected characteristics, and published under the provisions of Clause 8. The Commission would welcome a report by the Secretary of State not only on deaths but on general trends concerning the use of restraint in mental health units, particularly where these impact on people who share a protected characteristic under the Equality Act 2010 and so that the concerns of UN treaty bodies can be directly addressed.

The effects of the disproportionate use of restraint is repeatedly cited as a concern by United Nations treaty bodies. For example, the Committee on the Rights of Persons with Disabilities expressed concern and made

recommendations regarding the use of restraint in healthcare settings, where it noted in particular disproportionate use against ‘black and other ethnic minorities with disabilities belonging to ethnic minorities’¹³.

This echoed the report from the Committee on the Elimination of Racial Discrimination, which noted the “overrepresentation of persons of Afro-Caribbean descent in psychiatric institutions and of a higher likelihood of persons of Afro-Caribbean descent being subjected to restraint, seclusion and overmedication”.¹⁴

This amendments will ensure that the Secretary of State’s report addresses other key equality and human rights questions in addition to deaths as a result of the use of force in mental health units, and that a statement is made to Parliament.

Recording of a patient’s relevant characteristics

Commission’s recommendation

The Bill should be amended to ensure that the requirement to record the relevant characteristics of a patient following the use of force by staff includes a record of gender reassignment status.

The Bill as currently drafted includes a requirement to record all of the protected characteristics under the Equality Act 2010 except gender reassignment. This amendment will correct this omission.

Although this issue is not the subject of an amendment at this stage, the Commission considers it to be a critical yet straightforward technical error in the Bill that requires amendment at the next available opportunity.

Analysis

The Commission welcomes the provision (currently Clause 7 (5) (k)) for the recording of a patient’s relevant characteristics in relation to the use of force¹⁵. The Public Sector Equality Duty (PSED)¹⁶ requires public bodies to have ‘due regard’ to the aims of the PSED so they can tackle institutional discrimination. This in turn requires an evidence based

¹³ CRPD (2017) Concluding Observations on the UK

¹⁴ CERD (2016) Concluding Observations on the UK

¹⁵ UN Human Rights Treaty Bodies repeatedly mention restraint in relation to specific groups: this includes UN Convention Against Torture, the International Convention for the Elimination of All Forms of Racial Discrimination, UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. See the [UN Concluding observations on the UK](#). Also see the analysis in relation to the amendment we are supporting on Clause 9.

¹⁶ Equality Act 2010 s149

approach to policy and practice through effective and proportionate equality monitoring¹⁷.

We support the explicit inclusion of the characteristics protected under the Equality Act 2010 (currently Clause 7 (9) and (10)) but note that gender reassignment has not been included. We are not aware of any rationale for this. There is no equality analysis which explains why this is the case. Trans people experience significant levels of discrimination in the health service¹⁸.

Omitting gender reassignment seems to undermine the intent of the Bill to tackle discrimination in the use of force. Without a monitoring provision covering gender reassignment, there will be insufficient information to understand what the issues are in relation to restraint for people who share this protected characteristic. Given that all the other protected characteristics are covered, it is also arguable that, on the face of it, overlooking people with this protected characteristic could lead to systemic discriminatory practice.

An amendment to correct this error would also be in line with the Government's own commitment to deliver greater equality for the LGBT community, recently confirmed in the announcement that the results of the National LGBT survey¹⁹ will be published together with a new LGBT Action Plan this summer²⁰ and that there will shortly be a consultation on reform of the Gender Recognition Act 2004²¹.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work at: www.equalityhumanrights.com

For more information, please contact:

Parliamentary lead:

Katherine Perks (Tuesday, Wednesday, Thursday)

¹⁷ [EHRC \(2011\), Code of Practice for Services, Public Functions and Associations \[ONLINE\] \(Accessed 8 June 2018\)](#)

¹⁸ EHRC, 'Is Britain Fairer: Key facts and Findings on Transgender People', 2015, online: <https://www.equalityhumanrights.com/en/britain-fairer>.

¹⁹ Government Equalities Office, National LGBT Survey, July 2017, online: <https://www.gov.uk/government/consultations/national-lgbt-survey>

²⁰ Gay Times, Exclusive: Theresa May announces LGBT Action Plan to improve lives and address injustices, 24 May 2018.

²¹ Hansard, House of Commons, Vol. 641, Col. 421, 17 May 2018.

Katherine.Perks@equalityhumanrights.com
Tel: 020 7832 7813

Policy lead:

Jonathan Timbers
Jonathan.Timbers@equalityhumanrights.com
Tel: 0161 829 8557