

# **The Draft Health Service Safety Investigations Bill**

## *Memorandum 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 Draft Health Services Safety Investigations Bill (“the Bill”). This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reasons for, the procedure selected.

### **B. Purpose and effect of the Bill**

2. The Bill is intended to make provision in relation to three main subject matters.
3. First, the establishment of the Health Service Safety Investigations Body (“HSSIB”) as an independent statutory body, with powers to conduct investigations into incidents or accidents within the NHS which appear to evidence risks affecting patient safety. HSSIB will replace the Healthcare Safety Investigation Branch (“the Investigation Branch”), which was established as a branch of the NHS Trust Development Authority (a Special Health Authority established under section 28 of the National Health Service Act 2006) on 1<sup>st</sup> April 2016.
4. Second, the Bill imposes a prohibition on the disclosure of information held by the HSSIB in connection with an investigation, thereby creating a ‘safe space’ within which participants can provide information for the purposes of an investigation. Information will only be able to be disclosed in certain limited circumstances or by order of the High Court.
5. Third, the Bill makes provision for the accreditation of NHS trusts and foundation trusts to carry out investigations into patient safety with the benefit of ‘safe space’.

### **C. Delegated powers**

6. The Bill contains four clauses which make provision for delegated powers. The first, clause 10(1), confers a power on the Secretary of State to make regulations to amend the amount specified in a penalty notice.
7. The second, clause 36(2), confers a power on the Secretary of State to make regulations to make consequential amendments to other legislation.
8. The third, clause 40(2), confers a power on the Secretary of State to make regulations to appoint the day on which all clauses of the Bill apart from clauses 37 and 39 - 41 will come into force.

9. The fourth, paragraph 23(1), Schedule 1, confers a power on the Secretary of State to make one or more schemes in relation to the transfer of staff and property.
10. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the Department has considered the need:
- to ensure that as much detail about how HSSIB, 'safe space' and accreditation are intended to function is included on the face of the Bill; and
  - to provide flexibility for responding to changing circumstances, so that requirements can be adjusted without the need for further primary legislation.

### **Clause 10(1): Penalty notice**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Negative resolution where the regulations amend the amount specified in a penalty notice for the purpose only of reflecting changes in the rate of inflation; otherwise affirmative resolution

### Context and purpose

11. This clause confers a power on the Secretary of State to amend the amount specified in clause 9(3). Clause 9(3) provides that the amount specified in a penalty notice must not exceed £20,000. The Chief Inspector may give a penalty notice to a person where they have failed to provide information, documents, equipment or other in accordance with a notice issued under clause 7. Clause 10(1) provides that the Secretary of State may by regulations made by statutory instrument amend the amount specified in clause 9(3).

### Justification for taking the power

12. The power is necessary to ensure that it will be possible to change the upper limit that may be specified in a penalty notice in line with changes in inflation or because the maximum amount specified in clause 9(3) is no longer considered an appropriate incentive for compliance. The maximum penalty has been calibrated according to similar powers in other legislation, for example, Health and Social Care Act 2012 (s.105 & Schedule 11; Monitor's Enforcement Powers), Communications Act 2003 (s.123(2); enforcement of conditions regulating premium rate services), Immigration Act 2014 (s.23 & s.25; penalty notices imposed on landlords and agents in respect of persons disqualified by immigration status). There are also examples of similar powers to amend the upper limit of a penalty level in legislation; Communications Act 2003 (s.123(2); see above), Immigration Act 2014 (s.23 & s.25; see above), Policing and Crime Act 2017 (s.146(7); penalties for breach of a requirement or prohibition of any financial sanctions legislation).

### Justification for the procedure

13. It is proposed that regulations made under this power will be subject to the negative procedure where they amend the amount specified in a penalty notice for the purpose only of reflecting changes in the rate of inflation. In all other cases, the affirmative procedure will apply.

### **Clause 36(2): Consequential amendments**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative resolution where the regulations amend primary legislation; otherwise negative resolution

### Context and purpose

14. This provision confers a power on the Secretary of State to make consequential changes to other legislation to take account of the creation of the HSSIB and the investigatory framework created by the Bill.

15. Regulations made pursuant to this power may repeal or otherwise amend any provision of an Act or subordinate legislation passed before the Bill or in the same session. As this power would enable amendments to primary legislation via regulations, it could be considered a Henry VIII power, although the scope of this power is limited to the purpose as set out and will not provide for any other amendments to primary legislation.

### Justification for taking the power

16. This power is necessary to ensure that the creation of the HSSIB is reflected where necessary in other legislation. This would include, for example, listing the name of HSSIB in other legislation as appropriate.

### Justification for the procedure

17. Where a consequential amendment power is used to amend primary legislation it is usual to use the affirmative procedure. Where a consequential power is used to amend subordinate legislation it is usual to use the negative procedure. Examples can be found in section 23(2) – (5) of the Cities and Local Government Devolution Act 2016 and section 1(2) – (8) of the NHS (Charitable Trusts Etc) Act 2016.

### **Clause 40(2): Commencement**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** None

### Context and purpose

18. This clause deals with the commencement of the provisions in the Bill. It identifies those provisions for which the Bill itself sets a commencement date and provides that the other provisions in the Bill come into force on such day as the Secretary of State may by regulations appoint. Different days may be appointed for different purposes. Such regulations may include transitional, transitory or saving provision.

### Justification for taking the power

19. Delegating the power ensures that the provisions in the Bill relating to the establishment of HSSIB can be commenced after the necessary preparatory steps have been taken. Delegating the power also ensures that any transitional, transitory or saving provision that needs to be made in connection with the commencement of these provisions can be made at the appropriate time.

### Justification for the procedure

20. Commencement regulations are to be made by statutory instrument. However, no Parliamentary procedure is considered necessary, given that the content of the provisions to be commenced would have already been considered by Parliament during the passage of the Bill, and that any other provision made in those regulations would relate to that commencement and would be technical in nature.

## **Paragraph 23(1), Schedule 1: Transfer of staff and property**

***Power conferred on:*** Secretary of State

***Power exercised by:*** Order

***Parliamentary procedure:*** None

### Context and purpose

21. This provision confers a power on the Secretary of State to make one or more property transfer schemes or staff transfer schemes in connection with the establishment of the HSSIB by the Bill.

### Justification for taking the power

22. This delegated power is necessary to allow for provision to be made for the transfer of property and staff from the Investigation Branch to HSSIB once HSSIB is established and operational. The Investigation Branch was established on 1<sup>st</sup> April 2017 and it is not yet known precisely which property or staff will need to be transferred to HSSIB.

### Justification for the procedure

23. An order under this power would be made by statutory instrument and would not be subject to any parliamentary procedure. It is proposed that this is the appropriate procedure on the basis that transfer schemes would contain details about the transfer of property and staff from a branch of a Special Health

Authority to a statutory body established to take on some of the functions of that branch, which Parliament is unlikely to wish to debate. There is a precedent for this approach in section 96(4) of the Care Act 2014, which relates to the abolition of a Special Health Authority (Health Education England) and the creation of a body corporate of the same name. Orders made under that provision are statutory instruments but are not subject to any form of parliamentary procedure (see section 125 of the Care Act 2014).

**Department of Health**  
**September 2017**