

EXPLANATORY MEMORANDUM TO

THE MENTAL HEALTH ACT 1983 (PLACES OF SAFETY) REGULATIONS 2017

2017 No. 1036

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Regulations set out the circumstances in which a police station may be used as a place of safety for a person aged 18 years or over considered to be suffering from a mental disorder, and make provision about their treatment whilst detained. The Regulations also provide that occupational therapists and paramedics are part of a wider group of healthcare professionals, one of whom a constable must consult, if practicable to do so, before removing a person who appears to be suffering from a mental disorder to any place of safety.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Policing and Crime Act 2017 (“the 2017 Act”) amends provisions of the Mental Health Act 1983 (“the 1983 Act”) which confer powers on the police to remove persons considered to be suffering from a mental disorder to a “place of safety” for the purpose of their examination, care or treatment. Warrants issued under section 135(1) of the 1983 Act provide police officers with a power to enter private premises and remove a person to, or keep a person at, a place of safety. Section 136 gives a constable an emergency power to remove a person from any place other than a private dwelling to, or keep them at, a place of safety. Section 135(6) sets out the types of location that may be used as places of safety, and this definition includes police stations. The 2017 Act adds new section 136A, which provides that only persons aged 18 and above may be detained in a place of safety that is a police station. It also provides that the Secretary of State may make regulations prescribing the circumstances in which a police station may be used as a place of safety for a person aged 18 and over, and how persons detained at a police station are to be treated. These Regulations are the first to be made under section 136A.
- 4.2 The 2017 Act also amends the 1983 Act to provide in section 136A(1C) that a constable must, if practicable to do so, consult one of a list of specified healthcare professionals before removing a person who appears to be suffering from a mental

disorder to (or keeping them at) a place of safety under section 136. The Secretary of State has the power to specify by regulations other persons to be consulted. These Regulations are the first to be made under section 136(1C)(d).

- 4.3 As provided for in the Policing and Crime Act 2017 (Commencement No. 4 and Saving Provisions) Regulations 2017, neither the amendments made by the 2017 Act, nor these Regulations, apply to persons where a warrant for their removal was issued, or their removal had already started, before 11 December 2017, when the amendments and the Regulations will come into force. In those cases, the removal will continue to be dealt with under the provisions of the 1983 Act as they stood when the warrant was issued or the removal started. This is intended to avoid confusion as to which provisions are applicable to a person at a given time, and interruptions to arrangements already in train for mental health assessments or provision of care.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
5.2 The territorial application of the instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Police stations, and in particular custody suites, are not generally a suitable place for a person suffering from a mental disorder who has committed no crime and who needs to be assessed in a calm and therapeutic environment. It places the police in a care and welfare role for which they are not best suited and which is not necessarily in the best interests of the person, diverts police resources from their primary law enforcement responsibilities, and may delay appropriate assessment and care arrangements for the person.
- 7.2 Both the English (<https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983>) and Welsh (<http://gov.wales/docs/dhss/publications/160920mentalacten.pdf>) Codes of Practice to the 1983 Act state that police stations should not be used as a place of safety other than in exceptional circumstances. In recent years there has been significant progress in reducing the frequency with which police stations are used as a place of safety. Across England and Wales such instances fell from 4537 cases in 2014/15 to 2,100 in 2015/16. However, police data in relation to the use of police stations as places of safety shows that their use has varied significantly from area to area in recent years, with use of police stations appearing to be more the norm than the exception in some areas (for example 856 such uses in Sussex and 767 in Devon and Cornwall during 2013/14). Care Quality Commission data (“A Safer Place To Be”, October 2014, <http://www.cqc.org.uk/publications/themed-work/safer-place-be>) also revealed that people were routinely excluded from other, “health-based” places of safety for reasons including intoxication, history of violence and disturbed behaviour. The policy objective of the Regulations is to ensure that police stations are only used as a place of safety for persons over 18 in exceptional circumstances. This is to help

ensure that those in mental health distress receive the most appropriate support and care, and to achieve greater consistency in the approach to the use of police stations in such cases.

- 7.3 Between March and November 2014, the Home Office and Department of Health jointly undertook a review of the operation of sections 135 and 136 of the 1983 Act, in order to improve the outcomes for people in mental health crisis subject to these provisions. The review report (“Review of the Operation of Sections 135 and 136 of the Mental Health Act 1983”) is available at: www.gov.uk/government/consultations/review-of-the-operation-of-sections-135-and-136-of-the-mental-health-act
- 7.4 The review sought the views of service users, voluntary sector organisations, police and health professionals working in the field and their professional bodies on the use of police stations as places of safety, through workshops and an online survey. Some service users expressed the view that such use was criminalising and that the involvement of police officers could add to the distress of the person concerned. Many people raised concerns as to whether violent people could be safely managed in a healthcare setting if police stations were not available. Such views were particularly prevalent amongst healthcare staff. However, 63% of police officers and 68 % of service users believed police stations should never be used. The majority of those who responded thought that police stations were often used because of a shortage of other “health based” places of safety. 49.7% of those who responded thought that a police station should never be used as a place of safety. In answer to a separate question 73% of responders thought that a police station should be used only in exceptional situations if the person was very violent. (People were asked to agree or disagree with a series of statements which were not mutually exclusive and a number of people agreed with more than one statement.)
- 7.5 Following consideration of the range of views expressed, the review recommended “Ensuring that police cells can only be used as a place of safety for adults if the person’s behaviour is so extreme they cannot otherwise be safely managed”.
- 7.6 In March 2015 the Department of Health published “No voice unheard, no right ignored – a consultation for people with learning disabilities, autism and mental health conditions”. The consultation sought to explore views on a range of proposals, including the recommendations from the review of sections 135 and 136 of the 1983 Act, and specifically sought views on proposals that young people should never be taken to a police station. Almost 500 responses were received overall, around half from service users, carers and other individuals. In respect of the use of police stations, some of the 164 specific responses received on this issue, advocated that decisions should be made on the basis of risk. The Government responded to the consultation in November 2015 (www.gov.uk/government/consultations/strengthening-rights-for-people-with-learning-disabilities).
- 7.7 Considerable progress has been made in reducing the frequency of use of police stations as places of safety through non-legislative means, including street triage schemes, local Crisis Care Concordat Partnerships, and investment of up to £30m on Improving Places of Safety and Beyond Places of Safety programmes to improve the facilities available. However legislation is necessary to consolidate and build on the progress to date, ensuring that use of police stations is reduced to the minimum

possible, while recognising that it may be necessary or appropriate in exceptional circumstances.

- 7.8 To achieve this the Regulations set out the circumstances in which a police station can be used as a place of safety and set out a number of safeguards both in relation to the decision making process and to ensure the welfare of a person while detained at a police station.
- 7.9 To use a police station as a place of safety, the constable or approved mental health professional making the decision must be satisfied that an adult's behaviour poses an imminent risk of serious injury or death and, because of that risk, no other place of safety in the police area can reasonably be expected to detain him or her. The decision maker must also be satisfied that, so far as reasonably practicable, a healthcare professional will be present at the police station and available to that person throughout their detention. If the police officer is not of the rank of at least inspector, an officer of that rank or higher must authorise the decision to use a police station.
- 7.10 Before deciding to remove a person under section 136, police officers must, where reasonably practicable, consult one of a list of specified healthcare professionals. Section 136(1C) lists a registered medical practitioner, a registered nurse, an approved mental health professional or a person specified in regulations for this purpose. These Regulations add occupational therapists and paramedics to the list to encompass other specific healthcare professionals with whom police already have liaison arrangements in some local areas.
- 7.11 Mental health conditions may mask or distract from underlying physical health issues, and conversely physical health issues can sometimes present as, and be mistaken for, mental health issues. Police officers cannot be expected to be expert in interpreting such issues. Any use of restraint can also cause particular mental and physical distress to those in mental health crisis. Stringent safeguards therefore need to be in place for such potentially vulnerable persons to ensure their physical wellbeing while awaiting a mental health assessment. The Regulations accordingly specify that, so far as reasonably practicable, a healthcare professional must be present and available during the period the person is detained at the police station. They also set out how frequently a healthcare professional must check the person's welfare.
- 7.12 In order to ensure that a person is not kept at a police station for any longer than is necessary the Regulations require a custody officer at the police station to review the person's behaviour at least every hour to assess whether the person continues to meet the criteria for being detained in a police station. The frequency of these reviews can be reduced to no less than once every three hours where the person is sleeping and a healthcare professional has not identified any risk that would require the person to be woken more frequently. Following the review (and having consulted with the healthcare professional who carried out the last welfare check, if reasonably practicable), if the officer determines that the person's behaviour no longer poses an imminent risk of serious injury or death, or that a place of safety that is not a police station can now reasonably be expected to detain the person, the officer must make arrangements to transfer the person to another place of safety that is not a police station. This requirement to transfer the person does not apply however, if it would result in a delay to a mental health assessment and the delay would be likely to cause distress to the person.

- 7.13 The Regulations address the majority of the issues mentioned in the Home Office’s memorandum to the Delegated Powers and Regulatory Reform Committee in June 2016 (paragraphs 214-219). The memorandum is available at: www.parliament.uk/documents/lords-committees/delegated-powers/Policing-and-Crime-Bill-DPM.pdf.
- 7.14 The memorandum anticipated that the Regulations would also contain arrangements for escalating differences of opinion about whether the conditions for using a police station had been satisfied, and for post-incident reviews. However, after further consideration, it was thought to be more appropriate to preserve the discretion of local areas to establish or adapt their own arrangements on these issues, in line with the English and Welsh Codes of Practice to the 1983 Act relating to establishing local policies on police powers and places of safety. This was in view of the complexity and variety of local governance structures in place across the country and the potentially wide range of personnel who might be involved in local decision-making. Instead, the accompanying guidance on the changes to the 1983 Act (made by the 2017 Act) and these Regulations, recommends considering the need to establish local escalation or dispute resolution processes. It also suggests that local areas consider establishing procedures for post-incident reviews following any use of a police station as a place of safety.

Consolidation

- 7.15 The Regulations do not amend any other instrument so no consolidation is required.

8. Consultation outcome

- 8.1 In June 2016 Home Office and Department of Health officials began targeted consultation with key experts and stakeholders on the approach to and content of the Regulations, meeting with representatives of charities and professional organisations working in the mental health field - Mind, Rethink/Mental Health Alliance, NHS providers and the Royal College of Psychiatrists - to discuss the then Bill’s provisions, and the approach to framing the Regulations. This was followed by further workshops and bilateral meetings during July and August 2016 with representatives from these organisations as well as from the police, Police and Crime Commissioners, College of Policing, Royal Nurses Union, Oxleas Foundation Trust, Faculty of Forensic and Legal Medicine, South London and Maudsley Trust, Approved Mental Health Professionals and NHS England.
- 8.2 A range of perspectives were covered in discussions – with some participants believing that the threshold for the use of a police station to be used as a place of safety should be very high or that they should never be used, while others pointed to the challenges of safely managing some very violent persons in health settings. The challenges of accurately describing in legislation the types of behaviour that might warrant use of a police station were also discussed. There was general agreement that it was essential to have adequate safeguards in place in relation to the ongoing welfare of a person held in a police station in such circumstances.
- 8.3 Based on these discussions a paper outlining the issues to be covered by the Regulations, and how these might be framed in legislation, was sent out to these meeting participants and other interested stakeholders in December 2016 for comments. The paper included proposals to develop a set of conditions that police officers would need to be satisfied existed before considering the use of a police

station, linking behaviour exhibited by the person to information about the capability of various places of safety to manage that behaviour successfully. It was anticipated that the Regulations might also specify when using a police station was not appropriate – for example because of a shortage of “health based” places of safety. The proposals included the levels of consultation (with health professionals) and approval (from senior officers) that should be required before making decisions. They also dealt with options for ongoing medical checks of the person and regular reviews of the continued need for use of a police station. Feedback was sought on whether the decision making processes considered the right factors, whether any other provisions should be included and whether the safeguards seemed adequate.

- 8.4 13 written responses providing some 90 specific comments were received from individuals and organisations. Just under half of the comments related to reasons why police stations should not be used as places of safety at all. Key themes from the remaining responses included the importance of medical input to decisions wherever possible; the importance of the role of the custody officer in ensuring the wellbeing of the person and regularly reviewing their detention; that police stations should not necessarily be seen as “safe” in comparison to a “health based” place of safety, and that both their use and time spent there should be limited as far as possible; and suggestions for how certain provisions could be framed to assist in reaching operational decisions including how thresholds of behaviour might be defined. There has, in addition, been ongoing ad hoc contact with various individual practitioners and subject matter experts, as well as Welsh Government officials, on specific issues in relation to development of the Regulations and the accompanying guidance on the wider changes to the 1983 Act.

9. Guidance

- 9.1 The Department of Health and the Home Office have produced guidance on the changes to the 1983 Act (made by the 2017 Act) and these Regulations, which is being published simultaneously with the laying of the Regulations: “Guidance For The Implementation Of Changes To Police Powers And Places Of Safety Provisions In The Mental Health Act 1983”.
- 9.2 The guidance is non-statutory and is intended to assist policing and health organisations and front line practitioners to identify the most significant changes to the legislation and their likely impact on local policy and procedures. The guidance takes a chronological approach to how cases might be dealt with and seeks to identify those scenarios most likely to arise as a result of the changes, as well as making suggestions as to good practice. The guidance is expected to act as the main form of advice initially in helping areas to prepare for and implement the new provisions. It may also form the basis of material for revisions to existing training courses and internal guidance documents used by the various individual police forces and other organisations.
- 9.3 Under section 118 of the 1983 Act there is a statutory requirement for the Secretary of State to produce a Code of Practice, and to lay the Code and any alterations to it before Parliament. Specified individuals must have regard to the Code when performing functions under the Act. The Code of Practice for England was last revised in 2015. There is also a Code of Practice for Wales, last revised in 2016. The Department of Health intends to incorporate relevant elements of the guidance into the Code of Practice for England when it is next revised. Similarly, the Welsh

Government plans to amend the Mental Health Act 1983 Code of Practice (for Wales) when it next reviews the Code in its entirety.

10. Impact

10.1 There is no direct impact on charities or voluntary bodies, although such bodies may find opportunities to provide services in support of health providers that provide police officers with alternatives to detention, such as drop-in centres, “crisis cafes” or other community or charity based local initiatives. There is no direct impact anticipated for business or the private sector, although again there may be opportunities to support or supplement local healthcare provision and capacity, including for private sector health or care home providers, subject to local health commissioning decisions.

10.2 The impact on the public sector involves changes in procedures for police forces, mental health trusts, local authority social services departments, ambulance services and commissioners of local mental health services, and a reduction in the use of police stations with a likely corresponding increase in uses of other places of safety. The relevant extracts from pages 43-44 of the overarching Impact Assessment submitted for the Policing and Crime Bill (available at: <http://www.parliament.uk/documents/impact-assessments/IA16-006.pdf>) are reproduced in paragraph 10.3 below. The figures below are still applicable. The measures introduced by these Regulations will not result in impact further than that established by the 2017 Act. The more detailed Impact Assessment (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/528323/Impact_Assessment_-_Police_Powers_under_the_Mental_Health_Act.pdf) assumed that these Regulations would specify that police stations would only be used “when certain conditions are met, for example, where the person’s behaviour is such that they cannot be safely managed in a health-based place of safety. From a different perspective, the aim is to ensure that adults are taken to any place of safety other than a police station” (page 11). A separate assessment has not been prepared for this instrument.

10.3 Costs

Additional beds will be required to provide health-based places of safety as an alternative to police stations. It is estimated that around 33 additional beds could be required in England and Wales. In the first year this is estimated to cost £15.2 million, which includes one-off capital costs. In the following year the ongoing costs are estimated to be £10.1 million (then rising slightly each year to allow for population growth, reaching £10.7 million in 2025).

There are also costs to the police of remaining at the health-based place of safety while the detainee is booked in, estimated at £260,000 per year.

Benefits

The associated reduction in the use of police custody is estimated to save the police £930,000 per year from reduced cell use and £930,000 per year from reduced police time, representing an annual saving of approximately £1.9 million per year.

The enabling power to amend the list of possible places of safety under section 135(6) so that anywhere which is considered suitable and safe can be a place of safety imposes no costs. It is assumed that any new local arrangements created as a result of the provision are done so on a local value for money basis.

Overall, there is evidence to suggest that detainment in police custody can deteriorate the mental condition and reduce the well-being of those experiencing mental health crises. The reduction in the use of police custody can therefore be expected to improve the wellbeing of those detained under sections 135 and 136.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The objective of these Regulations is to ensure that those experiencing mental health crises receive the most appropriate and effective support. While it is difficult accurately to predict the number of persons who might continue initially to be taken to police stations as a place of safety under the new provisions, it is anticipated that this may be fewer than 500 cases per year across England and Wales. The effectiveness of the new regime will be monitored through a number of different mechanisms outlined in sections J and K (pg 32 & 33) of the Bill's Impact Assessment. With respect to data these include:

i) NHS Digital's annual publication, Patients Formally Detained Under the Mental Health Act 1983, which includes data on use of NHS places of safety under sections 135 and 136 of the Mental Health Act;

ii) the police Annual Data Requirement (implemented on a voluntary basis from April 2015, and mandatory from April 2016) for use by police forces to improve the quality and transparency of the data; and

iii) voluntary use by the police of the mental health 'data toolkit', that captures more detailed information about section 135 and 136 detentions, for local use.

Both data sets described in (i) and (ii) above are published annually.

- 12.2 The National Mental Health Crisis Care Concordat Steering Group for England and Wales provides an overarching structure through which a wide range of national stakeholders can provide feedback through regular contact with the Home Office and the Department of Health. In addition the Home Office has a range of standing meetings and mechanisms with the police and Police and Crime Commissioners through which to obtain feedback on the implementation and effectiveness of the new arrangements.
- 12.3 Any emerging feedback from the monitoring of the operation of the new provisions will be fed into the wider independent review of the 1983 Act, chaired by Professor Sir Simon Wessely, which was launched on 4 October 2017.
- 12.4 The provisions in these Regulations will be reviewed in conjunction with the normal post-legislative review of the 2017 Act three to five years after Royal Assent

13. Contact

Linda Robinson at the Home Office, Telephone 0207 035 0853 or email: Linda.Robinson@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.