

DELEGATED POWERS MEMORANDUM

FORENSIC SCIENCE REGULATOR BILL

Clause 2(1): Duty to prepare and publish a code of practice about the carrying on of forensic science activities

Power conferred on: *The Forensic Science Regulator*

Power exercised by: *Statutory code of practice*

Parliamentary Procedure: *Affirmative procedure*

Context and purpose

1. The Bill places the Forensic Science Regulator (“the Regulator”) on a statutory footing and confers functions on the Regulator in respect of forensic science activities for the purposes of the criminal justice system in England and Wales. Clause 2 requires the Regulator to publish a code of practice about forensic science activities in England and Wales. Before publishing the code (or any alteration or replacement), the Regulator is required to consult such persons as they considered appropriate, which must include persons who are, or are likely to be, performing activities covered by the proposed code (clause 3(1) and (2)). The Regulator is also required to obtain the approval of the Secretary of State to the code (clause 3(3)(b)).
2. Under clauses 5 to 7 of the Bill the Regulator is empowered to enforce forensic science standards. In particular, the Regulator will have powers to investigate forensic science providers when it suspects they are putting the criminal justice system at “substantial risk”. The Regulator would be able to issue “compliance notices” to these providers requiring them to take specified steps and would be able to temporarily shut facilities until they meet the terms of their compliance notice. The Regulator may only exercise the investigative and enforcement powers in clauses 5 to 7 in respect of forensic science activities covered by the code. Moreover, while a failure to adhere to the code would not, of itself, render a person liable to civil or criminal proceedings, such a failure can be taken into account by the Regulator in deciding whether to take enforcement action and by a court in determining a question in criminal and civil proceedings (clause 4).

Justification for the power

3. The provision of reliable, quality assured forensic analytical services is essential to the successful investigation and prosecution of many offences and to the integrity of the criminal justice system. As such, it is vital that forensic science providers operate to high standards. The current non-statutory “Codes of Practice and Conduct for forensic science providers and practitioners in the Criminal Justice System” is available [here](#). As with the existing non-statutory code, the statutory code of practice will contain detailed and technical specifications and procedures to be followed by forensic science service providers; these are properly matters for a code of practice rather than primary legislation. Moreover, the code will need to

keep pace with rapidly changing technical and scientific developments and reflect any extension of the Regulator's remit (as a consequence of regulations made under clause 11(2)(c)). It is anticipated that the code will be updated on a regular basis (the non-statutory code is on its fifth iteration since 2011).

Justification for the procedure

4. By virtue of clause 3(3)(b) and(c), the draft code must be laid before Parliament and approved by both Houses. The same Parliamentary procedure applies before any alteration to the Code or a replacement Code can be published. This level of parliamentary scrutiny is considered appropriate given the potential consequences of a failure by a forensic science provider to abide by the code in terms of this triggering enforcement action by the Regulator, the risk of a miscarriage of justice and the adverse impact on the integrity of and confidence in the criminal justice system as a whole.

Clause 11(2)(c): Power to amend meaning of “forensic science activity”

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

5. The Regulator can exercise functions in respect of any “forensic science activity”, as defined in clause 11. That definition is initially limited to activities for purposes relating to: (i) the detection and investigation of crime in the England and Wales; and (ii) the preparation, analysis, or presentation of evidence in criminal proceedings in England and Wales. Clause 11(2)(c) confers on the Secretary of State a power to extend the definition of forensic science activity by specifying in regulations additional purposes for which forensic science activities may be carried on.
6. Clause 11(3)(b) confers on the Secretary of State a power to make transitional, transitory and saving provision in regulations made under clause 11(2)(c).

Justification for the power

7. It is appropriate to initially limit the Regulator's functions to forensic science activities for purposes related to the criminal justice system in England and Wales (the same remit as the current non-statutory Regulator). However, there have been calls to extend the regulation of forensic science beyond the criminal justice system. For example, there have been recent cases of alleged malpractice in forensic toxicology in the family courts. Should evidence of systemic malpractice accumulate such as to threaten the reliability of forensic evidence presented in civil or family proceedings, it is important that the regulatory regime can be extended quickly to meet the challenge to the integrity of the civil or family justice systems. It is therefore appropriate to confer on the Secretary of State a power to extend the

definition of forensic science activities in respect of which the Regulator can exercise function.

8. It is appropriate for there to be a power in regulations made under clause 11(2)(c) to make transitional, transitory and saving provision. If the Regulator's remit over forensic science is extended to civil proceedings, it might be necessary to make transitional or saving provision in relation to evidence in on-going civil proceedings to which the amended definition of forensic science and therefore the code and Regulator's remit should not apply.

Justification for the procedure

9. Regulations made under clause 11(2)(c) are subject to the affirmative procedure (clause 11(3)(c)). This is considered to afford an appropriate level of parliamentary scrutiny given the regulatory consequences for forensic science providers of the extension of the meaning of forensic science activity. Exercise of this power would extend the scope of forensic science in respect of which the Regulator can exercise functions. This means that the regulator can make provision in the code of practice, and exercise investigative and enforcement powers, in relation to forensic science activities in new fields such as the civil courts. It is appropriate that Parliament should have the opportunity to debate the merits and implications of any such extension of the Regulator's remit.

Clause 13: Commencement powers

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: None.

10. Clause 13 contains standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations. Clause 13(7) states that the Secretary of State may by regulations made by statutory instrument make transitional, transitory or saving provision in connection with the coming into force of any provision of this Act.

Justification for the power

11. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

12. As is usual with commencement powers, regulations made under clause 13 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement

by regulations enables the provisions to be brought into force at a convenient time.