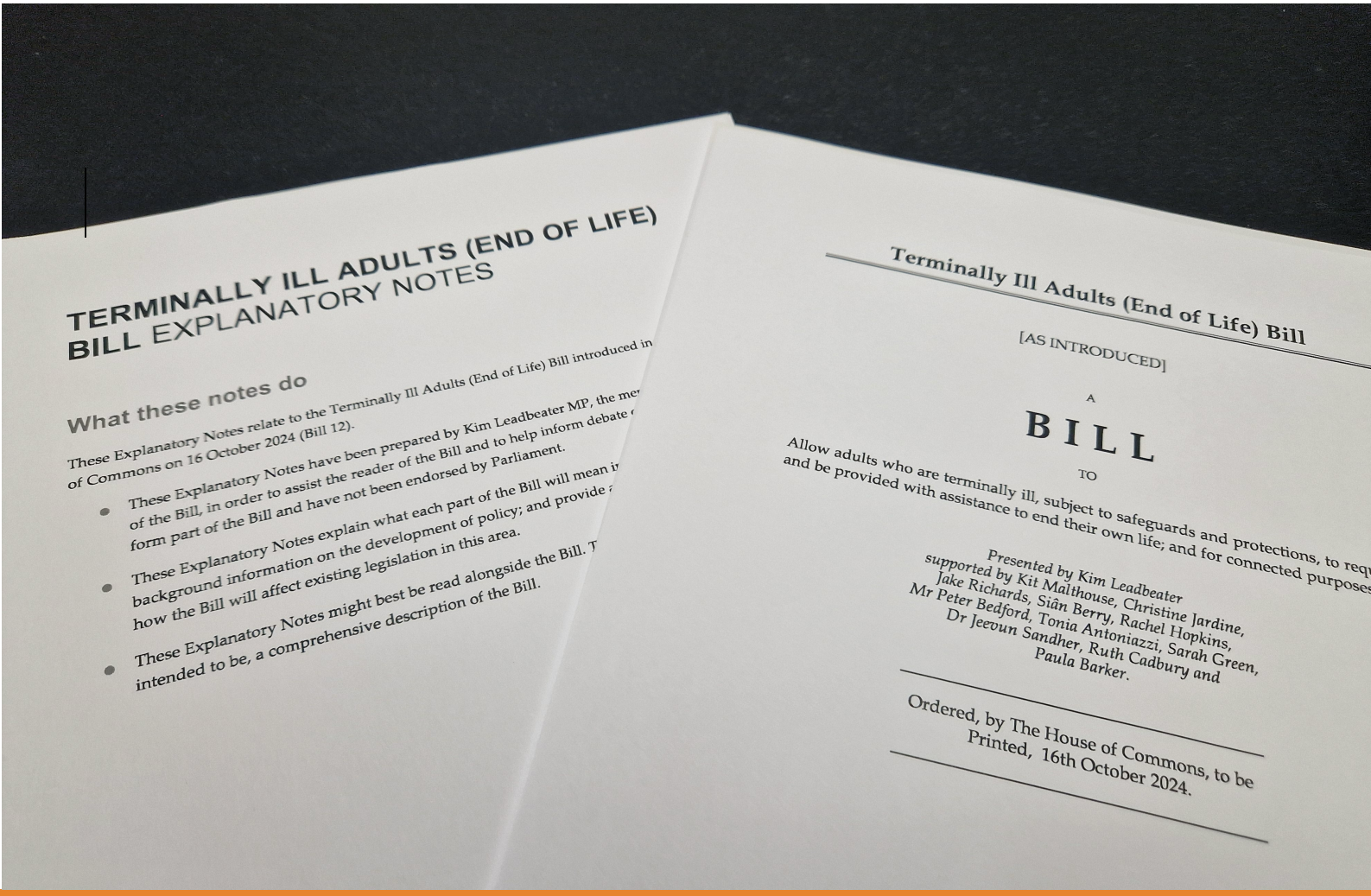

Terminally Ill Adults (End of Life) Bill: Concerns about the delegated powers

January 2025

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Acknowledgements

This paper was produced by Matthew England.

The research for this paper was supported by the Legal Education Foundation as part of the Hansard Society's ongoing research into delegated legislation and its parliamentary scrutiny.

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Introduction

The Terminally Ill Adults (End of Life) Bill – often referred to as the assisted dying bill – was introduced to the House of Commons on 16 October 2024 by Kim Leadbeater MP. As a Private Member's Bill, the Bill is subject to procedures and timetables that differ in some respects from those that apply to Government bills, as outlined in the Hansard Society's recent briefing on the Private Member's Bill procedure in relation to this bill.[1]

On 29 November 2024, the House of Commons voted to give the Bill a Second Reading by 330 to 275 votes. The Bill was subsequently committed to a Public Bill Committee, which is expected to begin its work later this month. Unprecedentedly for a Private Member's Bill, the Committee was also given the power to take written and oral evidence.

This briefing does not offer an opinion about the principle of assisted dying or the operability of the bill's provisions for a system of assisted dying. Drawing on the Hansard Society's expertise in relation to delegated legislation, it is intended to inform parliamentary and public debate solely about the powers that will be granted to Ministers to legislate by regulations for the purpose of establishing and operating the proposed system of assisted dying, and the parliamentary scrutiny to which they will be subject. In several instances we suggest improvements that could be made to better ensure parliamentary oversight of the future use of these powers.

[1] England, M. and Fox, R. (27 November 2024), *The Assisted Dying Bill: A guide to the Private Member's Bill process* (London: Hansard Society).

Why is there no Delegated Powers Memorandum?

For Government bills, the responsible Department would normally produce a memorandum - a Delegated Powers Memorandum (DPM) - containing details about any powers the Bill would grant to Ministers or other bodies. A DPM normally outlines:

- details of each power in the bill, including its context, its scope, to whom the power is delegated, and the parliamentary scrutiny procedure, if any, that will apply to any exercise of the power;
- the reasons for taking the power; and
- why the procedure assigned to the power is considered appropriate.

The DPM is typically published when, or shortly after, a Government bill is presented to Parliament, and is formally submitted to the Delegated Powers and Regulatory Reform Committee (DPRRC), a House of Lords select committee tasked with scrutinising the delegated powers contained in any bills introduced to the Lords, to aid the DPRRC's scrutiny of the bill. The DPRRC then produces a report that draws attention to any provisions that it believes contain an inappropriate delegation of power or any procedures that would not provide an appropriate level of parliamentary scrutiny. It is expected that the Government will in turn respond in a timely way setting out whether Ministers will propose amendments to the Bill to reflect the Committee's concerns.

The House of Commons does not have an equivalent select committee that looks at the delegated powers in bills to inform the scrutiny undertaken by MPs. That is why the early publication of a DPM after presentation of a Bill in the House of Commons is so important, as MPs have no other way to formally ascertain a full explanation of the powers sought by Ministers.

The Cabinet Office Guide to Making Legislation states that where the responsible department recommends that the Government should support the Private Member's Bill or remain neutral then a DPM should be produced for consideration by the relevant Cabinet Committee – the Parliamentary Business and Legislation (PBL) Committee – alongside other key documents such as the explanatory notes, a legal issues memorandum, and an impact assessment, to inform Ministers' final decision.[2] In the case of the Terminally Ill Adults (End of Life) Bill, the Government has decided to remain neutral, although it is unclear whether the conventional approach for reaching such a decision through collective ministerial agreement has been followed, or whether the decision was instead made unilaterally by the Prime Minister.[3] However, regardless of the way in which the decision was reached, the accompanying documentation, including a DPM, is still required to inform the Government's approach to the Bill. Given the importance of this Private Member's Bill the DPM would ideally have been published before Second Reading. The Government has, to date, given no indication of whether it has produced a DPM and if so when it will be published. At the very latest, it must be published when the Bill is introduced to the House

[2] Cabinet Office (2022), Guide to Making Legislation, paras. 45.18 to 45.20.
[3] Cabinet Office (2022), Guide to Making Legislation, para. 45.25.

of Lords.[4] Of the 29 Private Members' Bills that received Royal Assent in the 2022-23 and 2023-24 Sessions, DPMs were published for 20 of them; of which, nine were published in advance of Second Reading, two were published during later Commons stages, and nine were published upon the bill's introduction to the House of Lords.

A DPM for a Government bill sets out why Ministers propose to take certain powers, and the justification for the scrutiny procedures. It is intrinsically more difficult to produce a DPM for a Private Member's Bill and more so when the Government has adopted a position of neutrality. However, the Government has an overriding duty of care to the statute book. As such, any powers that may accrue to Ministers because of a Private Member's Bill must be acceptable to the Government. It must therefore take a view on the powers and their scrutiny in a DPM and should publish it as soon as possible to inform scrutiny of the Bill in the elected House.

[4] Cabinet Office (2022), Guide to Making Legislation, para. 45.36.

Clause 20: Power to specify approved substances

The Bill does not specify which drugs, or other substances, may be provided to patients for the purpose of an assisted death. Instead, the Secretary of State is required by clause 20(1) to specify in regulations one or more 'approved substances' which doctors will be authorised to supply to patients who have chosen to end their own life in accordance with the Act. The power is non-discretionary, meaning that the Secretary of State *must* specify at least one approved substance. Any regulations made under the power will be subject to the negative procedure, meaning that a debate and approval vote will not be required. The regulations will be laid before Parliament after being made into law by the Minister and if neither House passes a motion to reject the regulations within 40-days, then Parliament will be deemed to have consented.

The DPRRC has adopted different positions on similar powers to specify approved substances contained in two previous Private Members' Bills to provide for a system of assisted dying.

- The 2014 Assisted Dying Bill [Lords]:[5] This bill, introduced by Lord Falconer, delegated a power to specify in regulations the medicines that may be provided to someone seeking an assisted death, with the regulations subject to the negative procedure. The DPRRC stated that it did not consider either the power or the procedure to be inappropriate.[6]
- The 2021 Assisted Dying Bill [Lords]:[7] This bill, introduced by Baroness Meacher, delegated a power identical to the one contained in the 2014 Bill, with the regulations similarly subject to the negative procedure. However, this time the DPRRC stated that a definitive list of medicines should be set out on the face of the Bill, with a corresponding power to amend that list through regulations, which should be subject to the affirmative procedure (the regulations would be laid before Parliament in draft, and could not be made into law by the Minister unless and until they have been debated and approved by both Houses).[8]

In July 2024 Lord Falconer introduced another Private Member's Bill – the Assisted Dying for Terminally Ill Adults Bill – and it too included a delegated power to specify approved substances[9]. The power is nearly identical to the power in the 2014 and 2021 Bills and strongly resembles the power in Kim Leadbeater's bill currently before the Commons. The one difference is that Lord Falconer's 2024 bill proposes that the draft affirmative procedure should apply to the exercise of the power.

MPs may wish to enquire why Kim Leadbeater has chosen not to adopt the scrutiny

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[5] The *Assisted Dying Bill*, HL Bill 6, 2014-15.
[6] Delegated Powers and Regulatory Reform Committee (2014-15), 6th Report, HL Paper 36, para.8.
[7] The *Assisted Dying Bill*, HL Bill 13, 2021-22.
[8] Delegated Powers and Regulatory Reform Committee (2021-22), 9th Report, HL Paper 83, para.7.
[9] The *Assisted Dying for Terminally Ill Adults Bill*, HL Bill, 2024-25, clause 4(7).

procedure set out in the 2024 bill but has preferred that proposed in the 2014 and 2021 incarnations of the bill, despite the advice to the contrary of the Delegated Powers Committee.

Designating approved substances through regulations is not in itself objectionable. The list of approved substances may need to be amended quickly and frequently in response to any new research and any relevant observations made once the new system comes into force. Nevertheless, the substances with which people will be permitted to end their lives will be a matter of considerable public and political interest. The negative procedure, however, would mean that the Secretary of State could add items to, and remove items from, the list of approved substances without any requirement for a parliamentary debate or vote, despite the likely level of interest in such regulations.

The negative procedure would facilitate quick ministerial decision-making and action. If an approved substance were found to cause adverse medical events or to be unreliable for the purpose of facilitating an assisted death, then the Government would be able to remove the substance immediately from the approved list without the encumbrance and delays of a parliamentary process.

However, this could be addressed by making provision for the use of the 'made affirmative' procedure in urgent cases where the Secretary of State wishes to remove a substance from the approved list and is of the opinion that it is necessary to do so immediately in order to prevent adverse medical events or failed assisted deaths. This would mean Ministers could act expeditiously but Parliament would have to debate and approve – albeit retrospectively – the change in the list. Whilst not perfect it would provide more opportunity for oversight than that offered by the negative scrutiny procedure. The 'draft affirmative' procedure could then apply for all other non-urgent changes to the list. Indeed, the fact that there may be a need to make urgent amendments to the list in future is not a reason not to apply the draft affirmative procedure to the first set of regulations specifying the approved substances.

Should an initial list of substances and a requirement to consult be set out on the face of the Bill?

Conventionally, substances of such importance should be specified only after thorough consultation, having regard to scientific advice, medical research, and evidence from other jurisdictions. While it may in principle be preferable to have a list of substances on the face of the Bill, a list should not be included in this Bill simply to satisfy that preference if the requisite consultation and research has not taken place.

However, MPs may wish to consider whether it is desirable to include on the face of the Bill a requirement for an appropriate form of consultation to take place before the regulations can be laid before Parliament.

For example, the Misuse of Drugs Act 1971 requires that when the Government wishes to lay regulations to add or remove an item from the list of controlled drugs, it can only do so

if it has consulted with, or is following a recommendation from, the Advisory Council on the Misuse of Drugs. The 1971 Act also requires that any such regulations are subject to the draft affirmative procedure.

Similarly, the power in section 62 of the Medicines Act 1968 which prohibits the sale or supply of specified medicinal products is subject, in non-urgent circumstances, to a requirement to consult with either the Commission on Human Medicines or a specially appointed expert committee before an Order can be made.

The approved substances designated under clause 20 of the Leadbeater Bill may include licensed medicinal products used in a way that goes beyond the purpose for which they were licensed, or unlicensed drugs.[10] This is not unusual. As a briefing from the Parliamentary Office of Science and Technology (POST) in 2022 noted, the drugs used for assisted dying in jurisdictions where it is legal are not approved or licensed by a regulatory authority for a lethal purpose.[11] Drugs used for medical purposes undergo a strict approval process involving rigorous efficacy and safety tests; the drugs, or combinations of drugs, used for assisted dying generally do not undergo such a process. MPs may therefore wish to introduce a requirement that the Secretary of State consult relevant parties and have regard to certain evidence (such as that from other jurisdictions), before specifying drugs or other substances for the purpose of the Act, rather than leaving it to his or her discretion.

[10] J. Hatzel, 'The UK Assisted Dying Bill and its implications for pharmaceutical companies', *Bristows*, 27 November 2024.

[11] Hobbs, A. and Gajjar, D. (2022), *Assisted Dying* (Parliamentary Office of Science and Technology), pp.30.

Clause 32: Power to ensure assistance is available

Clause 32 provides the Secretary of State with a power to "ensure assistance is available."

Under clause 32(1), the Secretary of State may, by regulations, make provision:

(a) to secure that arrangements are made, by the Secretary of State or other persons, for the provision of assistance to persons in accordance with this Act; and
(b) for related matters.

The regulations may, "in particular, enable the provisions of such assistance as part of the health service in England and the health service in Wales."

This power is a Henry VIII power – that is, a power which may be used to amend, repeal or revoke primary legislation. Clause 32(3) specifies that the power to make regulations under this clause includes power to amend, repeal or revoke "any provision made by an enactment passed or made before the end of the Session in which this Act is passed." The wording also implies that the power could be used to amend this Bill itself following Royal Assent. This is not uncommon.[12] Indeed, several recent Acts have included an even broader power to amend any primary legislation "whenever passed or made",[13] including prospective primary legislation.

However, the DPRRC has stated that particularly compelling reasons are needed to justify granting powers that can be used to amend the Act of Parliament that contains those powers.

While earlier provisions have permitted the amendment of enactments either "passed before the end of this Session" or "whenever passed or made", these provisions have generally been affixed to powers to make consequential or transitional amendments. This is not the case in respect of the power in clause 32 of this Bill. The power is constrained by the proviso that regulations must be for the purpose of ensuring that "assistance to persons" (i.e., an assisted death) is provided in accordance with the Act. This suggests a similar purpose to a power to make amendments consequential on the Act and is perhaps intended as a pragmatic alternative to including those consequential amendments on the face of the Bill. However, a separate power to make consequential provision is included in clause 38. But beyond that proviso, little can be deduced about how it is thought this power will be used in practice, beyond the fact that it may, in particular, be used to enable

[12] See, for example: section 116 ('Minor and consequential amendments') and section 144 ('Transitional provision etc') of the Energy Act 2013; section 18 ('Transfer of additional functions'), section 19 ('Consequential and transitional provision'), section 30 ('Mayoral development orders') and section 53 ('Consequential provision') of the Infrastructure Act 2015; and section 250 ('Power to make consequential provision') of the Levelling Up and Regeneration Act 2023.

[13] See, for example: section 142 ('Consequential provision') of the Environment Act 2021; section 95 ('Power to make consequential amendments') of the National Security Act 2023; and clause 133 ('Power to make consequential amendments') of the Data (Use and Access) Bill currently before Parliament.

the provision of assisted deaths through the National Health Service.

But as the DPRRC has previously stated, where a power provides that delegated legislation may "in particular" include a specified matter, it implies the legislation may deal with matters beyond that specified matter.[14] The explanatory notes shed little more light, except to clarify that the power could be used to make arrangements for the funding of any provision made by the regulations. Could the regulations thus be used to enable the provision of assistance through the private sector on behalf of the health service in England and in Wales? If the intention is that the regulations will be used only to establish an assisted dying service, either within or separately to the NHS, would they require that the service be free at the point of access to the person requesting assistance?[15]

A key principle that the House of Lords Constitution Committee has applied to delegated powers is that they should not be framed in such a way that gives little indication of how they should be used.[16] The DPRRC's Guidance to Departments states that the Delegated Powers Memorandum should set out how it is proposed that a power should be exercised.[17]

In the current absence of the DPM, **MPs may therefore wish to seek clarification from the sponsor of the Bill, Kim Leadbeater, about how she envisages the power being used, and similarly from Ministers how they expect to use this power if it were granted to them.**

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[14] See, for example: Delegated Powers and Regulatory Reform Committee (2017-19), 16th Report, HL Paper 85, para.6; Delegated Powers and Regulatory Reform Committee (2017-19), 21st Report, HL Paper 122, para.19.

[15] See, for example, A. Ruck Keene KC, 'Kim Leadbeater's Terminally Ill Adults (End of Life) Bill – some questions', *Mental Capacity Law and Policy*, 12 November 2024.

[16] Simson-Caird J., Hazell, R. and Oliver, D. (2017), *'The Constitutional Standards of the House of Lords Select Committee on the Constitution'*, (London: The Constitution Unit, University College London), pp. 7, para. 2.1.7. See, for example: House of Lords Constitution Committee (2015-16), 3rd Report, HL Paper 16, para.1.

[17] Delegated Powers and Regulatory Reform Committee (2021), Guidance for Departments on the role and requirements of the Committee, para.19.

Published by the Hansard Society

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