HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

19th Report of Session 2010–12

Health and Social Care Bill

London Olympic Games and Paralympic Games (Amendment) Bill

Terrorism Prevention and Investigation Measures Bill

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference "to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments".

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

Nineteenth Report

HEALTH AND SOCIAL CARE BILL

Introduction

1. This is a substantial 12-Part Bill covering a range of topics including, in particular, the Health Service in England (Part 1). The Department of Health have prepared a comprehensive memorandum for the Committee (the memorandum) on the Bill[1], which covers all of the delegated legislative powers and also other powers conferred by the Bill which are more administrative in character.

Part 1—General

2. This Bill involves a significant amount of delegation. It raises issues of accountability, in particular for executive actions and delivery of services. But our consideration is concerned only with those aspects of the Bill which fall within our Terms of Reference, set by the House. Those Terms of Reference charge us "to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny." It is not for us to consider whether the Bill might have conferred additional powers or to consider the delegation of powers that are purely administrative or executive in character or are concerned solely with the allocation of resources.

3. The legislative structure for the NHS proposed under Part 1 is helpfully summarised at paragraphs 10 to 38 of the memorandum. As no delegation of legislative power is involved in the overarching duties under clauses 1 to 5, we have no comment to make on those clauses.

4. Functions of legislating are conferred mainly on the Secretary of State rather than on other bodies such as the NHS Commissioning Board (the Board) and Clinical Commissioning Groups (CCGs). The Board is to be empowered by the Bill to impose various requirements of general application within the NHS (for example, to require CCGs to incorporate particular terms in their commissioning contracts, specify the content of the group's annual reports, specify uses of capital or revenue which must be taken into account for the purposes of a group's annual capital limit). Except where it appears below, we do not consider the conferring of such functions on the Board as inappropriate if the House accepts the basic policy of the Bill.

Clause 10—Duties of Clinical Commissioning Groups

5. Section 3(1) of the National Health Service Act 2006 (the 2006 Act) requires the Secretary of State to provide throughout England, to such extent as he considers necessary to meet all reasonable requirements, certain services (including hospital accommodation) described generally in subsection (1)(a) to (f). This maintains the position which has existed since the start of the NHS that the services are described broadly in the primary legislation,

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1 www.parliament.uk/hldelegatedpowers-bills

leaving the detail of precisely what will be provided to the Minister/Secretary of State through the exercise of his judgment as to what is considered necessary to meet all reasonable requirements. In practice, the Secretary of State's functions are made almost wholly exercisable by Strategic Health Authorities, Primary Care Trusts or Special Health Authorities by directions under section 7 of the 2006 Act.

6. Clause 10(2) amends section 3(1) so as to replace the Secretary of State's duty with a duty on CCGs to arrange for the provision of services described in subsection (1)(a) to (f) to such extent as they consider necessary to meet the reasonable requirements of those for whom they have responsibility. The list of services is unchanged.

7. Clause 10(3) inserts five new subsections into section 3 of the 2006 Act. Subsection (1A) specifies for whom a CCG has responsibility. Subsection (1B) enables the Secretary of State, by regulations subject to negative procedure, to add to the descriptions of those for whom a CCG has responsibility if there is a connection with the CCG's area; and subsection (1C) requires the Secretary of State to exercise the power to give CCGs responsibility, as respects emergency care, for every person present in their area. We have no point to raise on subsections (1B) or (1C). Indeed, the power in subsection (1B) is consistent with the Secretary of State's duty to promote a comprehensive health service, in case the provision made by subsection (1A) proves insufficient.

8. New subsection (1D) enables the Secretary of State, by regulations subject to negative procedure, to provide that subsection (1A) does not apply to persons of a description prescribed by the regulations or in circumstances prescribed by the regulations. The exercise of this power removes people from those for whom a CCG has responsibility, with the consequence that the CCG's obligation to arrange for NHS services for them does not apply. The Secretary of State need not apply any "necessary to meet reasonable requirements" test before making the regulations, but he must act rationally and consistently with his duties under the 2006 Act, in particular the duty in section 1 to continue the promotion in England of a comprehensive health service.

9. Paragraph 56 of the memorandum indicates that the power might be used, for example, for people receiving primary medical services as temporary residents. Paragraph 57 indicates that the regulations might fulfil a similar function to the current NHS Functions Regulations (S.I. 2002/2375). But so far as those regulations describe what Strategic Health Authorities and Primary Care Trusts may or must provide, they cannot affect the scope of the Secretary of State's own current duty under section 3 (paragraph 5 above), whereas the regulations under new section 3(1D) will affect the scope of the CCG's duty under the new section 3. We consider the exercise of this power to be potentially very significant. It operates on a key provision of the 2006 Act and appears to us wider than might at first sight be apparent. **We recommend that regulations under new section 3(1D) of the 2006 Act should be subject to affirmative procedure.**

Clause 15—Public Health Functions

10. The Bill confers various public health functions on the Secretary of State, particularly relating to health protection (new sections 2A and 2B of, and paragraphs 7C, 8 and 12 of Schedule 1 to, the NHS Act 2006). Other public

health functions are given to local authorities, especially functions relating to health improvement. New section 6C of the 2006 Act enables the Secretary of State, by order subject to affirmative procedure, to require local authorities to exercise his public health functions (and other functions exercisable in connection with them). This is a power of some significance, as is acknowledged in paragraph 85 of the memorandum; and paragraph 83 of the memorandum explains proposed funding arrangements. In view of the affirmative procedure, we do not find this power inappropriate.

Clause 18—Special Health Authorities and Directions

11. Under the 2006 Act the Secretary of State has various powers of direction over NHS bodies, but there are unusual arrangements for Parliamentary control. The default position is that the directions must be given by an instrument in writing (that is, not a statutory instrument and without a Parliamentary procedure). In certain specified cases, the directions must be given by regulations subject to negative procedure. In other specified cases, the directions may be given either by an instrument in writing, or by regulations subject to negative procedure, at the choice of the Secretary of State. Directions under section 7 of the 2006 Act fall into the last category (except in a few cases where they must be given by regulations). Section 7 enables the Secretary of State to direct specified NHS bodies, including Special Health Authorities (SpHAs), to exercise any of his functions relating to the health service.

12. Clause 18 re-enacts this power of direction in its application to SpHAs, broadening it so as to enable directions to require an SpHA to exercise not only any of the Secretary of State's functions relating to the NHS but also the functions of "any other person" relating to the NHS. This is explained at paragraphs 101 to 104 of the memorandum. The Bill retains the current position that directions under section 7 may be either by regulations subject to negative procedure or by an instrument in writing.

13. The lack of an absolute requirement for directions to be subject to negative procedure is well-established, though, were it not for the precedent, we might have questioned it. But this applies only to the exercise by a SpHA of the Secretary of State's own functions. Different considerations apply to directions by the Secretary of State requiring any other person's functions to be exercisable by a SpHA. A SpHA is subject to directions of the Secretary of State under section 8 of the 2006 Act and the effect of a direction under section 7 is likely to make a function which this Bill requires to be exercised with a degree of independence from the Secretary of State to be exercised under the Secretary of State's control, contrary to the administrative structure established by the Bill. **We therefore recommend that all directions under section 7(1) in respect of functions of those other than the Secretary of State must be in regulations subject to negative procedure.**

14. In addition, the power in section 7 as amended by clause 18 does not expressly exclude the Secretary of State giving directions requiring an SpHA to exercise a legislative function of the Secretary of State (for example, the function of making orders or regulations). This reflects the current section 7. But paragraph 7 of Schedule 6 to the Bill takes a different approach and expressly excludes powers to make orders or regulations from the functions which may be made exercisable by the Board (on behalf of the Secretary of

State) under that paragraph; paragraph 576 of the memorandum explains (and we agree) that this would not be appropriate. We consider that similar considerations apply to section 7 as amended by the Bill. Also, clause 16 rightly excludes health functions from the EU which may be made exercisable by the Board or a CCG the function of making subordinate legislation. We accept that it might be said that the exclusion of legislative functions is implied in section 7. **But given the different approach taken elsewhere within this Bill, we recommend that the Bill should make explicit that the Secretary of State may not delegate order- or regulation-making powers under section 7 of the 2006 Act. A similar point applies to new sections 98A, 114A, 125A and 168A of the 2006 Act at clause 46.**

Directions more generally

15. Underlying our recommendation in paragraph 13 above is a concern about functions conferred on one person being required to be made exercisable by another, with potentially significant consequences for the practical operation of the Bill, but with no requirement (or in some cases such as clause 294(4) no option) for Parliamentary control.

16. We also have a general reservation about how the Bill significantly increases the number of powers where the Secretary of State has the choice whether or not to subject his directions to Parliamentary control; it is arguable that in some instances it would be at least as appropriate for there to be Parliamentary control in all cases. We acknowledge that the exercise of the power will range from the frequent and particular to the general but rare. We make no specific recommendation other than that in paragraph 13, but for the information of the House we mention here those new powers to give directions which may, under the Bill, be made either by an instrument in writing or in regulations subject to negative procedure. They are directions under section 13ZI of the 2006 Act (instruction power if Board is failing), clause 20, and those listed in clause 298(13)(a) of the Bill at page 269. It is not clear what criteria will be used to decide whether the exercise of those powers will, in any particular case, be subjected to a Parliamentary procedure, and the House may wish to keep this under review.

Clause 20—Mandate

17. Paragraphs 108 to 113 of the memorandum explain the purpose of the mandate which is published each year by the Secretary of State and laid before Parliament, but is not subject to Parliamentary procedure. The mandate may include not just objectives which the Board must seek to achieve, but also requirements with which the Board must comply. These might be of general application across the Board's functions and could govern the Board's dealings with NHS bodies such as CCGs, and also with those providing the services for the NHS (for example where the Board itself arranges for the provision of particular services pursuant to regulations under new section 3B of the 2006 Act). The mandate contains a number of different powers, some of which are significant and at least partly legislative in character and merit Parliamentary oversight, others of which are administrative and for which no Parliamentary procedure seems necessary. We consider that requirements imposed on the Board and with which they must comply under new section 13A(7)(b) should be subject to a

Parliamentary procedure, especially as the other requirements imposed (under new section 6E in clause 17) are, rightly, in an instrument subject to negative procedure. We do not accept the explanation in paragraph 113 of the memorandum that there need be no Parliamentary procedure simply because the mandate will be an annual event. **We draw the House's attention to the mixed nature of provisions under the mandate; and we recommend that the requirements imposed by the mandate should be in an instrument subject to the negative procedure**.

Clause 22—Establishment of Clinical Commissioning Groups

18. New section 14A(1) of the 2006 Act enables the Secretary of State to specify in writing a day by which the Board must ensure that all providers of primary medical services are members of a CCG. This is not subject to Parliamentary procedure, as explained at paragraph 166 of the memorandum. But the day determines the length of the period for the purposes of the transitional arrangements in Schedule 6 to the Bill (see definition of "initial period" in paragraph 1). **In these circumstances, we consider it would be more appropriate for the day to be appointed by a statutory instrument, but this need not be subject to Parliamentary procedure.**

Clause 33—Fluoridation

19. Clause 33 inserts 14 new sections into the Water Industry Act 1991. The new sections set out the procedure in connection with the fluoridation of water supplies. New section 88L deals with the situation where a variation or termination proposal has been made by a local authority, the Secretary of State considers the proposal practicable and the proposer wishes to proceed.

20. Section 88L(2) requires the proposer to comply with requirements prescribed (by regulations subject to negative procedure) as to steps to be taken to consult and ascertain opinion on the proposal. But regulations (subject to negative procedure) may provide for cases (including either variation or termination) where that duty does not apply.

21. In addition, section 88L(4) enables a direction in writing (subject to no Parliamentary procedure) to disapply the duty, in termination cases only. These directions may "apply generally or in relation to a particular termination proposal".

22. So, it appears that in termination cases, general rules about disapplying the consultation requirements may be made either by regulations subject to negative procedure or by directions by instrument in writing subject to no procedure. A similar situation occurs at new section 88K (about the proposer making arrangements with other affected local authorities) and 88M (cases where the relevant local authorities must act through a joint committee etc.).

23. The overlap is acknowledged in the memorandum at paragraphs 402 (about section 88K) and 417 (about section 88M). We are not convinced by the reason given in the memorandum as to why all general dispensations should not be given by the regulations. **We therefore recommend that the power to direct given by new sections 88K(5), 88L(4) and 88M(4) should be confined to particular termination proposals, leaving the general issues to be dealt with in the regulations.**

Clause 44—Emergency Powers

24. Clause 44 amends section 253 of the 2006 Act, which is about the Secretary of State's power to give directions in an emergency. Under the amended section, directions may be given to any of a number of NHS and other bodies, specified in new subsection (1A). Directions under both the existing and proposed section can have a significant impact on the practical operation of the Act, as functions normally exercisable by one person or body can be made exercisable by another person or body. By the amendment made by clause 44(7) the directions may be given either by instrument in writing or by regulations. The introduction by the Bill of the latter option is mentioned at paragraphs 459 and 461 of the memorandum. This recognises that the directions might place burdens on private providers.

25. Clause 44(5) provides that the Secretary of State may direct the Board (by instrument in writing or regulations—at his choice) to exercise his direction-giving powers under section 253. Accordingly, the Board may, under the Bill, be given significant powers (albeit only in an emergency) with no requirement for Parliamentary control. The instrument giving the Board those powers is not required to be subject to Parliamentary control; and where the Board exercises those powers, even the option for their exercise to be subject to a Parliamentary procedure is lost. This is a particular aspect of the general issue we raise at paragraphs 15 and 16 above. **We draw this to the attention of the House in order to give the Minister the opportunity to explain the circumstances in which it is likely that the Board would be given the power to exercise the Secretary of State's functions of giving directions.**

Clauses 80 and 82—Licensing

26. Clause 80(1) provides that any person who provides a health care service for the purposes of the NHS must hold a licence (granted by Monitor, that is, the Independent Regulator of NHS Foundation Trusts, renamed by clause 58). Regulations, made by the Secretary of State and subject to the negative procedure, may determine, where a service provided by two or more persons acting in different capacities, which of them is to be regarded as providing the service. These regulations might determine, for example, where an organisation provides a service through its employees, whether it is the organisation, or each employee, that needs a licence (see paragraph 634 of the memorandum). This is based on section 10(2) of the Health and Social Care Act 2008.

27. The Bill specifies no criteria for the grant of a licence (see paragraphs 29 and 30 below). Clause 82 enables the Secretary of State, by regulations subject to negative procedure, to provide for exemptions from the need to hold a licence. The regulations may, in particular, specify as a condition of the exemption that a person comply with any direction given by Monitor. Clause 82(4) to (7) provides a notice procedure for making representations before the regulations are made, but this involves only statutory bodies, not those whose activities are to be licensed.

28. The power in clause 82 is explained at paragraphs 637 to 643 of the memorandum. The negative procedure is supported by the precedent of the Electricity Act 1989 (though that Act pre-dates the establishment of the Committee, and the notice procedure under that Act involves those whose activities are being regulated). But especially as the Bill itself has no licensing

criteria we consider this procedure insufficient at the introduction of the new scheme. **We therefore recommend that the first set of regulations made under clause 82 (exempting from the need to hold a licence) should be subject to affirmative procedure. For the subsequent exercise of the regulating-making power the negative procedure would provide the House with sufficient oversight of the regulations.**

Clause 85—Licensing Criteria

29. There are no licensing criteria specified in the Bill. Under clause 85(1) it is for the licensing authority, Monitor, to set the criteria administratively. In doing so, it is subject to the general duties set out in clause 59 and must have regard to the matters set out in clause 62.

30. Clause 85(3) requires Monitor to obtain the approval of the Secretary of State to the criteria. The Secretary of State may therefore withhold approval until Monitor produces criteria acceptable to him and there are no criteria in the Bill setting out the basis on which his approval would (or would not) be given. If the Secretary of State himself were setting the criteria, we would expect it to be done by regulations subject to a Parliamentary procedure. For example, the power of the Secretary of State to prescribe additional matters by reference to which an application for status as a CCG is granted is exercisable by regulations subject to a Parliamentary procedure (page 30, line 31 of the Bill). Similarly, applications for permission under section 12 of the Health and Social Care Act 2008 are assessed by the Care Quality Commission against requirements set out in regulations by the Secretary of State subject to a Parliamentary procedure. **As the criteria are crucial to the scheme which is novel and as the Secretary of State has a considerable role in setting the initial criteria under clause 85 we recommend that his approval should be given by order subject to affirmative procedure. Approval for revisions should be by order subject to negative procedure.**

Clause 234—NICE Recommendations

31. The National Institute for Health and Clinical Excellence is a Special Health Authority and as such subject to direction of the Secretary of State under section 8 of the 2006 Act as respects how it exercises its functions.

32. The Bill replaces it with a new body, the National Institute for Health and Care Excellence (NICE). NICE is subject to specific powers of direction (e.g. clauses 231 and 242) and there are powers in clauses 232, 234 to 237 and 239 for the Secretary of State to make regulations about various matters. But there is no general power of direction and indeed clause 234(4) prevents regulations permitting a direction to be given about the substance of NICE's advice, guidance or recommendations. So it is, in structural terms, a more independent body than its predecessor.

33. There is only one power relating to NICE which we wish to draw to the House's attention.

34. Clause 234 enables the Secretary of State, by regulations subject to negative procedure, to confer functions on NICE. Those functions may include making recommendations about any matter concerning or connected with the provision of NHS services, public health services or social care in England. The regulations may require any public body (other than a local

authority) exercising functions in connection with the provision of health services (defined in clause 230(3)) or social care in England to comply with a recommendation by NICE, i.e. the "recommendation" is mandatory. This is a significant power which in other circumstances might be subject to affirmative procedure. However, as paragraph 997 of the memorandum explains, at least so far as NHS commissioning bodies are concerned, the practical effect which could be achieved by the regulations is now achieved by directions. We therefore consider the negative procedure is adequate, **but draw to the House's attention to the fact that the recommendations may be made binding on a wide range of bodies exercising public functions, not just commissioning bodies.**

Clause 268—Information

35. Chapter 2 of Part 9 establishes the Health and Social Care Information Centre, which is subject to various powers of direction by the Secretary of State or the Board. The Centre has functions set out in the Bill, with power given to the Secretary of State to add to those functions in certain specific respects by regulations subject to negative procedure.

36. Clause 268 enables the Secretary of State, by regulations subject to negative procedure, to confer powers on either the Secretary of State or the Board to give directions which may (among other things) require any public body exercising functions in connection with the provision of health services or of adult social care in England (defined in clause 269) to exercise specified functions of the Centre, the Secretary of State, or the Board.

37. Accordingly, the power to make regulations may be used, for example, to give the Board powers of direction over local authorities. But there are limitations in clause 268(2) and (3). However, as the regulations are targeted only at information functions, we consider the negative procedure is sufficient.

LONDON OLYMPIC GAMES AND PARALYMPIC GAMES (AMENDMENT) BILL

Introduction

38. This Bill amends the London Olympic Games and Paralympic Games Act 2006 (the 2006 Act) to supplement the provision originally made there about advertising and trading in the vicinity of 2012 Games events, the sale of tickets, and the management of traffic. Only the first and third of these topics involve delegated powers. The Department for Culture, Media and Sport and the Department for Transport have prepared a memorandum for the Committee[2] to explain the way in which the legislative powers conferred by the 2006 Act, and the arrangements for their Parliamentary scrutiny, are affected by provisions of the Bill.

Clause 2—Advertising and Trading Regulations: Parliamentary Procedure

39. Section 19 of the 2006 Act confers wide powers on the Secretary of State to make regulations "about advertising in the vicinity of the London Olympic events", including provision about the place and nature of the advertising concerned and the time during which the restrictions are to apply (which must be no longer than is needed to secure compliance with the Host City Contract). Similar powers are conferred by section 25 for regulating trading in the vicinity of London Olympic events.

40. When the Committee considered those powers in 2006[3] we accepted that, although the powers were very wide, special considerations apply to legislating for events taking place only in one particular year. We therefore considered the delegation acceptable in view of the affirmative procedure that was to apply, and bearing in mind other factors such as the limited duration and geographical application of the regulations, and the specific requirements (in sections 23 and 29) to aim to ensure that those affected knew about the detailed provisions of the advertising and trading regulations well in advance.

41. Clause 2(1) and (2) of the Bill amend the 2006 Act to provide that only the first set of regulations under section 19 (about advertising) are to require the affirmative procedure, and subsequent regulations are to be negative; and the obligation to aim to give notice of the provisions to persons likely to be affected or interested is removed for the subsequent regulations. Subsections (3) and (4) make equivalent provision for regulations under section 25 (about trading).

42. The reasons for these changes are fully explained in paragraphs 15 to 21 of the memorandum. Because the first regulations must specify the places where and times when the regulations will apply, they would need to be amended if the venue or time of a Games event were to change. Paragraph 17 explains that such a change would be exceptional, and it gives examples of circumstances where it might be necessary. But a need to amend the regulations urgently would mean the requirements for affirmative approval

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2 www.parliament.uk/hldelegatedpowers-bills

3 11th Report, Session 2005–06, HL Paper 95

and for several months' notice to affected persons could not be met (paragraphs 18 and 19).

43. The department therefore proposes that only the first regulations under sections 19 and 25 should be affirmative and require minimum periods of notice. A draft of those regulations has recently been laid before Parliament for approval in the usual way. Until clause 2 of the Bill comes into force (which may be several months prior to the opening of the Games), any further regulations under section 19 or 25 would be affirmative (and the notice requirements would continue to apply to them). Thereafter, regulations would be subject to negative procedure, and the notice requirements would not apply.

44. Despite the importance which we previously attached to the affirmative procedure and the notice requirements, we accept the Department's case in principle for the changes now proposed. But we consider that the extent of the relaxation of Parliamentary procedure goes further than is necessary to resolve the difficulty explained in the memorandum. In paragraphs 17 and 18 it is envisaged that the first regulations would require amendment only if there were some urgent need to change the arrangements for one or more Games events. But clause 2(1) and (3) would have the effect of applying the same relaxation to amending regulations made several months before the Games began.

45. We therefore do not consider that the removal of the requirement for affirmative approval is appropriate without some limitation. We therefore recommend that affirmative procedure should apply unless the instrument contains a declaration by the minister making the regulations that it is necessary by reason of urgency to make the instrument without first laying it in draft for approval (in which case the negative procedure should apply).

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

Introduction

46. This Bill repeals provision in the Prevention of Terrorism Act 2005 for control orders (to be made against persons suspected of being, or having been, involved in terrorism-related activity) and introduces a new system of terrorism prevention and investigation measures (TPIM). The Home Office have prepared a memorandum for the Committee[4].

47. The Bill enables the Secretary of State to give a TPIM notice (clause 2) to impose TPIMs on an individual if certain conditions (clauses 3 and 4) are met. Schedule 1 sets out an exhaustive list of the measures that may be imposed. A TPIM notice is in force for one year and may be extended for a further year (clause 5). Except in cases of urgency (which are referred to a court after a TPIM notice has been given—see clause 3(5)(b), and Schedule 2), the Secretary of State must obtain the permission of the court before giving a notice (clauses 3(5)(a) and 6). If permission is given (or if a notice is confirmed by the court after being given) the court must give directions for a 'directions hearing' (clause 8) and then a 'review hearing' (clause 9) to review the decisions of the Secretary of State that the relevant conditions were, and continue to be, met. The Bill also provides for measures specified in a TPIM notice to be varied (clause 12), and for the revival of a notice that has been revoked or that has expired and not been extended (clause 13). There is provision about appeals and other court proceedings in clauses 16 to 18.

48. If it should consider that more stringent restrictions (than those available under Schedule 1) should be imposed on individuals in response to a raised level of threat to the public, the government has devised a system of enhanced TPIM notices, to be made available alongside the system of TPIM notices provided for by the Bill. It is proposed that this enhanced system would be put in place by the introduction of an Enhanced Terrorism Prevention and Investigation Measures Bill (previously published in draft[5]) by way of emergency legislation, with a view to enacting the powers to give the enhanced TPIM notices. However, special provision is required in case a need for enhanced measures is perceived to arise during a period when Parliament is dissolved: that is dealt with in clauses 26 and 27.

Clauses 26 and 27—Temporary Power for Enhanced Measures

49. Clause 26 deals with the position where it is considered that an enhanced TPIM regime should be available to the Secretary of State at a time when Parliament is dissolved (so that there is no opportunity to enact the Enhanced Terrorism Prevention and Investigation Measures Bill that is to be held in readiness). In that event, the Secretary of State may make a 'temporary enhanced TPIM order' (subsection (1)) during the period beginning with the dissolution and ending with the first Queen's Speech of the new Parliament.

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4 www.parliament.uk/hldelegatedpowers-bills

5 www.homeoffice.gov.uk/publications/about-us/legislation/etpim-bill-docs/etpim-draft-bill

50. Such an order would enable the Secretary of State to impose enhanced measures by notice (subsection (2)) on individuals whom she is satisfied on the balance of probabilities are or have been involved in terrorism-related activity. The categories of enhanced measures that may be imposed are set out in subsection (3): these are intended to correspond with the enhanced measures provided for in Schedule 1 to the draft Enhanced TPIM Bill; and subsections (5) to (10) specify the ways in which the arrangements for enhanced TPIM notices may differ from the relevant provisions (see clause 27(5)). These subsections will enable the temporary enhanced TPIM order to include provision corresponding with that contained in the draft Enhanced TPIM Bill. (For instance, subsection (10) enables provision of a kind to be found in clause 10, and some of clause 12, of the draft Bill.) Subsection (11) contains a Henry VIII power to amend, or apply (with or without modification), any enactment, including the Bill. The provision which it is envisaged may be made under this subsection is explained in paragraph 39 of the memorandum; and the temporary order would be likely to contain provision corresponding with that in clause 3 of, and Schedule 2 to, the draft Bill.

51. A temporary enhanced TPIM order under clause 26 would have effect for a maximum of 90 days (clause 27(1)) and would be subject to no Parliamentary procedure. It must however be laid before Parliament as soon as practicable after it is made (clause 27(2)).

52. In considering whether this form of delegation is appropriate, we took account of the following factors:

- The government is seeking to avoid introducing legislation to enable measures which go beyond those permissible under the 'standard' TPIM regime for which this Bill provides unless satisfied that the level of threat to the safety of the public justifies those measures.
- A temporary enhanced TPIM order may only be made during a limited period that is unlikely to exceed six weeks, and may have effect for no more than 90 days.
- The nature of the regime for which the order may provide is reasonably clear from a combination of:
    (i) clause 26 itself;
    (ii) clauses 1 to 7 of, and the Schedules to, the Bill; and
    (iii) the published draft Bill.
- Although provision of the kind enabled by this power would normally be expected to attract a requirement for prior approval in draft by both Houses; the circumstances in which the power may be exercised would prevent any opportunity for prior Parliamentary control.

53. We consider that the power conferred in clause 26 is in the nature of an exceptional measure to meet exceptional circumstances. In, and only in, those circumstances, we do not consider the power is inherently inappropriate. We draw this to the attention of the House as it is for the House to decide whether, as a matter of policy, the proposed process for enacting an enhanced TPIM regime while there is no Parliament is acceptable.