

THE VETERANS ADVISORY AND PENSIONS COMMITTEES BILL

Memorandum from the Ministry of Defence to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Veterans Advisory and Pensions Committees Bill (“the Bill”). This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. This Bill creates a new enabling power for the Secretary of State to make regulations establishing Veterans Advisory and Pensions Committees (VAPCs) for specified areas. This enabling power will be inserted into the Armed Forces Act 2006 and regulations will be made using the negative parliamentary procedure.
3. The enabling power in the Bill enables the regulations to confer functions upon the committees relating to eight different topics. It also permits regulations to make provision as to the manner in which the VAPCs carry out those functions, and as to the names of the VAPCs.
4. The bill essentially repeals and re-enacts an existing power, section 25 Social Security Act 1989 (“SSA 1989”). However the new power permits a much broader range of statutory functions to be given to the VAPCs than section 25. This is the key purpose of the Bill.

C. DELEGATED POWERS

Clause 1: Veterans advisory and pensions committees

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

5. This clause creates an enabling power which will be inserted in the Armed Forces Act 2006 (“AFA 2006”).
6. The power gives the Secretary of State the power to make regulations to establish committees known as VAPCs. These regulations may make provision regarding the membership of committees, the appointment and

removal of members, and the period and terms of membership. Additionally, the power allows regulations to give the VAPCs certain functions in relation to War Pensions, War Pensioners, Armed Forces Compensation Scheme (AFCS) benefits and AFCS benefits recipients.

7. The power is a re-enactment of an existing delegated power, section 25 SSA 1989, replaced with modifications. The key differences between the powers are the power to confer broader statutory functions in new section 343C(3)(a) to (d) AFA 2006 relating to former members of the armed forces; their family members; services provided by MOD to former members or their family members; and Armed Forces Covenant matters relating to former members or their family members. This broader power will allow regulations to be made that align the functions set out in regulations with the realities of the VAPCs' current activities.
8. The department has been careful to ensure that any extension to the scope of the delegated power, in comparison with the existing power in section 25 SSA 1989, is limited to what is necessary to achieve the policy outcomes.
9. It is considered appropriate to re-enact section 25 SSA 1989 in the Armed Forces Act 2006, instead of amending the existing section 25 SSA 1989, as (a) this power is more suited in subject matter to the Armed Forces Act 2006, which contains key legislation relating to the subject matter of the power, and (b) the SSA 1989 is old legislation that has largely been superseded and repealed.

Justification for taking the power

10. The VAPCs are non-departmental public bodies. As they currently undertake additional functions to their statutory functions including in relation to issues such as raising awareness of the Armed Forces Covenant, MOD's intention is to use the power to bring their current statutory functions more in line with their non-statutory functions and to maintain this alignment as the activities of the VAPCs may change over time. This is to ensure that the committees are operating on a clear statutory footing. Putting this level of detail on the face of the Bill would be inappropriate, and would remove the ability of Ministers to respond to changing demands from veterans in respect of their requirements.
11. Additionally, the power allows the regulations to include provisions about the manner in which the VAPCs are to discharge their functions. This is necessary in order to address issues that may arise as a result of a current independent review into the limited areas of veterans' issues and Armed Forces Covenant matters.
12. The principal concerns of veterans and their families may evolve over time due to societal changes (economic or political) and due to world events. The enabling power in the bill will allow for the statutory functions of the committees to be amended over time so that the committees can best serve the needs of veterans and reflect the contemporary concerns of the veteran community at any given point in time, without requiring amendment to primary legislation which would inevitably take more time to achieve. This aligns with the

Secretary of State's overall vision to ensure that the highest possible standards of support are provided to veterans.

13. The power is limited in that it only relates to the subject areas of Armed Forces support, veterans' issues and Armed Forces Covenant matters. It does not allow regulations to expand the functions of the VAPCs beyond the list of functions contained in the power.

Justification for the procedure

14. The negative resolution procedure is considered to provide an appropriate level of scrutiny as the subject matter of the regulations is not controversial in nature and there is nothing about the drafting of the enabling power that is novel, contentious or unusual. In particular, it is considered appropriate to follow the precedent of section 25 SSA 1989, on which this power is closely modelled, which provides for regulations made under it (by virtue of section 29 SSA 1989) to be subject to the negative resolution procedure.
15. Furthermore, there is nothing in the content of the enabling power and the associated subject matter is invasive of rights or draconian in its impact, nor does it interfere with vested rights or alter legal relationships.
16. There are no features in the enabling power which, when compared to the substance of the predecessor power in section 25 SSA 1989, would indicate that a heightened form of parliamentary scrutiny is required for oversight/safeguard purposes.

Clause 2: consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

17. Clause 2(2) contains a standard power for the Secretary of State to make consequential provision in consequence of provisions of the Bill. It is necessary to take such a power to ensure that amendments to legislation that are required as a result of the repeal of section 25 SSA 1989 in particular, can be made. As is usual with such powers, regulations made under this clause are subject to the negative resolution procedure.

Clause 3: commencement, and transitional and saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

18. Clause 3(3) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations; subsection (5) provides that such regulations may include transitional, transitory and saving provision in connection with commencement and to make different provision for different purposes. As is usual with commencement powers, regulations made under this clause 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.

Ministry of Defence
28 April 2023

Annex: Relevant sections of the DPRRC's Guidance on producing memoranda

Copied below are the sections from the [DPRRC's Guidance on the role and requirements of the Committee](#) that deal with the timing and content of these Delegated Powers Memoranda, for ease of access.

[...]

A. Terms of reference

3. The Committee's terms of reference, with regard to its delegated powers function, are:

“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 ...”.

[...]

C. The practicalities of submitting memoranda

When should the delegated powers memorandum be received by the Committee?

8. According to the Cabinet Office guidance (page 123), the Parliamentary Business and Legislation (PBL) Committee (a Cabinet Committee) require a delegated powers memorandum before it will approve a bill for introduction, and this memorandum must be made available to both the Commons and the Lords on introduction of the bill to either House.

9. As far as the DPRRC is concerned, however, the following applies:

- in the case of a bill beginning in the Lords, the memorandum must be received by the Committee on (or before) its introduction into the Lords; and
- in the case of a bill beginning in the Commons, the Committee will not consider the bill until it has been brought to the Lords (unless it is emergency legislation). A version of the memorandum, reflecting any changes during the bill's passage through the Commons, must be received by the Committee when the bill arrives in the Lords.

In what circumstances should supplementary memoranda be provided to the Committee?

10. A supplementary memorandum must be provided when:

- any government amendment is tabled which introduces a significant new delegated power or significantly amends an existing one. It is not required if an amendment is simply giving *full* effect to a recommendation by the Committee or addressing a point raised by it;
- for any non-government amendment with significant delegated powers which the Government are able to indicate that they will support;

- when a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones.

Early warning of amendments

11. Because of tight legislative timescales, the DPRRC reports on amendments on a “best endeavours” basis. Where possible, early warning of relevant government amendments should be given (along with advance sight of the text of amendments). This is particularly important with regard to Commons amendments as the timing of ping-pong is not subject to a minimum interval and can be scheduled quickly.

12. Where the Committee has been unable to consider a significant relevant amendment, it would assist the House if the Minister in charge of the bill were to bring this to the attention of the House when the amendment is being considered.

If a supplementary memorandum is required, when should it be received by the Committee?

13. Supplementary memoranda must be received on (or before) the day an amendment is tabled.

[...]

Format of memoranda

16. Memoranda, whether the original or a supplementary, should adopt the following format: each power should be introduced by an italic heading which should set out:

- the clause and subsection number
- who is to exercise the power
- by what means, and
- subject to what level (if any) of Parliamentary scrutiny.

The power should then be explained in the paragraph(s) below the italic heading (see Part Two of this guidance).

17. Do not give the powers additional identifiers (such as “Power 1”, “Power 2” etc.).

18. Take particular care:

- to ensure that the explanatory paragraph(s) apply to the provision identified in the italicised heading, and
- when a bill is brought up from the Commons (especially if it has been extensively amended on report), to ensure that the references to clause and subsection numbers are up to date.

19. When a bill which starts in the Lords is returned by the Commons with amendments which introduce significant new delegated powers or significantly amend existing ones, the supplementary memorandum should be structured by reference to the relevant numbered Commons amendments and should not be an updated version of the entire original memorandum.

[...]

PART TWO [of the guidance]

A. Powers to be covered by a memorandum

27. The memorandum should identify **every provision for delegated legislation** in the bill. Given that powers to give directions, issue codes of practice, etc. can be delegated legislative powers, to the extent that they are in a particular bill, the memorandum should cover them as well. Where a power is considered not to be legislative in character, the memorandum should explain fully why this is thought to be the case.

B. Content of the explanatory paragraph(s)

28. After the italicised heading (described in paragraph 16 above), an explanatory paragraph (or paragraphs) should:

- fully explain the purpose of the power
- describe why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill
- fully explain the choice of parliamentary scrutiny procedure provided for each power; and, if there is no scrutiny, the justification for its absence.

Explaining the power

29. With regard to explaining the power, take particular care to ensure that:

- the memorandum fully explains why the delegation is necessary and why the matter cannot be included in the bill. For example, if the reason is “we need flexibility”, explain why it is needed; if it is asserted “it is a reserve power”, explain why a reserve power is needed and what events are likely to trigger its use in the future; or, if the reason is “we need to respond urgently”, explain the reason for, and degree of, urgency;
- the memorandum justifies the full extent of the power. If the government has in mind a particular proposed exercise, it is helpful for the Committee to be told of this. But the Committee will judge the power by reference to what *could* be done under it by the current or any future government and not only what the current government say they intend to use the power for;
- where a power is delegated to a person or body other than a Minister, the memorandum explains why the power has been conferred on that person or body; and
- the memorandum fully justifies any unusual or novel delegations of power, powers to define, or amend definitions of, key expressions used in the bill, powers to interfere with vested rights or legal (for example, ordinary contractual) relationships, and powers to make provision by directions, or in codes or “guidance”.

Explaining the procedure

30. With regard to explaining the procedure, take particular care to ensure that:

- the memorandum fully explains any de-hybridising provision (that is, provision which enables an order which would otherwise be hybrid because it would affect private interests to proceed as if it were not). Unless addressed in the memorandum, the Committee will invite the House to satisfy itself that private interests otherwise protected by the hybrid instruments procedure will be adequately protected under provision in the bill;
- unless a power is self-evidently concerned only with Money or Supply provision, the choice of a Commons-only procedure is fully explained. The Committee will wish to be satisfied that the subject matter of the power is such that the Lords would not expect to scrutinise the exercise of the power;
- in circumstances where it is proposed that there should be a removal, or relaxation, of Parliamentary control, from the exercise of a power that presently requires it, the memorandum fully justifies the change;
- where the negative procedure is chosen on the ground that there is insufficient time for an affirmative, the memorandum explains why the “made affirmative” procedure is not applied; and
- where the chosen procedure is “first-time affirmative”, the memorandum fully explains why the negative procedure is thought to afford adequate scrutiny on subsequent exercises of the power, and on what that prediction is based, bearing in mind that the power will remain exercisable by future governments.

31. The procedure chosen for each power should be explained in the memorandum in its own context and on its own merits. Avoid simple formulaic explanations such as “the provision is procedural”, “the regulations will be technical”, “the order will make administrative provision” or “the provision will be detailed” without analysing the effect of the power to explain why this is thought to be the case.

Use of precedent

32. Where there is a precedent for a delegation or the choice of Parliamentary procedure, the memorandum should indicate this, identify the precedent and explain its relevance to the bill. The Committee will take any precedent into account in its examination of a bill although will not necessarily find a provision appropriate on the basis of precedent alone. In particular, if the power is a re-enactment with modifications of an existing power, the memorandum should say so and explain the differences.

33. A precedent will hold less weight if:

- if it predates the Committee (that is, pre-1993)
- it is an Act arising out of a private Member’s bill
- the power cited was inserted by an amendment at a late stage in a bill’s passage.

C. Some principles applied by the Committee

34. When the Committee was first set up, it concluded that it was not possible to set out a list of criteria which would give precision to the test of appropriateness. Instead it was decided that the merits of the proposed use of a delegated power had to be considered on a case by case basis. Whilst the Committee continues to consider each delegation on its merits, the accumulation of over twenty years of experience has enabled the Committee to develop a number of principles which provide the

starting point for its consideration of delegated powers. These principles are set out in the following paragraphs.

Principles

35. Every Henry VIII power (that is, a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament), including where the power is expressed in terms of “modification”, should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the memorandum.

36. If a bill is, in effect, a skeleton bill (so that the real operation of the Act would be entirely by the regulations, or orders made under it), or if part of a bill is, in effect, a skeleton part of a bill, the Committee will expect a full justification for the decision to adopt that structure of powers.

37. With regard to any power to make incidental, consequential or similar provision,

- where it is a Henry VIII power, the memorandum should explain why the particular form of wording setting out the power has been adopted. The presumption in respect of Henry VIII powers, that they should be subject to the affirmative procedure, applies. Therefore, where they are not, the memorandum should explain why not. Where the power extends to the amendment of future Acts, the memorandum should explain clearly why it is thought such a power is necessary;
- where it is a non-Henry VIII power which is included in a commencement order (and which will not therefore be subject to any Parliamentary procedure), the Committee will expect such a power to be covered by the delegated powers memorandum and explained in the usual way.

38. Where a bill creates a criminal offence with provision for the penalty to be set by delegated legislation, the Committee would expect, save in exceptional circumstances, the maximum penalty on conviction to be included on the face of the bill. Therefore, where this is not the case, the memorandum should explain why not and at the very least the Committee would expect the instrument to be subject to affirmative procedure. Similarly, where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification.

[END]