



Toolkit for scrutinising delegated powers in Bills

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This toolkit will assist parliamentarians, researchers and civil society to understand and scrutinise delegated powers contained in Bills. It is designed to help identify:

- (i) whether a clause or paragraph delegates a legislative power;**
- (ii) whether it is an appropriate delegation of power; and**
- (iii) whether the exercise of that power is subject to the appropriate degree of parliamentary scrutiny**

– in order to see where amendments or other actions, such as seeking further clarification from the Minister/Department, may be needed.

The toolkit is structured as sequential ‘Yes/No’ questions, with the answers colour-coded as follows:

A green square indicates that there does not appear to be a problem. Proceed to the question number indicated in the adjacent square.

A yellow square indicates that there may be a problem. Proceed to the question number indicated in the adjacent square. A potential problem is addressed in this following question.

A red square indicates that the provision is likely to be an inappropriate delegation of legislative power, or the exercise of the power may be subject to an inappropriate degree of parliamentary scrutiny. We recommend proceeding to the question number indicated in the adjacent square, as there may also be other aspects of the power that may be problematic.

Does the clause or paragraph delegate legislative power?

1	Does the clause or paragraph allow or instruct a Minister (or other individual or body) to make further provision that is not included in the Bill? ¹	YES Q2	NO END ²
2	Will the further provision impose or detail legal requirements or legally enforceable rules (something that someone must follow)?	YES Q3	NO END ³
3	Will the provision be made by Statutory Instrument? ⁴	YES Q5	NO Q4
4	Has a convincing reason been provided (either by a Minister or in the Bill's supporting documents) for why such provision is to be made by something other than Statutory Instruments?	YES Q5	NO Q5

Does the delegated power form part of a 'framework' / 'skeleton' approach?

5	Is enough substantive material included on the face of the Bill to enable you to understand how the policy related to the delegated power will operate and be implemented in practice? ⁵	YES Q7	NO Q6
6	Has the Government provided a convincing justification (either by a Minister or in the Bill's supporting documents) for leaving the real operation and detail of the policy to delegated legislation, including an explanation as to why no other approach is reasonable to adopt?	YES Q7	NO Q7

Is the delegated power justified?

7	Is it clear what the delegated power will be used for? ⁶	YES Q8	NO Q8
8	Is the only justification for the power any of the following: (a) the detailed policy has not been developed and/or there is not enough time to develop it; (b) the measures are very technical in nature; (c) it is needed to align with international standards or meet international obligations indefinitely? ⁷	YES Q11	NO Q9

¹ For example, the clause or paragraph may allow Ministers to make regulations, orders, or rules that specify further changes or provide further details that are not included in the Bill.

² The clause/paragraph does not confer a delegated power.

³ The clause/paragraph does not confer a legislative power.

⁴ The answer to this question may be in a separate clause/paragraph in the Bill. Examples of other devices that have been used include guidance, directions, public notice, protocols, and codes of practice. The use of these devices to legislate has been criticised by the House of Lords Delegated Powers and Regulatory Reform Committee, as such devices may circumvent the publication requirements that accompany, and the parliamentary scrutiny that is afforded to, Statutory Instruments.

⁵ Answering this question may require a nuanced judgment. The answer may well be 'in part'. If in doubt, answer 'No'.

⁶ If the purpose of the delegated power is not clear from the face of the Bill, it can also be assessed using the Bill's supporting documents, such as the Explanatory Notes and the Delegated Powers Memorandum.

⁷ The Cabinet Office 'Guide to Making Legislation' explicitly recognises that these justifications, on their own, are unlikely to be sufficient for the inclusion of a delegated power in a Bill.

9

Is the power justified on the basis that: (a) there is a need for speed; and/or (b) the subject matter requires frequent adjusting?

YES

Q10

NO

Q11

10

Is the need for speed or frequent adjustment clear from the face of the Bill or supported by empirical evidence or precedent in the Bill's supporting documents?

YES

Q11

NO

Q11

11

Is it clear to you why the provision that can be made using the power could not or should not be included in the current Bill or a future Bill?

YES

Q12

NO

Q12

What is the scope of the delegated power?

12

Could the power be used to make more wide-ranging change than is necessary to achieve its stated purpose?⁸

YES

Q13

NO

Q15

13

Has the Government explained (in the Bill's supporting documents or in material provided by a Minister) how the exercise of the power is to be limited to its stated purpose?

YES

Q14

NO

Q15

14

Are apparent limitations of the power based only on assurances given by the Government, such as through statements or supporting documents, rather than through limitations that **must** be followed?

YES

Q15

NO

Q15

15

Has the ability to exercise the power been appropriately time-limited on the face of the Bill to expire on a set date or after a set period of time (a sunset provision)?

YES

Q17

NO

Q16

16

Is there a good reason for the power's duration?⁹

YES

Q17

NO

Q17

Is the parliamentary procedure appropriate?

17

Could the exercise of the power make changes or cover policy that you feel ought to be debated and actively approved by parliamentarians?

YES

Q18

NO

Q20

18

Can the provision made using the power only be made into law or remain law after being actively approved by one or both Houses of Parliament?¹⁰ (the affirmative procedure)

YES

Q19

NO

Q20

⁸ For example, the power may include ambiguous words that may create wide ministerial discretion, such as a clause or paragraph that enables a Minister to 'simplify or improve' a matter or make modifications which are considered 'expedient'. Alternatively, there may not be any ambiguous words used, but the actual scope of the power may exceed the scope needed to address the power's stated purpose.

⁹ While an explicit reason may be provided in the Bill's supporting documents or by a Minister, good reasons may be apparent based purely on the power's subject matter.

¹⁰ The answer to this question may be in a separate clause/paragraph in the Bill.

19 Does such a requirement only apply to the first exercise of the power despite the scope of the power remaining the same on subsequent uses?

YES

Q20

NO

Q20

20 Is there a comparable power under existing law?¹¹

YES

Q21

NO

Q22

21 Is the exercise of the power subject to a less stringent parliamentary procedure (including bespoke 'strengthened scrutiny' procedures and/or other safeguards) when compared to a similar power under existing law?

YES

Q22

NO

Q22

Is the delegated power a 'Henry VIII power'?

22 Does the power allow a Minister (or other individual or body) to amend, repeal, or otherwise alter the effect of an Act of Parliament (a 'Henry VIII power')?

YES

Q23

NO

Q28

23 Has a convincing justification been provided (either by a Minister or in the Bill's supporting documents) for conferring such a power?

YES

Q24

NO

Q24

24 Does the power also allow a Minister (or other individual or body) to make provision that amends, repeals, or otherwise alters the effect of a **future** Act of Parliament?

YES

Q25

NO

Q26

25 Has the Government explained (either by a Minister or in the Bill's supporting documents) why it is thought such a power to amend a **future** Act of Parliament is necessary?

YES

Q26

NO

Q26

26 Is the power subject to the affirmative procedure?

YES

Q28

NO

Q27

27 Has a convincing justification been provided (either by a Minister or in the Bill's supporting documents) as to why the Government has chosen a different parliamentary procedure?¹²

YES

Q28

NO

Q28

Is it one of the following types of power or subject matter?

Power enabling legislative sub-delegation

28 Does the power permit the delegated legislation made under it to further delegate legislative power to a Minister (or other individual or body)?

YES

Q29

NO

Q30

¹¹ For example, if the delegated power in the Bill enables a Minister to abolish a public body, is there a power in an existing Act of Parliament that enables a Minister to abolish a different public body?

¹² There is a strong presumption for 'Henry VIII powers' to be subject to the affirmative procedure.

29 Will the exercise of the sub-delegated power be subject to the same parliamentary oversight as the exercise of the original delegated power?¹³

YES	Q30	NO	Q30
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Power to make consequential provision

30 Does the power allow consequential changes to be made to legislation?¹⁴

YES	Q31	NO	Q32
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31 Does the power allow the Minister to make changes that they consider 'appropriate in consequence of' or 'appropriate in connection with' a part of the Bill?¹⁵

YES	Q32	NO	Q32
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Criminal offences

32 Does the power permit criminal offences to be created or modified by delegated legislation?¹⁶

YES	Q33	NO	Q33
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33 Does the power permit the penalty for criminal offences (newly created or existing) to be set by delegated legislation?

YES	Q34	NO	Q35
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34 Is the maximum penalty included on the face of the Bill?

YES	Q35	NO	Q35
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Fees and charges

35 Can the power be exercised to impose fees or charges for services or functions?

YES	Q36	NO	Q37
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36 Can the fees or charges operate on more than a cost-recovery basis?¹⁷

YES	Q37	NO	Q37
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Power to make retrospective provision

37 Is delegated legislation made using the power permitted to make changes to the law that have effect from a date earlier than the date that the legislation is made?

YES	Q38	NO	END
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38 Is the power subject to the affirmative procedure?¹⁸

YES	END	NO	END
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¹³ Legislation made using sub-delegated powers is still the law. Therefore, sub-delegation of power without provision for parliamentary scrutiny of its exercise breaks the link between law-making and parliamentary accountability.

¹⁴ These are changes made in consequence of substantive changes made by other provision in the Bill.

¹⁵ Such wording may allow ongoing changes to be made based largely on a Minister's subjective judgment.

¹⁶ It is normally for Parliament, not Ministers, to legislate for the creation or modification of criminal offenses.

¹⁷ Fees and charges for services or functions operating on more than a cost-recovery basis may amount to taxation, which is normally a matter for a Finance Bill.

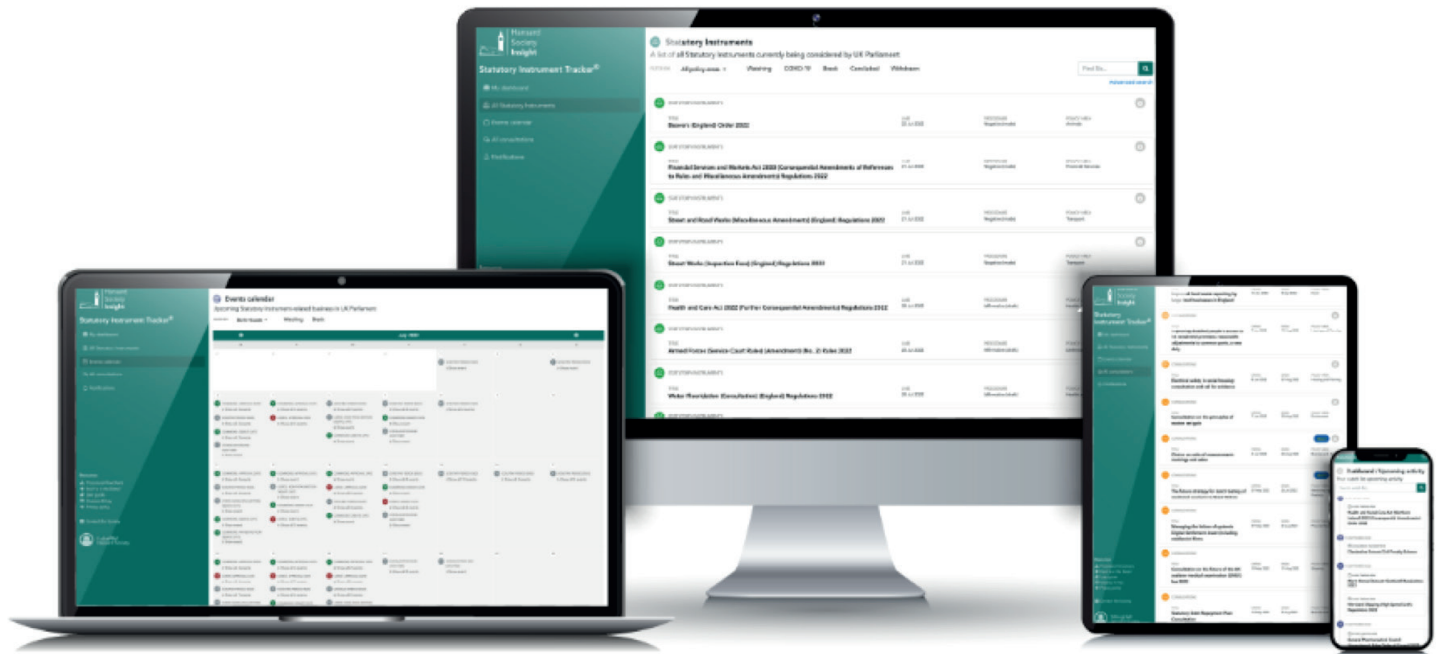
¹⁸ There is a strong presumption that powers to make retrospective provision should be subject to the affirmative procedure.

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