



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

7th Report of Session 2021–22

Armed Forces Bill

**Critical Benchmarks
(References and
Administrators' Liability)
Bill [HL]**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) 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;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

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; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Henty](#)

[Lord Janvrin](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Tope](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcrpublications.

General Information

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelegatedpowers@parliament.uk.

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 and certain instruments made under other Acts specified in the Committee's terms of reference.

Seventh Report

ARMED FORCES BILL

1. The primary purpose of the Bill is to continue in force the Armed Forces Act 2006 (“the 2006 Act”) which would otherwise cease to have effect at the end of 2021. The Bill also makes provision about the following matters (amongst other things):
 - amendments to the service justice system, including changes to the membership of Courts Martial;
 - the prosecution of offences where there is concurrent jurisdiction between service law and the civilian criminal law;
 - imposing duties on public bodies with respect to the armed forces covenant;
 - creating a new Service Police Complaints Commissioner.
2. The Ministry of Defence (MOD) has provided a delegated powers memorandum (“the memorandum”).

Clause 8—Armed forces covenant

3. Clause 8 amends Part 16A of the 2006 Act which relates to the armed forces covenant. Clause 8 inserts a number of new sections into Part 16A the primary purpose of which is to require specified public authorities which have functions in the fields of healthcare, education and housing to have regard to the following matters when exercising specified functions in those fields:
 - the unique obligations and sacrifices made by the armed forces;
 - the principle that it is desirable to remove disadvantages arising for service people;
 - the principle that special provision for service people may be justified by the effects on such people of membership of the armed forces.

The public authorities to which this duty applies and the functions to which it applies are specified separately for each of England, Wales, Scotland and Northern Ireland. In each case a wide range of bodies and functions are specified.

4. One of the sections inserted into Part 16A of the 2006 Act (section 343AE) confers a power on the Secretary of State to issue guidance relating to the duties imposed by the Part on public authorities. It also requires the relevant public authorities to have regard to the guidance when exercising the healthcare, education and housing functions to which the duties imposed by the Part apply. The guidance is not subject to any requirement for it to be scrutinised by or even laid before Parliament. Instead, a duty is imposed on the Secretary of State to publish the current version of any guidance that has been issued under section 343AE. There are two aspects to this power that we would wish to draw to the attention of the House.

5. The armed forces covenant principles relate to the disadvantages arising for “service people” and also with the provision to be made for “service people”. The term “service people” is defined in section 343B to include “relevant family members” of service and former service personnel. However, there is no description of who is a relevant family member for these purposes on the face of the primary legislation. The Department makes it clear in the memorandum that the guidance will specify who is to be regarded as a relevant family member for the purposes of the duties imposed by Part 16A.¹ To this extent the guidance will have legislative effect. As we have made clear in the past,² we do not consider it appropriate for legislation to be made in the form of guidance. **Accordingly, we consider that the power to define “relevant family member” should be exercised through the making of regulations. How “relevant family member” is defined is liable to have a significant impact on the nature and scope of the armed forces covenant principles and therefore on the duties imposed on public authorities by the Bill. For this reason, we consider that the regulations defining “relevant family member” should be subject to the affirmative resolution procedure.**
6. The Department explains in the memorandum why the guidance is not subject to any parliamentary procedure. It states:³

“It is uncommon for statutory guidance of this nature to have a parliamentary procedure. This clause contains a duty to consult the devolved administrations prior to issuing guidance insofar as it concerns devolved functions. This provides sufficient safeguards for the nature of the guidance.”
7. We do not find this explanation convincing. Consultation and parliamentary scrutiny are aimed at different things, and we do not consider that consultation can be viewed as a substitute for parliamentary scrutiny. We have indicated on numerous occasions that we consider that guidance should be subject to parliamentary scrutiny in circumstances where, as here, a legal duty is placed on public authorities to have regard to the guidance in exercising statutory functions so that the guidance is liable to have a significant impact on how the functions are exercised. We consider the arguments are particularly strong here:
 - The armed forces covenant principles are expressed in very broad terms and so are capable of being construed in a variety of ways. The Department acknowledges in the memorandum that one of the purposes of the guidance is to indicate how the principles should be construed by the public authorities at whom they are aimed.
 - The armed forces covenant principles will affect a wide range of functions in the fields of education, healthcare and housing. It seems very likely that the guidance will have a significant impact on how the functions are exercised. The Department refers in the memorandum to the fact that the new duties imposed by clause 8 are currently applied on a voluntary basis by the relevant public bodies; and that there is variation in both observance and delivery across the United Kingdom. The implication is that the purpose of the guidance is to promote

1 See paragraph 32 of the memorandum.

2 [31st Report](#), Session 2017–19 (HL Paper 177).

3 See paragraph 33 of the memorandum.

consistency in how public authorities comply with the duties imposed by Part 16A. Ensuring consistency must imply that the Government expect the guidance to have a significant impact on how the relevant functions are exercised in relation to service people. It seems clear from what is said in the memorandum that one of the purposes of the guidance is to affect the specific actions which are taken by the authorities in exercising the functions to which the guidance relates.

8. **In the circumstances, we consider that guidance issued under section 343E should be made subject to parliamentary scrutiny. We consider that the draft affirmative resolution procedure should apply, given the broad range of functions to which the guidance relates and the significant impact the guidance is liable to have on the exercise of those functions.**

Clause 10—Power to restrict grounds of appeal in connection with service complaints

9. Part 14A of the 2006 Act provides the statutory underpinning for the making of complaints by persons subject to service law. Part 14A has the effect of requiring the Defence Council to decide whether the complaint is to be dealt with by the Defence Council themselves or by a person or panel of persons appointed by the Defence Council. Where the decision is not taken by the Defence Council, there is a requirement for service complaints regulations to make provision enabling the complainant to appeal to the Defence Council.
10. Clause 10(3) amends section 340D of the 2006 Act, which is the provision of Part 14A which deals with appeals. One of the effects of the amendment is to allow service complaints regulations to restrict the grounds on which an appeal to the Defence Council may be made. The power is expressed broadly and does not contain any limitations on what those restrictions might be.
11. The memorandum does not explain why such a broad power is needed. According to the memorandum,⁴ the amendment forms part of a wider package of reforms of the service complaints system to enable closer alignment between the grounds of appeal in the service complaints system and the MOD's civilian grievances system, where an appeal is allowed only where there is new evidence or there is a suggestion of a procedural error. This suggests that it is already known what restrictions on grounds of appeal will be provided for in service complaints regulations, and that this could be set out on the face of the primary legislation.
12. **In the circumstances, we recommend that, unless the Government provide convincing reasons for leaving the restrictions on grounds of appeal to be determined in the regulations, the Bill should set out on its face the provision to be made in service complaints regulations about these matters.**

⁴ See paragraphs 45 and 46 of the memorandum.

**CRITICAL BENCHMARKS (REFERENCES AND
ADMINISTRATORS' LIABILITY) BILL [HL]**

13. There is nothing in this Bill which we would wish to draw to the attention of the House.

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 8 September 2021 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Baroness Browning, Lord Janvrin, Lord Goddard of Stockport, Lord Hendy, Baroness Meacher, Lord Rowlands and Lord Tope.