

ARMED FORCES COMMISSIONER 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 Armed Forces Commissioner Bill (“the Bill”). The Bill was introduced in the House of Commons on 6 November 2024. 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. The Armed Forces Commissioner Bill will establish and confer functions on the office of the Armed Forces Commissioner and abolish the office of the Service Complaints Ombudsman for the Armed Forces (SCOAF). The Commissioner will be able to proactively launch independent investigations into issues affecting service personnel and their families more widely, and to lay those reports before Parliament. The Commissioner will be a direct point of contact for serving personnel and their families, providing a strong, independent voice and increasing parliamentary oversight and Ministerial and departmental accountability to those who serve our nation.
3. The Armed Forces Continuous Attitude Survey has shown a fall in morale in our Armed Forces over the last decade and has also indicated systemic challenges in terms of retaining our personnel. One of the first steps towards tackling this will be the establishment of a new Armed Forces Commissioner. This is a Government manifesto commitment and is the first in a series of steps that will be taken by the new Government to renew the nation’s contract with those who serve, and to improve service life.
4. The current remit of the SCOAF provides for the independent and impartial oversight of the service complaints system for members of the UK Armed Forces and is set out in the Armed Forces Act 2006. The current functions of the office of SCOAF provide powers for them to help service personnel access the service complaints system, investigate complaints and report to the Secretary of State annually on the operation of the service complaints system. However, the SCOAF’s remit is narrow. The Ombudsman can only look into individual complaints, following completion of the service complaints process. Their remit is reactive and does not allow proactive investigations into issues facing our Armed Forces. The office of the SCOAF will be abolished and, in addition to their new powers, the Commissioner will incorporate the functions currently undertaken by the SCOAF.

5. The main elements of the Bill are:

- a) Establishing the office of the Armed Forces Commissioner in the Armed Forces Act 2006.
- b) The Commissioner's new powers to investigate general service welfare matters and the scope of such investigations. This will include an obligation on the Secretary of State to facilitate and co-operate with the Commissioner and consider any findings or recommendations made by the Commissioner in connection with such an investigation.
- c) The Commissioner's new powers to enter service premises in connection with an investigation into a general service welfare matter. This will include an ability for the Commissioner to access service premises with or without notice, subject to certain restrictions in relation to national security and personal safety.
- d) The Commissioner's expanded powers (from those currently set out in the Armed Forces Act 2006) to require information and documents for the purposes of their investigations and related enforcement mechanisms.
- e) The Commissioner's new powers and requirements in relation to reports that are provided to the Secretary of State to lay before Parliament. This will cover annual reporting requirements as well as specific reports containing the results of investigations into general service welfare matters.
- f) Making a technical amendment to the service complaints process to ensure that admissibility decisions can be made by civilians, as this is currently limited to certain officers.
- g) Abolishing the current office of the SCOAF and transferring their existing functions to the Commissioner.

6. The Bill has been drafted in a way which minimises the use of delegated powers, with as much detail as possible contained on the face of the Bill. **The Bill therefore creates only 3 new powers.** Details of these are set out at section C below.

C. DELEGATED POWERS

Clause 4(2): Commissioner's role in relation to general service welfare (new section 340IA(4)(e) (Commissioner investigations of general service welfare matters))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

7. Clause 4(2) inserts new section 340IA into the Armed Forces Act 2006, which creates a power for the Commissioner to conduct investigations into general service welfare matters. Subject to the following, the Bill provides that a “general service welfare matter” is a matter which in the Commissioner’s opinion arises in connection with the ongoing service of persons subject to service law and may materially affect the welfare of those persons or relevant family members.
8. Subsection (4) provides a list of matters that must be excluded. This list includes matters which should more appropriately be dealt with via the service complaint system, or which relate to a service inquiry, criminal investigation or criminal proceedings, or public inquiry. Subsection (4)(e) then provides that this list includes such other matters as may be specified by regulations made by the Secretary of State.

Justification for taking the power

9. MOD anticipates that certain defence matters should not be within the remit of the Commissioner’s thematic reports. However, due to the evolving (and sometimes urgent) nature of UK defence, there is a need to preserve the ability to respond and update the remit regularly and quickly. It is therefore not considered appropriate to provide full detail on the face of the bill and it would run the risk of becoming quickly outdated.
10. However, the regulation-making power is limited by subsection (6), which states that any such matter may only be one in which the Secretary of State considers would impinge on national security or might jeopardise the safety of any person. This narrowing of the power ensures minimal restriction (generally or in a particular case) of the Commissioner’s discretion to launch investigations into a wide range of matters and thus supports their independence whilst providing that there are appropriate safeguards in place.

Justification for the procedure

11. Given the potential for any regulations made under the power in subsection (4)(e) to contain important limits to the scope of the Commissioner’s investigations (a fundamental power in the exercise of their functions), it is considered appropriate to ensure that they receive a high degree of scrutiny and therefore should be subject to the affirmative procedure. This is achieved by amending section 373 Armed Forces Act.

Clause 4(2): Commissioner’s role in relation to general service welfare (*new section 340IA(8) (Commissioner investigations of general service welfare matters)*)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

12. Clause 1(1) inserts new section 365AA and clause 4(2) inserts new section 340IA into the Armed Forces Act 2006. Subsection (2)(a)(i) and (ii) of new section 365AA provide that the functions of the Commissioner are to promote the welfare of persons subject to service law and relevant family members, and to improve the public's understanding of the issues faced by persons subject to service law and by relevant family members. New section 340IA creates a power for the Commissioner to conduct investigations into general service welfare matters. Subsections (2)(a) and (2)(b) provide that a "general service welfare matter" is a matter which in the Commissioner's opinion arises in connection with the ongoing service of persons subject to service law and may materially affect the welfare of those persons or relevant family members.
13. To enable these provisions to be properly understood and applied, it is therefore necessary to define a "relevant family member". Subsection (8) provides that this may be specified in regulations made by the Secretary of State.

Justification for taking the power

14. There is potentially a wide range of individuals who may be considered sufficiently connected to a service person to constitute a family member for the purposes of the Commissioner's functions under new section 365AA and new section 340IA. Trying to overly constrain this definition may risk suggesting that family in this context is more of a traditional nuclear family and may not reflect differing circumstances (such as the bereaved) and changing understandings of what constitutes "family" in this context. There is therefore likely to be a degree of fine and technical detail that would not be appropriate to set out on the face of the bill. In addition, there is a desire to not overly restrict the definition in primary legislation to provide a degree of flexibility with regards to the definition and ensure that it is adequately future-proofed.
15. In addition to the above, there is existing precedent contained in section 343B(4) Armed Forces Act 2006 which similarly provides that the definition of "relevant family member" is contained in secondary legislation, relevant for the Armed Forces Covenant. The principles under the Covenant and the remit of the Commissioner will operate in a similar policy space (the welfare / effect of service on service persons and their families). There is therefore a strong policy desire to ensure that the two definitions of "relevant family member" retain parity as far as possible. It may be impractical to be relying on almost the same definition but having different procedures for amending them, and also inconsistent if the definition for the Commissioner was contained in the Armed Forces Act 2006 but the definition for the Covenant was not.

Justification for the procedure

16. 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. The regulations would be a procedural matter to simply ensure that the legislation works most appropriately to the different circumstances in which it will be applied.

17. The power has been tightly drafted, so that it only applies to the Commissioner's functions under new section 365AA and new section 340IA.

Clause 7: Commencement

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and Purpose

18. Subsection (1) of clause 7 of the Bill confers on the Secretary of State a regulation-making power to bring into force the Bill (except clauses 6, 7 and 8) on such day as they may appoint. Subsection (3) provides that the Secretary of State may also by regulations make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

Justification for taking the power

19. This is a standard clause for commencing the provisions of an Act, and making saving and transitional provisions related to commencement, by regulations.

20. Leaving a subset of provisions in the Bill, other than those for which the Bill itself provides the commencement date, to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, appoint and set up the Commissioner's office, issue guidance and update policies as appropriate, and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

21. It is standard practice for the power to bring into force the provisions of an Act on a specified day not to require any further Parliamentary procedure.