



BRIEFING PAPER

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Armed Forces Bill 2015-16: Lords amendments

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Summary

The Armed Forces Bill 2015-16 (175) had its Third Reading in the House of Lords on 5 May 2016. The Commons is due to consider Lords amendments on 11 May 2016.

This briefing paper provides information on amendments made to the Bill during its progress through the House of Lords.

Full background on the Bill, and its provisions as originally presented, can be found in Library Briefing Paper 7324, [Armed Forces Bill 2015](#).

Lords amendments

The Government tabled two amendments to the Bill at Report Stage which were agreed unopposed. Both amendments concern matters raised by the Delegated Powers and Regulatory Reform Committee of the House of Lords and are technical in nature.

Government Commitments

The Government also undertook a number of measures discussed during the Bill's passage through both chambers which were not written into the Bill. These include:

- A commitment to publish annually statistics on sexual offences in the armed forces, with the first set expected to be published before the 2016 summer recess;
- A review of the powers of commanding officers to investigate allegations of sexual assault and whether to amend Schedule 2 of the *Armed Forces Act 2006* via secondary legislation. This review is expected to take until the end of 2016.
- A planned review of the Armed Forces Compensation Scheme including the scheme's coverage and levels of awards, in particular for those most seriously injured, including those with mental health conditions. It is expected to report at the end of 2016.

The purpose of the Bill

The Armed Forces Bill 2015-16 will renew the *Armed Forces Act 2006* (itself renewed by the *Armed Forces Act 2011*) which provides the legal basis for the existence of the Armed Forces as disciplined bodies.

An Armed Forces Act is required every five years. The need for an Act dates back to the 1688 Bill of Rights which requires the consent of Parliament to be given to maintain an Army in time of peace. As such, one of the Act's most important functions is to provide the legal basis for the armed forces to continue to exist as a disciplined force.

The Bill updates elements of the Armed Forces' disciplinary system and extends the powers of Ministry of Defence firefighters.

The Bill contains provisions relating to the following matters:

- Duration of the Armed Forces Act 2006
- Testing for alcohol and drugs
- Investigation and charging of service offences
- Suspended sentences of service detention
- Offenders assisting investigations and prosecutions
- The Armed Forces Act 2006 outside the United Kingdom
- Repeals relating to discharge for homosexual acts
- War pensions committees
- Ministry of Defence firefighters

The *Armed Forces Bill 2015-16* completed its House of Commons stages on 11 January 2016. It received its Second Reading in the Lords on [11 February 2016](#) and was debated in Committee in two sittings on [1 February](#) and [3 February](#) 2016. It was considered on Report on [27 February 2016](#) and had its Third Reading on [5 May 2016](#).

1. Scrutiny in the House of Commons

This section briefly summarises these new clauses. A summary of the Bill's stages in the House of Commons can be found in House of Lords Library Briefing Paper LLN2016-0005 [Armed Forces Bill 2015-16: Briefing for Lords stages](#).

War pensions committee

A Government clause relating to war pensions committees was added to the Bill without opposition during Committee stage.¹ It expands the statutory remit of the Veterans Advisory and Pensions Committees.

War pensions committees are established by regulations made by the Secretary of State under section 25(1) of the *Social Security Act 1989*. Mark Lancaster, Parliamentary Under-Secretary at the Ministry of Defence, explained:

The new clause would amend section 25 of the Social Security Act 1989 to allow the Secretary of State to make regulations enabling the VAPCs to provide advice and deal with complaints in relation to the armed forces compensation scheme 2005 and future compensation schemes enacted under the Armed Forces (Pensions and Compensation) Act 2004.

The VAPCs already have certain functions and procedures, as described in section 25 of the 1989 Act and the war pensions committees regulations. This amendment would expand that remit, providing a legislative basis to underpin their broader role and functions.²

Homosexuality

A Government clause repealing legislation relating to a homosexual act constituting grounds for discharge from the Armed Forces was added to the Bill at Report. This clause was prompted by an amendment tabled during Committee stage by Kevan Jones, representing the Opposition.

The Government introduced the new clause repealing sections 146(4) and 147(3) of the *Criminal Justice and Public Order Act 1994* relating to a homosexual act constituting grounds for discharge from the Armed Forces (clause 14 in the version of the Bill, as introduced in the House of Lords). Introducing the new clause, Mark Lancaster, Parliamentary Under-Secretary at the Ministry of Defence, stated:

I am delighted to be speaking to this new clause today. It reflects the Government's commitment to the fair and equal treatment of lesbian, gay, bisexual and transgender armed forces personnel. It repeals two provisions regarding homosexuality in the Armed Forces that are inconsistent with the Department's current policies and the Government's equality and discrimination policies more generally [...] When sections 146 and 147 were enacted, it was Government policy that homosexuality was incompatible with service in the Armed Forces and, accordingly, members of the Armed Forces who engaged in homosexual activity were administratively discharged. That policy was rightly abandoned in January 2000, following a judgment of the European Court of Human Rights.³

Previously, the Government had expressed the view that a Law Commission bill may be the most appropriate legislative vehicle to repeal this legislation because it applied to both the Armed Forces and the Merchant Navy, which falls under the auspices of the Department for Transport. However, Mark Lancaster explained that the Government had "decoupled the two issues", and that the Department for Transport had undertaken to

¹ HC Deb 16 December 2015, c1609–12

² HC Deb 16 December 2015 c1609

³ HC Deb 11 January 2016 c600-1

“deal” with the legislation as it applied to the Merchant Navy “as soon as possible”.⁴ Opposition, SNP and Ulster Unionist spokespersons spoke in favour of the new clause and it was added to the Bill unopposed.

For the avoidance of confusion, it should be noted that the policy of administratively dismissing members of the armed forces who were engaged in homosexual activity was abandoned in January 2000. In introducing the new clause in the House of Lords, Minister of State Earl Howe said the provisions in the *Criminal Justice and Public Order Act 1994* “had no practical effect. They are, therefore, redundant.”⁵

⁴ HC Deb 11 January 2016 c600

⁵ HL Deb 11 February 2016 c2362

2. Scrutiny in the House of Lords

The Government tabled two amendments to the Bill at Report Stage which were agreed unopposed. Both amendments concern matters raised by the Delegated Powers and Regulatory Reform Committee of the House of Lords and are technical in nature. The Government has published an explanatory note on the Lords amendments which is available on the Bill page: [explanatory notes on Lords amendments](#) (Bill 175-EN 2015-16).

The Government also undertook a number of measures discussed during the Bill's passage through the Commons and the Lords which were not written into the Bill. These include:

- A commitment to publish annually statistics on sexual offences in the armed forces, with the first set expected to be published before the 2016 summer recess;
- A review of the powers of commanding officers to investigate allegations of sexual assault and whether to amend Schedule 2 of the *Armed Forces Act 2006* (which can be made through secondary legislation). This review is expected to take until the end of 2016.
- A review of the Armed Forces Compensation Scheme including the scheme's coverage and levels of awards, in particular for those most seriously injured, including those with mental health conditions. It is expected to report at the end of 2016.

2.1 Government amendments

The amendments concern Clauses 10 and 11 of the Bill which relate to part of the statutory framework for offenders assisting investigations and prosecutions. Under this section of the Bill, an offender may have their sentence reviewed and reduced if they provide assistance to an investigator or prosecutor.

Lords amendment 1 would insert a new subsection 10A into new section 304D. Lords amendment 2 would insert a new subsection 9A into new section 304E.

The amendments are technical in nature and relate to regulations and Parliamentary procedure. As this is quite complex, the full argument of the Lords Delegated Powers and Regulatory Reform Committee, which the Government accepted, is provided below:

3. Clauses 10 and 11 insert two new sections into the 2006 Act, sections 304D and 304E. The two sections are linked in that they both deal with the sentences of persons who either have offered to give, or have given, assistance to the investigator or prosecutor of an offence:

Section 304D deals with the situation where a person has offered to give, or has given, assistance for which no allowance was given on sentencing. In those circumstances, the Director of Service Prosecutions (DSP) may refer the case back to the Court Martial, and the court may substitute such lesser sentence as it thinks appropriate.

Section 304E deals with the reverse situation where a person has offered to give assistance, has received a reduced sentence and then knowingly fails to any extent to give the assistance promised. In those circumstances, the DSP may refer the case back to the Court Martial and the court may substitute a greater sentence.

4. Sections 304D and 304E largely replicate provisions which already exist in the civilian context and which are contained in section 74 of the Serious Organised Crime and Police Act 2005 (SOCPA).

5. Both sections 304D and 304E allow for appeals to be made to the Court Martial Appeal Court against the Court Martial's decision on sentence. The two sections do not however contain the detailed provisions governing the proceedings on an appeal. Instead they provide for these to be set out in regulations, with a power to make provision corresponding to that in Parts 2 to 4 of the Court Martial Appeals Act 1968 ("the 1968 Act"), with or without modifications. The 1968 Act contains the provisions which govern proceedings on other appeals to the Court Martial Appeal Court. There is a similar provision for appeal, and a similar delegated power, in section 74 of SOCPA.

6. The delegated powers conferred by sections 304D and 304E are subject to the negative procedure. We accept that it is reasonably common for provisions governing proceedings before a court to be set out in subordinate legislation subject to the negative procedure. To this extent we consider the delegated powers to be unexceptionable. However, there is one respect in which we consider the delegations to be inappropriate.

7. The 1968 Act makes provision about the recovery of costs and expenses in appeal proceedings. These provisions were amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the amended provisions include delegated powers which allow modifications to be made. These powers are subject to the affirmative procedure.

8. Since regulations under sections 304D and 304E are able to incorporate provisions of the 1968 Act with modifications, it would be possible for the regulations to make modifications to the costs provisions of the 1968 Act which, if made under that Act, would require the affirmative procedure. This issue does not arise in the civilian context because the provisions which can be applied under section 74 of SOCPA do not contain the same provisions on costs.

9. We take the view that as a matter of principle the powers conferred by sections 304D and 304E should be limited so that they do not allow the making of modifications which under the 1968 Act would require the affirmative procedure.⁶

Lord Tunnicliffe, speaking on behalf of the Opposition, expressed satisfaction that the amendments met the Committee's concern and gave his party's support. Both amendments were agreed unopposed.⁷

2.2 Government commitments

A wide-range of subjects were discussed during the Bill's progress through both Houses of Parliament. The Government gave a number of commitments related to some of these issues in the House of Lords. These will not be written into the face of the Bill.

⁶ House of Lords Delegated Powers and Regulatory Reform Committee, *21st Report – Armed Forces Bill; Housing and Planning Bill: Parts 6-9*, 12 February 2016 HL 98

⁷ HL Deb 27 April 2016 c1195

Power of Commanding Officer to investigate allegations of sexual assault

Members of both Houses raised concerns about the power given to Commanding Officers to investigate allegations of sexual assault.⁸ Earl Howe announced that the Service Justice Board will review this issue and, if needed, make changes to Schedule 2 of the Act through secondary legislation, subject to the affirmative procedure. The review is likely to take until the end of the year.

At present all allegations of serious offences, including murder and rape or assault by penetration, must be reported by a Commanding Officer to the service police. The Commanding Officer does have some discretion to investigate allegations of sexual assault, voyeurism, exposure and sexual activity in a public lavatory.

On Report Lord Touhig tabled an amendment that would remove a Commanding Officer's discretion to investigate allegations of sexual assault. Lord West of Spithead spoke in favour of the amendment, saying it would not, as some had suggested, impact on the chain of command or the Commanding Officer's position. Earl Atlee expressed concern that the power of the Commanding Officer may be delegated to more junior officers and suggested allegations of sexual assault are extremely difficult for a CO to investigate.⁹

Earl Howe, in response, spoke against the amendment as it would, he argued, require a Commanding Officer to refer to the service police for investigation of every allegation. Earl Howe was also concerned it would remove from COs the ability they have in very limited circumstances to ensure that an allegation or circumstances are appropriately investigated without involving the service police.¹⁰

Earl Howe outlined the existing requirements on Commanding Officers to consider whether an allegation of a service offence should be reported to the service police, and pointed out all Commanding Officers must take legal advice. Earl Howe argued:

The provision in the 2006 Act recognises that, given the width of these offences, there may be cases involving the most minor infringements that may be better handled other than by automatic police investigation.¹¹

However, he acknowledged that for some "our existing policies and procedures do not go far enough" and that they would like to amend Schedule 2 of the *Armed Forces Act 2006* so that all allegations of sexual assault, exposure, voyeurism and sexual activity in a public lavatory, must be referred to the service police.

AFA 2011 enables the Secretary of State for Defence to amend Schedule 2 by secondary legislation, subject to the affirmative procedure.

⁸ This issue was discussed in the House of Commons by the Select Committee on the Bill and by the Committee of the whole House on 16 December 2015, c1620-1626

⁹ HL Deb 27 April 2016 c1195-1200

¹⁰ HL Deb 27 April 2016 c1200

¹¹ HL Deb 27 April 2016 c1201

Earl Howe announced the Service Justice Board will review this issue and if necessary amend Schedule 2 of the Act by secondary legislation. This review will be completed by the end of the year and the Government will inform the House of the review's outcome:

I inform the House that the service justice board, chaired by the Minister for Defence Personnel and Veterans, has decided that the time is right for a fresh look at this issue, taking on board the arguments for the existing position and the views expressed in both Houses and by external organisations such as Liberty. The necessary work has been set in hand. My noble friend Lord Attlee made some very valid observations, and I assure him that the points that he raised under this heading will be addressed in the review. Any changes to Schedule 2 that may be needed can be made through secondary legislation, subject to the affirmative procedure. The review is likely to take until the end of the year, and I will report the outcome to the House in due course.¹²

Statistics on sexual offences

Members of both Houses tabled amendments requiring the Government to compile and publish statistics on allegations of sexual assault and rape. The Government resisted placing such a requirement into the Bill. However the Minister said in the House of Commons that he was "actively considering how best to publish the data as an official statistic."¹³

Lord Touhig tabled an amendment on Report requiring the annual publication of crime statistics. He pointed out that, while the Government has published some data, it is difficult to find and understand. Baroness Jolly said measuring such data could help change the armed forces culture by which inappropriate behaviour is considered (by some) acceptable. Earl Atlee also spoke in favour of data compilation.¹⁴

Earl Howe committed the Government to publishing data on an annual basis with the first report to be published before the 2016 summer recess.

Lord Touhig withdrew his amendment.

Earl Howe explained the statistics will cover cases where the service police have been the lead investigating agency and where the service justice system retained jurisdiction of the case throughout. The statistics will include:

- All sexual offences investigated by the service police, broken down by service, the offence type, the gender of the victim or suspect, location by country and outcome of investigation. This will be compiled by the crime statistics and analysis cell within the Service Police Crime Bureau.
- The number of referrals for all sexual offences received by the service prosecuting authority, broken down by service and offence type; the numbers of those charged with the offence referred,

¹² HL Deb 27 April 2016 c1201

¹³ HC Deb 16 December 2015 c1623

¹⁴ HL Deb 27 April 2016 c1196-1999

whether the person was charged with an alternative offence, and whether the case was discontinued.

- The number of cases heard at court martial which involve sexual offences, broken down by service, and include both pleas and findings. These will be provided by the military court service.

In addition the service police will have a crime registrar to ensure greater consistency with the Home Office police forces and assurance of data. The registrar will be responsible for developing, implementing and monitoring crime-recording policies, procedures and programmes and their application.¹⁵

Review of the Armed Forces Compensation Scheme

The Armed Forces Compensation Scheme provides a lump sum to those serving or former serving personnel who were injured as a result of their service in the armed forces on or after 6 April 2005.¹⁶

Lord Touhig raised in Committee and Report Stage provision for members or former members of the armed forces who suffer from mental health conditions caused by service. Lord Touhig tabled an amendment at Report Stage that would enable an immediate lump sum payment to be made to an individual upon a diagnosis of a mental health condition. Lord Touhig noted that Earl Howe indicated in a letter that the Government has begun a planned review of the Armed Forces Compensation Scheme.

The scheme tariff has nine tables of categories of injury relevant to military service, including mental health disorders. Lord Touhig said the British Medical Association's view is that mental health should be further up the tariff table. Lord Touhig argued the BMA believes the scheme does not reflect that mental health is not diagnosed immediately and that compensation should be awarded at the point of mental health illness rather than the point of diagnosis.¹⁷

Earl Howe announced the Government is reviewing the Armed Forces Compensation Scheme. This is a quinquennial review¹⁸ and Earl Howe said it will consider the scheme's coverage and level of awards, in particular for those most seriously injured, including those with mental health conditions. The review is at the stakeholder engagement phase and is expected to report at the end of 2016.¹⁹

¹⁵ HL Deb 27 April 2016 c1201-1202

¹⁶ The War Pensions Scheme applies to those injured before this date.

¹⁷ HL Deb 27 April 2016 c1215-1218

¹⁸ Lord Boyce carried out the last review in 2010 ([The Review of the Armed Forces Compensation Scheme](#), Cm 7798). A review of mental health was carried out by the newly created Independent Medical Expert Group in 2013 which made recommendations on compensation for mental health conditions that were incorporated into the scheme: HL Deb 27 May 2016 c1218

¹⁹ HL Deb 27 April 2016 c1218-19

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