

## Research Briefing

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By Claire Mills

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# Armed Forces Bill 2021-2022: Lords amendments

The primary purpose of the Armed Forces Bill is to renew the Armed Forces Act 2006 (itself renewed by the Armed Forces Acts of 2011 and 2016), which provides the legal basis for the existence of the Armed Forces as disciplined bodies. The Bill also amends the service justice system, further incorporates the Armed Forces Covenant into law and creates a new Service Police Complaints Commissioner.

The Armed Forces Bill, as amended in the Commons, was presented to the Lords on 14 July 2021 as [Bill 42](#).

The Bill was [considered in Lords Committee](#) between 27 October and 8 November 2021. [Report Stage](#) took place on 23 November 2021 and [Third Reading](#) took place on 29 November 2021.

Several amendments were made to the Bill. Government amendments include:

- Changes to the constitution of a Court Martial
- The establishment of a new Defence Serious Crimes Unit and Provost Marshal for Serious Crimes, as recommended by the [Henrique Review](#) which was published in October 2021.
- Amendments were agreed relating to the Armed Forces Covenant guidance to which public authorities must have due regard.
- Several technical amendments were also agreed relating to the language around the flexible working of Reserve personnel and to ensure consistency with existing legislation.

On Report, the Lords also agreed changes to concurrent jurisdiction and placed a legal responsibility on central government to have due regard to the principles of the Armed Forces Covenant.

[House of Commons consideration](#) of the Lords amendments took place on 6 December 2021. The Government's amendments were agreed. However, the Commons disagreed with the Lords amendments on concurrent jurisdiction and the Armed Forces Covenant.

The [Lords discussed the Commons reasons](#) for rejecting the amendments on 8 December 2021. Two amendments in lieu were proposed and agreed.

The Bill will now come back to the House of Commons.

The bill must receive Royal Assent by the end of 2021, otherwise the Armed Forces Act 2006 will expire.

For background on the provisions of the bill and the debate in the initial Commons stages see Library briefing papers:

- [The Armed Forces Bill 2019-2021](#), House of Commons Library, February 2021
- [Armed Forces Bill 2021-22: Progress of the Bill](#), House of Commons Library, June 2021

# 1 Government amendments to the bill

Baroness Goldie introduced several Government amendments during the Lords Committee Stage and on Report.

## 1.1 Committee Stage amendments

### Constitution of a Court Martial – Schedule 1

Amendments were agreed to Schedule 1 of the Bill that will allow a Judge Advocate to direct that a Court Martial should comprise four, rather than three, lay members and that a four-member Court Martial will remain validly constituted should it be subsequently reduced to three members.<sup>1</sup>

A Court Martial that comprises four members, must reach a finding with which at least three members agree.

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<sup>1</sup> The Bill seeks to fix the size of a Court Martial Board at either three or six lay members and move to qualified majority verdicts. Court martials with 3 lay members are intended to be for less serious offences.

The [Court Martial rules](#) will be amended to set out when such directions should be made.

The Government has introduced the changes because “the Covid pandemic showed the need for greater flexibility in the service courts as board members were taken ill or had to self-isolate”.<sup>2</sup>

The amendments are intended to make the system more flexible and are regarded as “a practical arrangement that seeks to future-proof the service justice system against this type of situation, or any other unforeseen circumstances that may arise in future”.<sup>3</sup> The Judge Advocate General is said to be supportive of the changes.<sup>4</sup>

## **Reserve Forces’ commitment– Clause 9 and Schedule 2**

Under clause 9 of the Bill changes are being made to the Reserve Forces Act 1996 to enable Reserve personnel to undertake periods of full time or part time service, or a combination of both, under one “continuous commitment”.

In Lords Committee the Government tabled a series of technical amendments to the language of clause 9 and Schedule 2. In introducing those amendments Baroness Goldie stated:

On reflection, we feel it more appropriate to refer to our new continuous service commitment using neutral terms, such as “a Section 24 commitment”. This will avoid any suggestion that reservists are in continuous service only in certain circumstances. Reservists are serving members of the Armed Forces during their entire term of service, not just when they are on duty or in training. It is a purely technical amendment and I can confirm that, importantly, it will have no impact on how the new measures we are introducing under Clause 9 will operate.<sup>5</sup>

The amendments were agreed without debate.

## **Defence Serious Crime Unit and a new Provost Marshal for Serious Crime – after Clause 11 and after Schedule 4**

### **Initial recommendations**

The [review of the Service police](#), conducted as part of the [Lyons Review](#) into the service justice system,<sup>6</sup> recommended the creation of a tri-service

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<sup>2</sup> [HL Deb 27 October 2021](#), c145GC

<sup>3</sup> *ibid*

<sup>4</sup> *Ibid*, c146GC

<sup>5</sup> [HL Deb 27 October 2021](#), c201GC

<sup>6</sup> Conducted by Professor Sir John Murphy.

Defence Serious Crime Unit (DSCU) to investigate serious criminal offences committed by Service personnel anywhere in the world.

When the Lyons review was published in early 2020 the MOD noted that it had begun scoping work on the recommendation for a DSCU.<sup>7</sup> However, the establishment of a DSCU was not included in the Armed Forces Bill when it was first introduced in January 2021 because of the ongoing review by Sir Richard Henrique into the investigation of alleged offences committed by Service personnel overseas.

### The Henrique Review

A judge-led [review into the investigation of alleged offences which occur on overseas operations](#) was established in October 2020 during the passage of the [Overseas Operations Act](#).

The review was not intended to feed into the Overseas Operations Act directly but complement its provisions. Any recommendations of the review would also build upon, but not reopen, those set out in the Lyons review, including the setting up of the DSCU.

The [review was led by Sir Richard Henriques](#) and reported toward the end of October 2021. Of the review's 64 recommendations approximately one third are focused on taking forward the establishment of the DSCU. Further to the original recommendations of the Lyons/Murphy review, he recommended that the DSCU be an operationally independent unit,<sup>8</sup> headed by a new Provost Marshal for Serious Crime. On publication of the review the Defence Secretary stated:

The new Defence Serious Crime Unit is key to meeting our commitment to further strengthen the service justice system. The Defence Serious Crime Unit will brigade the investigative capability for serious offending of the existing three service police forces. Under the leadership of a new provost marshal for serious crime, it will be instrumental in ensuring our service police are fully capable of meeting the challenges faced by the service justice system now and in the years ahead. I have therefore prioritised this work.<sup>9</sup>

### Amendments to the Armed Forces Bill

During the Lords Committee stage the Government introduced a number of amendments to the Armed Forces Bill that will establish the DSCU and create a new Provost Marshal for Serious Crime. The Government's amendments do not incorporate all of Sir Richard Henrique's recommendations on the DSCU.

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<sup>7</sup> Ministry of Defence, [Service Justice System review](#)

<sup>8</sup> And not based on existing service policing structures.

<sup>9</sup> Written Ministerial Statement HCWS349, [Sir Richard Henrique's Review](#), 21 October 2021

[Work on the operating model for the DSCU is currently underway within the MOD.](#)<sup>10</sup>

A new clause has been inserted (after clause 11) which amends sections 365A and 115A of the Armed Forces Act 2006 relating to the appointment of Provost Marshals. This new clause reflects the creation of a new Provost Marshal for Serious Crime, provides that the position is subject to the same rules of appointment as existing Provost Marshals,<sup>11</sup> and ensures their independence in relation to investigations.

This new clause also changes section 375 of the Armed Forces Act (definitions relating to police forces) to reflect the creation of the DSCU and makes provision for a new schedule to the Bill, under which the detail of the functions of the DSCU and the Provost Marshal for Serious Crime are set out.

The new schedule (schedule 5) amends other civilian primary legislation such as the Police and Criminal Evidence Act 1984, the Criminal Appeal Act 1995 and the Terrorism Act 2000, among others, to provide the DSCU and the Provost Marshal for Serious Crime with the same investigatory powers as the Provost Marshals for the Army, RAF and Royal Navy. The schedule does not enact any new investigatory powers for the Provost Marshal for Serious Crime and the DSCU.

Although not explicitly stated in the Government's amendments, the MOD has stated its intention to review the post of Provost Marshal for Serious Crime, three years after the DSCU is operational, as per the recommendation of Sir Richard Henrique.<sup>12</sup>

Amendments were also agreed to clauses 24 and 25 regarding territorial extent of the bill and its applicability to new schedule 5.

### Discussion of the amendments

During the Committee Stage, several Peers tabled cross-party amendments that sought to ensure that all investigations “are operationally independent from the military chain of command”, and to place a number of obligations on the DSCU, as per the recommendations of the Henrique Review. Namely:

- That the DSCU contains a victim and witness care unit.
- The Deputy Provost Marshal for Serious Crime be a civilian appointment.
- An annual report is produced by the new Provost Marshal for Serious Crime.
- The DSCU is established by 1 April 2022.

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<sup>10</sup> [Deposited Paper 2021-0856](#), 5 November 2021

<sup>11</sup> Under Section 365A of the Armed Forces Act 2006 a Provost Marshal must be appointed by HM The Queen and be an officer within the Service Police.

<sup>12</sup> [HL Deb 2 November 2021](#), c299GC and [Henrique Review](#), recommendation 12

- Protocols are agreed by the Provost Marshal for Serious Crime, the Director of Service Prosecutions and the Judge Advocate General relating to fatalities and ill treatment cases.

A further cross-party amendment was tabled seeking to establish a defence representation unit, as per Henrique's recommendations,<sup>13</sup> that would provide support for Service personnel and veterans under investigation.

Introducing the new clause and schedule, Baroness Goldie referenced the recommendations of the Henrique Review and said:

we have prioritised taking forward the recommendations to establish the Defence Serious Crime Unit, and I am extremely pleased that we were able to take swift action to table the government amendments for the key DSCU recommendations...<sup>14</sup>

She acknowledged that there were "non-legislative ways of implementing the recommendations from Lyons and Murphy under consideration" but that the additional recommendations for an operationally independent unit and a new Provost Marshal for Serious Crime set out by Sir Richard Henrique, required primary legislation.<sup>15</sup>

She outlined that the remaining operations-related recommendations of the Henrique Review, including those focusing on the "functionality, remit and operational considerations"<sup>16</sup> of the DSCU would be taken forward, or considered, over the coming months and where "appropriate and necessary" legislation would be brought forward "when Parliamentary time allows".<sup>17</sup>

In response Lord Robertson argued that "Some of his [Henrique's] recommendations that are not part of this new clause need to be implemented as early as possible".<sup>18</sup>

Baroness Goldie rejected the need for the cross-party amendments however. On the independence of the Provost Marshal, she highlighted that the language in the new clause was based on existing provisions in Section 115A of the Armed Forces Act 2006 that already applies to the Provost Marshals of the three service police forces. She said:

In taking this approach, the Government are faithfully following recommendation 7 by Sir Richard Henriques; he importantly recommended that the new provost marshal owe the duty "on the same terms" as the existing duty.

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<sup>13</sup> Recommendation 48

<sup>14</sup> [HL Deb 2 November 2021](#), c284GC

<sup>15</sup> *Ibid*, c285GC

<sup>16</sup> *Ibid*, c285GC

<sup>17</sup> *Ibid*, c284GC

<sup>18</sup> *Ibid*, c286GC

Baroness Goldie also argued that adding further Henrique recommendations to the government amendment was not necessary. She went on to confirm that:

we will be incorporating these recommendations in the work already under way to establish the operating model for the DSCU. To reassure the noble Lord, Lord Robertson, I emphasise that this will include the provision of a victim and witness care unit, the establishment of a strategic policing board as part of the governance structure of the DSCU, and a reporting requirement to Parliament. I am happy to confirm that we are already working towards a DSCU by April 2022.<sup>19</sup>

However, she noted that there may be “legislative implications and restrictions regarding the appointment of a civilian deputy provost marshal” and that this recommendation would be given further consideration. She also expressed the view that protocols for dealing with fatalities and cases of alleged ill treatment on overseas operations, should be considered by the service police, the Director of Service Prosecutions and the Judge Advocate General in the first instance. She went on to state:

These are important and complicated matters, and we need to determine whether they can be implemented as proposed by Sir Richard and without the need for legislation. While we will seek to progress them as quickly as possible, I suggest that it is vital that we get them right, and I do not think it would be appropriate or sensible to put a timeline of July 2022 for their implementation.<sup>20</sup>

With respect to the creation of a defence representation unit, Baroness Goldie commented:

while we absolutely agree with the principle of ensuring appropriate legal advice and support to individuals under investigation, we are not yet in a position to know whether we can accept the recommendations as presented. Further careful consideration will be required to determine the most appropriate and effective way of delivering this support, and I would not wish to time-bind that work.<sup>21</sup>

After a debate the cross-party amendments were not moved.

## Consequential amendments

The Government has made several consequential changes to clause 11 (Service police complaints) and clause 13 (deprivation orders), to reflect the creation of the DSCU.

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<sup>19</sup> Ibid, c288GC

<sup>20</sup> [HL Deb 2 November 2021](#), Ibid, c288GC

<sup>21</sup> Ibid, c289GC

## 1.2

# Report Stage amendments

In October 2021 the Lords Delegated Powers and Regulatory Reform Committee published a [report on the Armed Forces Bill](#). The Committee made recommendations in respect of two clauses:

- Clause 8 (armed forces covenant)- the Bill does not establish who constitutes a “relevant family member”, to whom the principles of the Covenant may apply. The Committee therefore recommended that this should be set down in regulations, subject to approval in both Houses, as it “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”.<sup>22</sup>

In addition, the guidance to be published under Section 343E of the Act relating to the duties imposed by the Covenant should be subject to Parliamentary scrutiny, by both Houses.

- Clause 10 (service complaints appeals) – allows service complaints regulations to restrict the grounds on which an appeal can be made to the Defence Council. The Committee concluded that such restrictions should be set out in primary legislation, unless the Government could provide “convincing reasons” otherwise.<sup>23</sup>

## Armed Forces Covenant – Clause 8

At Report Stage, several Government amendments were agreed that incorporate the Delegated Powers and Regulatory Reform committee’s recommendations on clause 8.

The guidance to which public authorities must have due regard, will now be laid in draft before Parliament and it will be brought into force by regulations, to be approved by both Houses. Introducing the amendments, Baroness Goldie said: “Given the status of the guidance and its importance in supporting the public bodies that will be subject to the duty, these amendments will provide Parliament with a greater opportunity to scrutinise this document before it is issued”.<sup>24</sup>

The Department will also define in regulations who constitutes a “relevant family member”. Those regulations will be approved by both Houses.

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<sup>22</sup> House of Lords Delegated Powers and Regulatory Reform Committee, [Seventh report](#), HL71, 18 October 2021, para.5

<sup>23</sup> Ibid, para.12

<sup>24</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c777](#)



In addition, amendments have been made that will require the Secretary of State to consult with the devolved administrations, and any other stakeholders, before making these regulations.

Other minor drafting amendments were made to clause 8 to reflect its scope in relation to Northern Ireland and to ensure its consistency with existing legislation.

The Government did not, however, bring forward amendments in relation to the Delegated Powers and Regulatory Reform Committee's recommendations on clause 10. Its reasons for not doing so were set out in its [response to the Committee's report](#).

### **Service Police complaints - Schedule 4**

An amendment was agreed that will provide for the records of the Service Police Complaints Commissioner to be public records, for the purposes of the Public Records Act 1958.

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## **Other amendments to the Bill**

Several amendments were introduced by Peers at Report Stage, two of which were agreed following a vote.

The cross-party amendment that was previously debated and withdrawn at Committee Stage in relation to the outstanding DSCU recommendations of the Henrique Review (see above), was also re-introduced at Report. That amendment was defeated on division, by 160 votes to 153.

[Commons discussion of the Lords amendments](#) took place on 6 December 2021. On division, both amendments were rejected.

The House of Lords [considered the Bill again on 8 December 2021](#). Two amendments were proposed in lieu of the rejected amendments and agreed on division.

## **2.1**

## **Concurrent jurisdiction of the Court Martial— Clause 7**

The issue of concurrent jurisdiction of a Court Martial for the most serious cases of murder, manslaughter, and rape have been discussed at length during the passage of this bill. Much of that debate focused on removing concurrent jurisdiction in relation to serious cases, including also domestic

violence and child abuse, and having them tried in civilian court. This was one of the main recommendations of the Lyons Review.<sup>25</sup>

At the Commons Report stage, an [Opposition amendment was tabled](#) which would place cases of murder, manslaughter, domestic violence, child abuse and rape under the jurisdiction of the civilian courts. Such cases could be heard at Court Martial with the consent of the Attorney General. That amendment was defeated on division by 360 to 274 votes.<sup>26</sup>

During the Lords Committee stage, Baroness Goldie said that the Government, while accepting the need to improve the decision-making processes in relation to concurrent jurisdiction, “do not believe that the introduction of an Attorney-General consent function is the best way to achieve it”.<sup>27</sup> She also highlighted the support for concurrent jurisdiction set out in the Henriques Review.

At Lords Report Stage, Lord Thomas of Gresford introduced an amendment that would ensure the most serious crimes of murder, manslaughter, domestic violence, child abuse, rape and sexual assault with penetration, are “normally” tried in the civilian courts when committed in the UK. The only exceptions would be with the consent of the Attorney General, when trial by court martial would be necessary “by reason of complexity involving the service”.<sup>28</sup> This would be set down in the protocol on jurisdiction.

In response, Baroness Goldie reiterated the previous Government position. She accepted the need to improve decision making with respect to jurisdiction but stated that “a better approach is to strengthen the prosecutors’ protocols and enhance the role of prosecutors in decision-making on concurrent jurisdiction”.<sup>29</sup>

She pointed to the creation of the DSCU as an important step in improving the skills and capabilities of the Service police to in dealing with serious crimes and the safeguards which already exist in the Bill, such as the Director of Public Prosecutions having the final say in any disagreements over jurisdiction. As such, the Government “do not believe that a presumption in favour of these offences being heard in the civilian courts is necessary or justified”.<sup>30</sup>

The Government was, however, defeated on division. The [amendment was agreed](#) by 210 votes to 190.

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<sup>25</sup> Hon. Shaun Lyons, [Service Justice System Review](#), March 2018, recommendations 1-3

<sup>26</sup> [Division No.51](#), 13 July 2021

<sup>27</sup> [HL Deb 27 October 2021 \[Armed Forces Bill\], c165GC](#)

<sup>28</sup> Lords Report Stage, [Amendment 2](#)

<sup>29</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c750-751](#)

<sup>30</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c750-751](#)

## Commons rejection and amendment in lieu

The House of Commons opposed the amendment by 302 votes to 221.<sup>31</sup>

At the Lords consideration of the Commons reasons for opposing the amendment, Lord Thomas proposed an [amendment in lieu](#) that would retain the presumption of a civilian trial for the most serious offences outlined, but any decision to proceed to trial by Court Martial would lay with the Director of Service Prosecutions, after consultation with the Attorney General. Introducing his amendment in lieu, Lord Thomas stated:

I listened to the debate in the other place, and my amendment in lieu has changes. Objection was made to the role ascribed to the Attorney-General. The Minister has made a similar objection in this House, and I have to admit that I had assumed that the Ministry of Defence and the Members in another place appreciated the constitutional position of the Attorney-General. It is one of his functions to supervise the Director of Public Prosecutions and the Director of Service Prosecutions and to be answerable in Parliament for them and their decisions. Hence it was Judge Lyons' recommendation that the AG's consent should be sought for the trial by a court martial of murder, manslaughter, rape and serious sexual offences committed in the UK. I agreed with his position: it represents the correct status of the Attorney-General in this country.

However, if the consent of the Attorney-General is the problem, this amendment in lieu leaves decisions about trial venue in the hands of the Director of Public Prosecutions—but only after consultation with the Attorney-General. The DPP would naturally consult the DSP, but, as the Minister, Mr Leo Docherty, made clear on Monday evening, it is the DPP's decision in the end.<sup>32</sup>

That amendment was agreed by 205 to 183 votes and now stands part of the Bill (clause 7).

## 2.2

## Due regard to the principles of the Armed Forces Covenant – Clause 8

Lord Mackay of Clashfern introduced an [amendment](#) that would place the same legal responsibility to have “due regard” to the Armed Forces Covenant on central government that the Bill currently requires of local authorities and other public bodies.

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<sup>31</sup> [Division 132](#), 6 December 2021

<sup>32</sup> [HL Deb 8 December 2021 \[Armed Forces Bill\], c1914-15](#)

This is another issue that has already been debated extensively in both the Commons and the Lords and is supported by groups such as the [Royal British Legion](#). In the Commons Committee of the Whole House, an Opposition amendment seeking to place the same obligations on central Government was defeated by 355 to 271 votes.<sup>33</sup> In speaking to that amendment the Minister for Veterans, Leo Docherty stated:

It does not need to include Government Departments, because that provision is already made. There are Ministers in every Department holding the lead for veterans' issues, and the Secretary of State is accountable in his annual report. Therefore, the provision for making central Government accountable is already in place.<sup>34</sup>

That position was reiterated by Baroness Goldie in the Lords Committee stage.<sup>35</sup>

In introducing his amendment on Report, Lord Mackay argued:

It is right that central government in the form of the Secretary of State, who is responsible to Parliament for the Armed Forces, should be responsible for respecting the Armed Forces covenant. If he does not have a duty to respect it, it is difficult to put that duty on local authorities, health authorities and so on.<sup>36</sup>

Responding, Baroness Goldie said that “The problem with the amendment as drafted is that it would not, as far as I can see, serve any identifiable meaningful purpose”.<sup>37</sup> Noting that responsibility for the delivery of frontline services rests at a local level, she went on to state that:

adding an obligation to central government does not seem in any way to address the need that we have identified that has to be addressed: the current disparity in the delivery of services across the United Kingdom. That, quite simply, is what the Bill is seeking to rectify. That is why trying to attach a covenant obligation to central government is something of a red herring—I do not actually see what it is going to deliver.<sup>38</sup>

Lord Mackay's amendment received cross-party support and, again, the Government was defeated on division. The [amendment was agreed](#) by 219 votes to 173.

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<sup>33</sup> [HC Deb 23 June 2021 \[Armed Forces Bill\], C932](#)

<sup>34</sup> [HC Deb 23 June 2021 \[Armed Forces Bill\], c887](#)

<sup>35</sup> [HL Deb 27 October 2021 \[Armed Forces Bill\], c192GC](#)

<sup>36</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c757](#)

<sup>37</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c767](#)

<sup>38</sup> [HL Deb 23 November 2021 \[Armed Forces Bill\], c770](#)

## Commons rejection and amendment in lieu

The House of Commons opposed the amendment by 305 to 215 votes.<sup>39</sup>

At the Lords consideration of the Commons reasons Lord Craig of Radley, who had supported the original amendment, proposed an [amendment in lieu](#).

The new amendment would no longer place a legal obligation on central Government to have due regard to the principles of the Armed Forces Covenant. It would, however, oblige the Secretary of State to report to Parliament within six months on the implications of not applying that same legal responsibility to central Government, as the Bill imposes on local authorities and other public bodies.

Introducing his amendment, Lord Craig said “This amendment therefore gives the Secretary of State time to consider his responsibility further and report to Parliament”.<sup>40</sup>

In response, Baroness Goldie stated:

The reason why the Government do not wish to expand that at the moment is not due to some sinister, covert or malign purpose. We want to see how this works in practice—let the measures bed down, assess them and see how they work. Very importantly, if some feature is not working, we want to identify it and what we do about it. That is a sensible, practical way forward before proceeding with any further enlargement of the legal duty.<sup>41</sup>

The new amendment was agreed on division, by 215 to 173 votes. The amendment now stands part of the Bill (clause 8).

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<sup>39</sup> [Division 133](#), 6 December 2021

<sup>40</sup> [HL Deb 8 December 2021 \[Armed Forces Bill\], c1918](#)

<sup>41</sup> [HL Deb 8 December 2021 \[Armed Forces Bill\], c1923-24](#)

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