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Defence Reform Bill

Bill 84 of 2013-14

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The *Defence Reform Bill* was introduced in the House of Commons on 3 July 2013. Second Reading has been tabled for 16 July 2013.

The intention of the Bill is to implement some of the proposals for reform that have been made in two recent White Papers: *Better Defence Acquisition*, Cm 8626 and *Reserves in the Future Force 2020,* Cm 8655.

Specifically, the Bill establishes the arrangements for reforming Defence Equipment and Support (DE&S) and turning it into a Government-Owned, Contractor-Operated (GOCO) organisation. It creates a statutory framework for the governance of MOD single source contracts and makes several amendments to the regulations governing the Reserve Forces.

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Summary

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Specifically, the Bill establishes the arrangements for reforming Defence Equipment and Support (DE&S) and turning it into a Government-Owned, Contractor-Operated (GOCO) organisation. It creates a statutory framework for the governance of MOD single source contracts and makes several amendments to the regulations governing the Reserve Forces.

The Government is currently assessing two options for the future operating model for DE&S: a Government-owned, contractor-operated entity (GOCO) or the public sector comparator which would see DE&S remain entirely within the public sector. In order to pursue the GOCO option legislation is required. Although a final decision on whether to pursue a GOCO is not expected until summer 2014, the relevant enabling legislation has been put forward as part of this Bill.

Part 1 of the Bill therefore makes provision for the Secretary of State to make arrangements for a company to provide defence procurement services under contract with the Secretary of State. Among other things, it covers the transfer of employees to that contractor, which will be done in accordance with TUPE regulations, financial claims against the contractor, the provision of financial assistance, the jurisdiction of the MOD police, and the disclosure and use of confidential information and intellectual property rights.

The proposal to transfer the whole of defence acquisition and support to a private contractor has provoked considerable debate. Several commentators have raised concerns over potential conflicts of interest, the length of the contract, how ministerial and parliamentary oversight will be provided, what financial risks the GOCO would bear and how a GOCO would make money whilst also saving the MOD money. The MOD itself has acknowledged that one of the biggest risks to the GOCO option is that international partners do not accept the proposed changes.

Part 2 of the Bill creates the new statutory framework for single source contracts. It creates a new Non-Departmental Public Body (the Single Source Regulations Office) to oversee that framework and a civil compliance regime. Part 2 also creates a new criminal offence relating to the unauthorised disclosure of information that may be obtained under this new framework.

Part 3 contains four measures to strengthen and support the Reserve forces. These include re-naming the Territorial Army; expanding the powers to call out the Reserve Forces, introducing new financial incentives to the employers of Reservists and exempting Reservists from the statutory two-year qualifying period required to bring a unfair dismissal case to an Employment Tribunal.

The proposals in this Bill will affect the Reserve Forces across all three services, although it is considered likely to have a greater impact on the Territorial Army because of the proposals for more integration with the Regular Army that have been made under *Army 2020*.

1 Background

The 2010 *Strategic Defence and Security Review* (SDSR) set out a number of aspirations for the Armed Forces, including the wholesale reconfiguration of the Armed Forces into what was termed Future Force 2020 and, among other things, wide ranging reform of the Ministry of Defence.[1]

Achieving both of these goals has been the subject of review over the last few years, with specific details on reconfiguration and reform made available in subsequent Government documents. A number of the recommendations that have been put forward by the Government now require legislation.

1.1 Future Reserves 2020 and Army 2020[2]

Shortly after the SDSR an independent commission was convened to review the role of the Reserves and their relationship with the Regular Army in order to determine how they could be better utilised within the context of Future Force 2020.

Future Reserves 2020 was published in July 2011 and concluded that the Reserves were under-exploited, not used efficiently and were in need of modernisation. That report recommended that the Reserve element of the Armed Forces should grow to become a far greater proportion of overall Service manpower[3] and that it should become more integrated within the overall force structure. It also recommended expanding the roles that the Reserve forces currently undertake to include all types of military operations. The broad recommendations of that review were subsequently endorsed by the Government and have formed a key part of the MOD's plans for restructuring the Army, which were announced in July 2012.

Army 2020 was the British Army's response to the SDSR's expectations of its capabilities, the need to reduce the size of the Regular Army by 20,000 personnel by 2020 and to accommodate cuts to the defence budget. Alongside the reconfiguration of the Army into two distinct elements: a high readiness Reaction Force and an Adaptable Force, one of the main recommendations of that report was for the greater integration of the Territorial Army[4] into the Army structure, an expansion in the roles that the Reserves will undertake and an increase, by 2018, in the number of trained reservists from approximately15,000[5] to 30,000, with a further 8,000 in training. The Reserves will thus provide both a larger proportion of the overall Army force structure in 2020 (a Regular/Reserve ratio of 70:30); whilst also providing certain specialist capabilities that it would not be practical or cost effective to maintain within the Regular force. As part of that change the Government also announced that an additional £1.8bn would be invested in the Reserves over the next ten years in order to provide them with the equipment and training they require. In exchange, the MOD has made clear that

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1 For further detail see Library Research paper RP11/10, *UK Defence and Security Policy: A new approach?,* January 2011

2 For further details see Library briefing SN06396, *Army 2020*, July 2012

3 In addition to the significant increase to the Territorial Army, the Maritime Reserves will increase to 3,100 personnel and the Royal Auxiliary Air Force will be increased to 1,800 personnel.

4 As opposed to the Regular Reserve, who are former members of the Regular Army but retain a Reserve liability.

5 There are approximately 30,140 army volunteer reservists at present, although only half are considered to be trained Reservists.

Reservists will be expected to commit to specific amounts of training time,[6] and for the Army in particular, to accept a liability for up to six months' deployed service, plus pre-deployment training within a five year period,[7] dependent upon operational demand.

In announcing the change the Secretary of State for Defence, Philip Hammond, stated that "in the past, the reserve may have come to be seen as an add-on to the army; in the future the reserve will be a vital integrated component of the Army".[8] In the accompanying document *Transforming the British Army 2012,* the significance of this decision was made clear in that it warns that without integration "the reduced Regular force would be unable to complete all of the tasks sets out in the Strategic Defence and Security Review".[9]

At the time the MOD acknowledged that it would be "a challenge" to recruit the number of Reservists required under the new force structure and that further work would be necessary on how to engage with employers and ensure they support employees who are Reservists.[10] A Green Paper setting out the MOD's proposals was published in November 2012, followed in July 2013 by a White Paper entitled *Reserves in the Future Force 2020: Valuable and Valued.* That paper sets out proposals for changes to the terms and conditions of service of the Reserves, including changes to pay and benefits to bring them into line with their Regular counterparts, pensions, and the entitlement to occupational health services when not mobilised. It also sets out new proposals for engaging with employers, including the provision of extra financial support to small and medium sized employers. In order to achieve the manning targets set out for the Reserves, the paper also outlines the intention to offer cash incentives to those leaving the Regular forces, including those leaving under the current redundancy schemes.

UK Volunteer Reserve Forces, at 1 April

	Naval Service[1]	Army[2]	RAF[3]
1990	7,020	72,500	1,720
1995	3,680	59,690	1,320
2000	4,080	45,610	1,800
2005	3,610	37,260	1,480
2006	3,290	38,460	1,350
2007	2,970	36,790	1,250
2008	2,880	35,020	1,340
2009	2,970	35,320	1,440
2010	2,930	33,130	1,500
2011	2,540	31,420	1,360
2012	2,570	31,160	1,360
2013 [4]	2,620	30,140	1,370

Notes

1 - Naval Service: RNR and RMR (excl University Royal Naval Unit)

2 - Army includes Non-Regular Permanent Staff (NRPS) and Officer Training Corps, excludes Ulster Defence Regiment and Homes Service Forces

3 - RAF excludes University Air Squadrons (UAS)

4 - Figures for 1 April 2013 are provisional w hilst the Ministry of Defence reviews the data.

Source: Defence Statistics, Ministry of Defence

In order to support some of the changes envisaged for the Reserves, including expanding the range of tasks Reservists can be called out for, legislation is now necessary.

6 At present members of a regional unit are required to complete a minimum of 27 training days per year, including an annual two-week camp; while members of national specialist units are required to complete 19 days divided between two or three weekends and an annual two-week camp. That training requirement for regional units is expected to rise to about 40 days per year

7 Current reserve legislation allows for one six-month deployment every five years.

8 HC Deb 5 July 2012, c1086

9 MOD, *Transforming the British Army*, July 2012, p.8

10 Evidence to the Defence Select Committee, *the work of the Ministry of Defence and the Armed Forces,* 12 July 2012, HC525-i, Q19

1.2 Defence Acquisition Reform

Defence Equipment and Support

As part of the defence reform agenda set out in the SDSR the Government committed to continuing its programme of defence acquisition reform which began under the previous Labour Government.

Central to those early reforms was the Green Paper *The Defence Strategy for Acquisition Reform* which was published in February 2010. That report endorsed the majority of recommendations that had been put forward in the independent review into defence acquisition, which was published in 2009 by Bernard Gray, before his appointment as the current Chief of Defence Materiel.[11] However, the Government at the time dismissed one of the main recommendations of the Gray report which called for the status of Defence Equipment and Support (DE&S), which is responsible for the acquisition and support of equipment for the UK Armed Forces,[12] to be changed and for it to be established as a Government Owned, Contractor Operated entity (GOCO). In a statement to the House in October 2009 the then Secretary of State for Defence, Bob Ainsworth, stated:

> I do not intend to take up his suggestion to establish DE&S as a Government-owned, contractor-operated entity, to put it more at arm's length from the rest of the Ministry of Defence. The Government have thought about this carefully, but we are not convinced that such a change would ultimately lead to better outcomes for the armed forces or defence generally. Having the DE&S as fully part of defence ensures a close working relationship with the military. Equipment acquisition is core business for my Department, and we have to get it right.[13]

Recognising that significant problems remain in the present system of defence procurement and support, and that further reform is necessary in order to gain better value from the defence budget, the current Government has continued in its drive for efficiency in defence acquisition. Under the direction of Bernard Gray, who was appointed Chief of Defence Materiel in January 2011, further changes have been implemented to address the specific problems of an "overheated equipment programme", a "weak interface between DE&S and the MOD", and "insufficient levels of business capability at DE&S". Those changes have included a restructuring of the DE&S management structure, the introduction of a costed 10-year equipment plan and the announcement of work on a new Defence Materiel Strategy that would consider how DE&S can operate differently to become more effective and more efficient.

A major part of that strategy work has been identifying the best future operating model for DE&S. The three options initially under consideration were a Trading Fund, similar in operation to the Defence Science and Technology Laboratory (DSTL); a non-executive public body working with a private sector partner, similar in operation to the Olympic Delivery Authority or the Nuclear Decommissioning Authority and a GOCO, which is the basis upon which the Atomic Weapons Establishment is currently run.[14] This latter option would entail a private sector company, or consortium, managing the UK's entire defence procurement and support programme on behalf of the Government. In the 2011/12 financial year defence procurement and support activities equated to approximately £17bn.[15] The MOD's current

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11 January 2011

12 DE&S currently employs approximately 16,000 personnel.

13 HC Deb 15 October 2009, c36WS

14 See Library Briefing SN05024, *Recent Developments at the Atomic Weapons Establishment,* March 2009 for further detail on the operation of AWE.

15 *Better Defence Acquisition,* Cm 8626, July 2013, p.10

defence equipment plan totals £160bn over the next ten years.[16] To date, no other country has pursued this option.[17]

After dismissing the Trading Fund option, in July 2012 the MOD confirmed that, on the basis of work conducted thus far, the strategic case for establishing a GOCO was stronger than the case for a non-executive public body. On that basis the MOD announced its intention to focus its efforts on developing and testing the GOCO option. It stated:

> The work to determine value for money between the options will take place over the next few months. In parallel, we will begin to develop a commercial strategy, engaging with industry to hone our requirement. This work will support decisions later this year on whether to proceed with the GOCO option and whether to launch a competition for a private sector management company to run the organisation. Provided that the further work demonstrates that the value-for-money case for GOCO over ENDPB is conclusive, this will be followed by an investment appraisal that will test the GOCO against a public sector comparator. Ultimately, this would be followed by a decision on whether to proceed.[18]

In April 2013 the MOD announced that it would undertake a final 12-month assessment phase that will examine two options for DE&S: the public sector comparator (DE&S+) and a GOCO. In a Written Ministerial Statement the MOD confirmed:

> During this assessment phase, we will work with HMT and the Cabinet Office on the "DE&S+" option to explore the extent of change that could be delivered while keeping the organisation fully within the boundaries of the public sector.
>
> In parallel, a commercial competition will be launched that will enable us to determine with potential private partners how a GOCO would work in practice, and what the costs and benefits would be. By the end of the assessment phase, we would expect to have proposals in a form capable of being contracted, if we decide to proceed with the GOCO model.
>
> We have made no secret of our expectation that the GOCO option is likely to prove better value for money, but we need to test this assumption with the market, to see what can be delivered and at what cost. No decisions have yet been made. At the end of this 12 month assessment phase we will have a comprehensive set of qualitative and quantitative data for both possible operating models which will enable us critically to evaluate the two options and make a final decision about the future of DE&S.[19]

In June 2013, the MOD subsequently published its Defence Materiel White Paper, which set out further details on these proposals, including the requirement for primary legislation should the GOCO option be chosen.

The *Better Defence Acquisition* White Paper envisages the following in relation to DE&S as a GOCO:

- The MOD will let a contract with a private sector contracting entity.

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16 See MOD, *Defence Equipment Plan 2012* for further details.

17 In the past the US has tried using Lead Systems Integrators, i.e. private sector companies, to manage procurement programmes, although this approach was abandoned following criticisms of major cost overruns and a lack of Pentagon co-ordination and control over its acquisition programmes.

18 HC Deb 17 July 2012, c845-6

19 HC Deb 25 April 2013, c62WS

- That contracting entity will operate, on behalf of the MOD, a limited company (the Operating Company) into which certain services currently being provided by DE&S will be transferred, together with the employees currently providing those services.[20] Under future arrangements military personnel will be seconded to the Operating Company and will not be employees of that organisation. The MOD will retain strategic control and ownership of assets, but the organisation will be operated on a for-profit basis by the private sector company that would remain accountable to its shareholders.

- The MOD's contract with the Contracting Entity would be managed by a 'Governor' function within MOD Head Office. That 'Governor' would be accountable to the Defence Board and would be responsible for communicating to the Contracting Entity the policy, strategy, and top level programme to be delivered.

- Any Departmental and wider Government roles that can only be performed by the Government, as well as some existing DE&S services will be retained by MOD. Services currently provided by DE&S but expected to be initially out of the scope of the GOCO include DE&S services relating to naval bases, defence munitions and information systems and services other than where directly related to defence equipment and support. Approximately 8,000 personnel are expected to be retained within the MOD.

- It is possible that the MOD may need to retain a separate delivery role in some areas, such as sensitive technology that could not be devolved to the Operating Company due to legal obligations and/or obligations arising from international Memoranda of Understanding.

- The transfer of DE&S business initially out of the scope of the GOCO will be implemented in stages after two years, thereby allowing the MOD to review how the process is working.

- The GOCO will act as the MOD's agent and will negotiate and sign new contracts on behalf of the Secretary of State.

- Defence acquisition programme costs will be paid directly from the MOD to the suppliers following verification and validation by the Operating Company. Those funds will not flow through the GOCO itself.

- The MOD will remain the Approval Authority for all projects and the National Audit Office will retain the right of audit.

- The Government will retain a 'special share' in the Operating Company on national security grounds.[21]

- On expiry or termination of the contract, the Operating Company will either be retained by the existing contractor or transferred to a new contractor following a competitive process; or revert back to the MOD.

- Subject to negotiations, affordability and value for money, a contract will be awarded for a term of up to nine years, subject to performance. There will be no opportunity for

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[20] At present there are 16,500 people employed by DE&S, although that is expected to fall to 14,400 by 2015. Approximately 75% of those personnel are Civil Servants employed by the MOD and the remainder are military personnel.

[21] The Government also retains a 'golden share' in AWE, Rolls Royce and BAE Systems.

extension. After nine years a full review of the GOCO will be carried out and the contract will be re-competed.

- Any potential Contracting Entity with a current conflict of interest that is assessed by the MOD to be unmanageable will not be allowed to bid for the contract.

In effect, under this option a private sector organisation would have responsibility for the entire defence procurement and support budget over the next nine years, which will equate to nearly £160bn. It will be responsible for delivering the MOD's current ten-year equipment plan, including the replacement of elements of the UK's nuclear deterrent beyond 2016.[22]

A final decision on the future operating model for DE&S is expected in summer 2014, although the requisite legislation has been put forward in this Bill. In the House of Lords on 10 June 2013, the Government defence spokesman confirmed that:

> If, at the end of the assessment phase, a GOCO operating model is selected, then we need to be able to move quickly to conclude a contract with the successful bidder. The Government therefore intend to provide in the defence reform Bill the necessary authorities to let a GOCO contract in 2014, together with measures required to allow a GOCO, to operate effectively.
>
> There are finely balanced arguments about whether primary legislation is strictly required to allow the establishment of a GOCO. The Government have, however, decided that it is right that we should legislate in this instance because of the importance of DE&S to our Armed Forces and in order to ensure that Members of both Houses, many of whom take a keen interest in defence matters, have a proper opportunity to explore and debate the issues.[23]

Single Source Contracting

The Defence Materiel White Paper also set out the MOD's intentions with regard to the reform of single-source contracting, i.e. without competition, which accounts for approximately 45% of all MOD contracts and equates to £6bn per annum.[24]

At present such contracts are placed using the Government Profit Formula and Associated Arrangements, also commonly referred to as the 'Yellow Book'. In place since 1968 the Yellow Book is a non-legally binding framework which can only be amended on the basis of consensus. Such arrangements therefore encourage the maintenance of the status quo, regardless of changes to the industrial landscape or modern procurement practices.[25]

A review of the Yellow Book began in January 2011 under the chairmanship of Lord Currie.[26] In acknowledgement that suppliers can price and perform without being constrained by the actions of competitors, the intention was to examine whether single supplier defence contracts could be modernised in order to achieve greater value for money.

Lord Currie published his report in October 2011 and made several recommendations for the creation of a new framework based on greater transparency and standardised reporting, with stronger supplier efficiency incentives and underpinned by stronger governance arrangements.

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22 HC Deb 10 June 2013, c55
23 HL Deb 10 June 2013. C1442-3
24 HL Deb 10 June 2013, c1443
25 A summary of those changes is set out in the MOD's Impact Assessment for this bill, p.20
26 HC Deb 26 January 2011, c10-11WS

Those recommendations were endorsed in the June 2013 White Paper which sets out a new statutory framework for single source contracts. That paper states:

> In exchange for a fair profit for industry, the new framework will provide the MOD with far greater transparency, helping us to investigate whether suppliers are being as efficient as possible. Standardised reports will allow us to better monitor single-source projects and identify areas where suppliers can reduce cost. Stronger protections will ensure the onus is on suppliers to use the most reasonable and appropriate pricing assumptions they can.
>
> The new framework will be introduced on a statutory basis, rather than being negotiated into contractual terms on a contract by contract basis. This will ensure widespread coverage across our single-source suppliers, and wider application across their single-source supply chains. We will also introduce stronger governance of the framework through a civil penalty regime to ensure compliance, and by replacing the Review Board for Government Contracts with a stronger arms-length body to be known as the Single Source Regulations Office (SSRO). The SSRO will ensure the regime is kept up to date, periodically recommending updates to the Secretary of State. It will also monitor the application of the regulations, and provide binding determinations in the event of disputes between MOD and single-source suppliers in its role as an independent expert in single-source procurement.[27]

That statutory framework is set out in Part 2 of this Bill.

[27] Ministry of Defence, *Better Defence Acquisition,* Cm 8626, June 2013, p.8

2 Main Provisions of the Bill

The intention of this Bill is to implement some of the changes envisaged above. Specifically, those reform proposals that will improve the procurement and support of defence equipment and strengthen the Reserve forces.

The Bill is divided into three distinct Parts and seven Schedules. Part 1 relates to the reform of the Defence Equipment and Support (DE&S) organisation; Part 2 creates a regulatory framework for MOD single source contracts that are tendered without competition and the creation of a new Non-Departmental Public Body to oversee that framework; while Part 3 makes several changes to the regulations governing the Reserve Forces.

2.1 Part 1 – Defence Procurement Arrangements

As outlined above, the Government is currently assessing two options for the future operating model for Defence Equipment and Support (DE&S): a Government-owned, contractor-operated entity (GOCO) or the public sector comparator which would see DE&S remain entirely within the public sector.

In order to pursue the GOCO option legislation is required. Although a final decision on whether to pursue a GOCO is not expected from the MOD until summer 2014, the relevant enabling legislation has been put forward as part of this Bill.

Part 1 of the Bill therefore makes provision for the Secretary of State to make arrangements for a company to provide defence procurement services under contract with the Secretary of State (clauses 1 and 6). It also makes provisions in relation to:

- the transfer of employees to that contractor (clause 9)
- the provision of financial assistance to that contractor (clause 2)
- financial claims against the contractor (clause 3)
- exemptions relating to the premises used by the contractor (clause 4)
- the jurisdiction of the MOD police in relation to the GOCO (clause 5)
- provisions for the transfer of property, rights and liabilities where the contractor is either in breach of contract or where the contract has come to an end (clause 10)
- the disclosure and use of information and intellectual property rights (clauses 7 and 8).

According to the Explanatory Notes, if the arrangements set out under Part 1 are made, i.e. a the GOCO is pursued, the net benefit expected to be delivered will equate to £934m over 10 years. In comparison the savings to be made by pursuing the DE&S+ option are expected to be third lower.[28]

[28] *Defence Reform Bill: Explanatory Notes*, paragraph 166

Provision of Defence Procurement Services and Status of the Contractor (Clauses 1 and 6)

Clause 1 sets out when Part 1 of this Bill will apply, i.e. when the Secretary of State confirms that the GOCO option for DE&S will be pursued and makes arrangements for a company (the contractor) to provide defence procurement services under contract with the Secretary of State. These arrangements will include acquiring rights in or over premises and property currently used for the purposes of DE&S and the employment of civil service personnel currently working in DE&S (subsection 1).

In the event that the contract expires, or is terminated by the MOD, **subsections 2-4 of clause 1** make provision for Part 1 to also apply to any new arrangements (successor arrangements) made by the Secretary of State in the future regarding the provision of defence procurement services, rights over premises and property, and the employment of civil service personnel.

Arrangements for a contractor to provide defence procurement services may take effect in phases over a period of time **(subsection 5)**; while the contractor may also be permitted to exercise any discretion of the Secretary of State in relation to performing its defence procurement functions **(subsection 7)**. The Explanatory Notes suggest that "the Secretary of State will remain responsible for defence procurement but, given the scale of the activities that the contractor may be required to undertake under the arrangements, it may be necessary for the contractor to exercise a discretion of the Secretary of State in respect of [their] procurement functions".[29]

Clause 6 makes provision for the contractor to exercise the rights, powers, duties or liabilities of the Secretary of State with respect to any contract that has been entered into prior to the date on which the contractor assumes responsibility for defence procurement services and DE&S employees are transferred to the contractor (the vesting date). That date is to be set down in secondary legislation.

Financial Assistance (Clause 2)

This clause makes provision for the Secretary of State to provide financial assistance to the contractor, in the form of loans, guarantees, indemnities or any other type of financial assistance, where it is considered appropriate.

However, neither the Bill nor the Explanatory Notes provide any indication of what circumstances may prompt the provision of financial assistance.

Financial Claims (Clause 3)

Under this clause the MOD will be liable for any financial claims made against a current or former contractor and the Secretary of State may make payments in order to settle any claims **(subsections 1 and 2).** The contractor concerned will be legally obliged to provide the MOD with any assistance required, including the provision of documents, access to evidence and making employees available for the purposes of court proceedings **(subsections 3 and 4)**.

However, certain exceptions to this clause will apply. Claims cannot be made by 'excluded persons' which are defined as any other company which is, or has been, a contractor either previously or in a current consortium; or a Minister of the Crown or other Government department. Claims cannot also be lodged in relation to services provided by the company other than those provided to the MOD; any contract of employment to which the company is party; claims relating to the provision of services to the contractor, such as IT services; any

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[29] *Defence Reform Bill: Explanatory Notes*, p.4

health and safety obligation of the company; or anything done or omitted to be done by the company either before it became or after it ceased to be a contractor.

However, liability will only transfer to the MOD with respect to financial claims and not those claims brought against it, for example in relation to performance.

Exemptions Relating to Premises (Clause 4 and Schedule 1)

Clause 4 gives effect to Schedule 1 which makes provision for the contractor to be exempted from certain legislative obligations and enforcement regiments that the Crown, and therefore the MOD, is currently exempt from. Examples include certain sections of the *Health and Safety at Work etc. Act 1974* and the *Nuclear Installations Act 1965*.

This is considered particularly pertinent to DE&S as it currently manages a range of safety and environmental functions and occupies a wide range of sites in order to carry out its functions.

However, exemptions will only be provided to the contractor in relation to the sites it will use for carrying out defence procurement activities. Under paragraph 7 the Secretary of State has the power to extend the current Crown exemptions in relation to other legislation not specified in the Schedule, where it is considered necessary. Such exemptions will be set down in secondary legislation.

Jurisdiction of the MOD Police (Clause 5)

The MOD Police is responsible for both the protection of military establishments and the prevention of crime within the MOD estates and as such has full constabulary powers.

This clause allows for the MOD Police to continue to exercise its police powers on premises that will be used by the contractor for the provision of defence procurement services. This includes any vehicles, vessels or aircraft and any new site utilised by the contractor for those purposes.

This clause will also allow for the MOD Police to investigate any allegations of fraud and other criminal offences relating to the provision of defence procurement services, including in relation to any contracts between the contractor and third party contractors.

Restrictions on Disclosure or Use of Information and Intellectual Property Rights (Clauses 7 and 8 and Schedule 2)

Both clauses will allow the contractor to have access to the confidential information and intellectual property that is currently held by the MOD and DE&S.

Clause 7 gives effect to **Schedule 2** of the Bill. That schedule makes provision for the contractor to access confidential information such as technical/design information, tender documentation, contracts and other commercially confidential information relating to any contract entered into by DE&S before the vesting date (see clause 6 above).

Under **paragraph 2** neither the Secretary of State nor the contractor will be prevented or penalised from disclosing relevant information to the parties named in that section, if disclosure is deemed necessary or expedient for the purposes of carrying out defence procurement functions. Disclosure is also permitted for audit purposes (**paragraph 3**).

Paragraphs 4 and 5 make provision for dealing with any unauthorised disclosures or the unauthorised use of confidential information by a contractor, outside of the provisions set down in paragraphs 2 and 3. However, they do not provide any detail on the implications or penalties for the unauthorised disclosure or unauthorised use of confidential information.

Under **Clause 8** protected works, defined as copyright works or database rights, may be provided to the contractor, or a service provider to that contractor, by the Secretary of State without infringing copyright or database rights, where the Secretary of State has acquired the right to use the work in relation to a contract entered into before the vesting date or where it is considered necessary for the contractor to fulfil its obligations in the delivery of defence procurement services **(subsection 1)**. Subsections 2 and 3 also allow for the contractor to provide a protected work to another contractor or service provider, and for those parties to use that work without infringing copyright or database rights, where it is necessary for the delivery of defence procurement functions.

Transfer of Employees (Clause 9)

Under the GOCO option approximately 6,500 personnel are initially expected to transfer to the new Contracting Entity. This clause ensures that the terms and conditions of service of those personnel will be protected by the Transfer of Undertakings (Protection of Employment) (TUPE) regulations once they are transferred from the civil service to become employed by the contractor.

Transfer Schemes (Clause 10 and Schedule 3)

In the event that a GOCO contract expires or is terminated by the MOD, **clause 10** provides the Secretary of State with the power to make one or more schemes for the transfer of property, rights and liabilities back to the Crown, the Secretary of State or to a new contracting entity providing defence procurement services **(subsections 1-3)**. Certain property, rights and liabilities may be excluded from that transfer scheme upon agreement between the contractor and the Secretary of State **(subsection 4).**

Further supplementary provisions relating to transfer schemes are contained in **Schedule 3**, including the specific provisions that a transfer scheme may make and the steps that should be taken with regard to the transfer of foreign property, rights or liabilities. **Paragraph 3** also provides for the payment of compensation to any person whose interests are adversely affected by a transfer scheme; while **paragraph 6** allows the Secretary of State to modify a scheme. However, where a transfer has already taken place, any modifications can only be implemented with the agreement of any affected persons.

Other Financial Provisions (Clause 11)

This is a general clause which confers on the Secretary of State the authority to make payments out of funds provided by Parliament for any expenditure that may be incurred in connection with the formation of a GOCO entity. It also allows for payments made in relation to the MOD taking on the liabilities of the contractor should the contract come to an end.

Commentary on the GOCO Option

As outlined above, a decision on the GOCO option is not expected to be made until summer 2014. The MOD has suggested, however, that putting forward the requisite legislation now will enable Parliament to effectively scrutinise the proposals.

Indeed, the proposal to transfer the whole of defence acquisition and support to a private contractor has provoked considerable debate. A RUSI acquisition focus group questioned the logic of choosing a Government-owned, contractor-operated entity in a July 2012 briefing paper. It raised a number of questions, including potential conflicts of interest, the length of the contract, ministerial and parliamentary oversight, who would make the ultimate decisions, what financial risks would it bear and how would those risks be assessed and how would the GOCO make money while also saving the MOD money. The report made the point that with respect to the comparison to the AWE GOCO *"*DE&S acquisition and management function in defence is much more diverse and complex than the development, production and support of nuclear weapons." It also concluded:

> The bottom line is that, as practitioners and observers of defence acquisition in the UK and elsewhere, at present we cannot easily see how the DE&S as a GOCO would even work in practice, let alone why it would be a less expensive and better alternative to what is in place.[30]

The Defence Select Committee asked the MOD to respond to the RUSI paper, which it did in written evidence to the Committee for its *Defence Acquisition* report (HC 9, 2012-13,ev 57). The MOD acknowledged that the questions asked are already under consideration but reinforced its view that "doing nothing is not an option". In that report the Defence Select Committee itself concluded:

> We agree that the current arrangements, constrained by public sector employment rules, are unsatisfactory, and we accept that the decision on the future of DE&S, while urgent, is too important to be rushed. It is clear that a GoCo is not universally accepted as the best way forward, and that there are particular concerns about how the MoD's overall responsibility for acquisition could be maintained within a GoCo. In particular, we believe problems might arise if a non-UK company were given responsibility for UK defence acquisition. We further believe it is vital that consultations are satisfactorily concluded with allies, to ensure that there is no adverse impact on co-operation, before any proposals are implemented.[31]

Indeed, in its Impact Assessment for this Bill the MOD acknowledged that one of the biggest risks to the GOCO option is that "international partners do not accept the proposed changes at all, or that the limitations put upon the scope of the GOCO through negotiation with our international partners mean that the GOCO no longer offers value for money. This would result in the option failing at the Final Business Case stage".[32] However, it also confirmed that the MOD is currently engaging with the UK's main allies in order to understand the challenges of a GOCO decision and that the MOD will ensure that any change in the status of DE&S will not damage the UK's relationships with international partners.[33]

In an article for *Defence Management* in May 2013, Shadow Defence Minister Alison Seabeck confirmed Labour's support for procurement reform but said the Government still had to make the case for a GOCO, including how conflicts of interest would be managed. Responding to the announcement of the Defence Materiel Strategy in June 2013, the Shadow Secretary of State, Jim Murphy, reiterated that view suggesting that:

> Welcoming this process today is not the same thing as supporting a GoCo in principle. There needs to be rigorous examination of all the possible options and a robust comparison between the two options of a GoCo model and DE&S+. That comparison should rest on the principles of ensuring value for money within programmes; industry adhering to new targets on time and cost; maintaining parliamentary accountability; enhancing a culture of consequence for decision makers; and military involvement being based on tri-service working, not on single-service rivalry.[34]

The CEO of defence and aerospace trade group ADS, Rees Ward, similarly said the Government still had many questions to answer about how the GOCO would work, ranging from how financial risk will be apportioned between the GOCO and the MOD and what the relationship between the two will be. In its summary of the *Defence Reform Bill*, ADS suggested that there were few surprises in the Bill, but that it would work to ensure that the

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30 "The Defence Materiel Strategy and the GOCO proposal for Abbeywood", *RUSI Acquisition Focus Group,* July 2012

31 Defence Select Committee, *Defence Acquisition,* HC 9, January 2013

32 Ministry of Defence, Defence Reform Bill Impact Assessment, July 2013, p.11

33 Ibid, p.13

34 HC Deb 10 June 2013, c53

final Bill contains workable safeguards against the unauthorised disclosure and use of contractor's confidential information and intellectual property.[35] The trade union Prospect has also highlighted its member's opposition to establishing a GOCO suggesting that "they believe it will cost more, it will deliver a less effective service to the military and, crucially, it will introduce additional risks by overcomplicating safety-critical decision-making".[36]

An April 2013 article in *The Economist* also suggested that the proposals raise more questions than answers:

> Many in the defence industry think that a good number of the difficulties associated with acquisition stem from requirement-setting by their military customers, particularly the "gold-plating" that takes place once projects have begun. More commercially minded executives in a GOCO might not be as soft a touch as civil servants, they concede. But the underlying incentives to game the system by getting new kit approved before the real cost emerges will not disappear.
>
> How, for example, will the lead company be chosen? [...] What will be its powers and responsibilities? How will financial risk be distributed when there are factors that only governments can determine—such as homeland security, foreign relations and the preservation of national technical capabilities? How long will a contract with a GOCO have to run given that many programmes take a decade to deliver and a plane or a ship may be in service for 40 years? How will the GOCO be incentivised? Will boosting defence exports—a government priority—be part of its remit? How will ministerial and parliamentary oversight of decisions involving large amounts of money and the future effectiveness of the armed forces be maintained?
>
> Perhaps the trickiest question of all is this: what makes the government think that it is capable of negotiating and supervising a contract of such extraordinary complexity, when the reason it wants to hand negotiation and management of defence contracts to a private firm is that it does not think it is very good at such things?[37]

2.2 Part 2 – Single Source Contracts

EU law requires most government contracts to be procured via an open, competitive process. Indeed, the MOD has made it clear that its preferred approach to procurement is through open competition in the domestic and global market.[38]

However, Article 346 of the Treaty on the Functioning of the European Union (TFEU) provides for an exemption to the procurement rules where a country considers it to be necessary for national security reasons. As the MOD has acknowledged "by its nature, defence equipment often requires advanced and specialist technology, and we are often limited to a single supplier if we want to get the capability we require, or we need to preserve industrial and technological capabilities in the UK for strategic reasons".[39] Such contracts are thus placed without competition and are referred to as single source contracts.

Over the last five years single source procurement contracts have averaged £6bn per annum and the MOD suggests that it is likely to remain a significant proportion of MOD procurement

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35 *Defence Reform Bill: An ADS Summary*, 4 July 2013
36 "Specialists oppose government's plans for defence equipment and support", Prospect, June 2013
37 "To boldly GOCO", *The Economist,* 13 April 2013
38 *National Security Through Technology,* Cm 8278
39 *Better Defence Acquisition,* Cm 8626, June 2013

spending in the future.[40] However, as outlined above, the governance of single source contracts is reliant upon an increasingly out-dated non-legally binding framework (the 'Yellow Book') that places most of the negotiating power with the contractor. The MOD's ability to achieve value for money in such contracts is therefore placed at risk.

Both the review by Lord Currie and the *Better Defence Acquisition* White Paper made recommendations for a new statutory framework to be established. In its Impact Assessment for this Bill the MOD suggested that legislation is necessary as "industry is unlikely to comply with recommendations that are not statutory". It also suggested that a new governance regime, supported by a regulatory body, will help ensure the regulations are kept up to date.[41]

Part 2 of the *Defence Reform Bill* creates the regulatory framework for single source contracts. It creates a new Non-Departmental Public Body (the Single Source Regulations Office) to oversee that framework and a civil compliance regime. Part 2 also creates a new criminal offence relating to the unauthorised disclosure of information that may be obtained under this new framework. Throughout this Part references are made to the potential GOCO contractor, which is referred to as an 'authorised person'. This is to allow for the fact that some functions under this Part may in the future be performed by the GOCO, as opposed to the Secretary of State.[42]

Under **clause 39** the Secretary of State has the power to repeal Part 2 through secondary legislation, if any future review of the statutory framework or the workings of SSRO recommends that both be abolished.

The changes to single source contracts are expected to deliver a net benefit of £1,712m over 20 years.[43]

Regulatory Framework for Single Source Contracts (Clauses 14 -29)

The regulations setting out this new statutory framework will largely be placed in one piece of secondary legislation called the Single Source Contract Regulations (SSCR). The MOD has stated that a draft of the SSCRs will be made available to the Public Bill Committee. However, clauses 14-29 of this Bill provide an overarching framework and an overview of what those regulations are required to contain:

The Explanatory Notes to the Bill (para 55 and 125) suggest that the SSCRs are likely to come into force on 1 October 2014 (referred to in the Bill as the relevant date).

Qualifying Contracts

The primary contracts that will be subject to the provisions of Part 2 of this Bill are defined in **clause 14** (and referred to as a Qualifying Defence Contract (QDC)). Clause 14 also confers power on the Secretary of State to make the Single Source Contract Regulations under secondary legislation.

The criteria for a contract to be considered a QDC are set down as follows:

- It is a contract under which the Secretary of State procures goods, works or services for defence purposes (which are to be specified in the SSCR).

- The value of the contract is of, or above, an amount which will be specificed in the SSCR. It is expected that the threshold of a QDC will initially be set at £5m.

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40 *Better Defence Acquisition,* Cm 8626, June 2013, p.7
41 Ministry of Defence, *Defence Reform Bill Impact Assessment*, p.16 and p.22
42 See paragraph 46 of the Explanatory Notes.
43 Explanatory notes, paragraph 168

- The contract is not of a sort that will be specified in the SSCR. That list is expected to include contracts that do not require regulation under this Bill because they are subject to other market pressures or pricing benchmarks, for example the sale of land or buildings.

- The contract is entered into on, or after, the relevant date (see above) and the contract is not the result of a competitive process

- A contract entered into before the relevant date, and amended on or after that date, and is not the result of a competitive process, may also become a QDC upon agreement between the Secretary of State and the primary contractor.

- A competitive contract that was entered into before the relevant date, but amended on a non-competitive basis afterwards, may become a QDC by agreement between the relevant Parties. Such contracts will only be included when the non-competitive amendment to what was originally a competitive contract, is not considered to be a new contract in its own right.

Under **subsection 7** the Secretary of State has the power to exempt contracts that would otherwise by QDCs on a case-by-case basis.

The sub-contracts of QDCs may also be subject to the Bill's provisions (subject to any modifications that may be set down in the SSCR **(clause 29)**), if they are awarded by the prime contractor on a non-competitive basis (referred to in the Bill as a qualifying sub-contract).[44] Under **clauses 27-29** the SSCR will set the conditions that must be met for a sub-contract to be considered a qualifying sub-contract, including the value threshold of the contract. In line with QDCs, the Secretary of State also has the power to exempt sub-contracts from being qualifying sub-contracts, on a case by case basis. A primary contractor must assess, and give the Secretary of State and any prospective sub-contractor notice if a contract, or prospective contract, is to be a qualifying sub-contract in order for them to assess the implications of being subject to the provisions in Part 2 of this Bill. As outlined below appeals over whether a sub-contract does indeed qualify can be made to the Single Source Regulations Office (SSRO). The SSCR will also set out the circumstances in which qualifying sub-contracts may be exempt from the provisions of this Bill.

Under **clause 30 (3) (d to f)** a prime contractor may be in contravention of its compliance obligations if it fails to make an assessment of the qualifying nature of a sub-contract; fails to give notice to a prospective sub-contractor of any positive assessment or if it determines that a sub-contract does not qualify and the Secretary of State believes that assessment is incorrect.

Pricing, Costs and Profit Rates

The SSCR must make provision for determining the price payable under a qualifying QDC, in line with the pricing formula set out in **clause 15**, which essentially bases the price on a set of allowable costs uplifted by a Contract Profit Rate. The Contract profit Rate is calculated using a six-step process which is set out in **clause 17.** The agreed costs referred to in steps 2, 3 and 6 are to be agreed between the Secretary of State or the GOCO contractor, and the primary contractor. Some of the standard rates that are relevant to determining that contract profit rate, including the baseline profit rate, are to be established annually by the Secretary of State, on advice from the SSRO (**clause 19**).[45] **Clause 20** makes provision for allowable costs. The SSRO must issue guidance on what are allowable costs. The Secretary of State

[44] Because primary contractors are usually private sector companies they are not subject to any legal obligation to advertise or compete their subcontracts if they do not wish to do so.

[45] See paragraph 68 of the Explanatory Notes for detail on the level of those standard rates.

or GOCO contractor and the primary contractor must have regard to this guidance in determining whether a cost is allowable or not. Any party may also ask the SSRO to determine whether a cost is an allowable cost or not.

Subsection 5 of clause 15 allows for the pricing formula to be adapted for three contract types, firm price contracts, fixed price contracts and cost-plus contracts,[46] although the latter is seldom used by the MOD nowadays. All prices are also subject to adjustment under the provisions of **clause 21**, the details of which are to be set down in the SSCR. **Clause 16** makes specific provision for the use of the pricing formula when it is used for target cost incentive fee contracts.[47] Any adjustments made under that clause must be agreed between the Secretary of State or GOCO contractor and the primary contractor. However, any of those parties may refer the matter to the SSRO for a determination (see below).

Under **clause 18** the SSCR may allow for some of the six steps to be disapplied for lower value QDCs, thereby simplifying the process for determining the contract profit rate in these circumstances. It also makes provision for one contract profit rate to be used for groups of contracts that the Secretary of State has in place with the same primary contractor. Similar to the provision in clause 16, any relevant party may ask for a determination by the SSRO as to whether the contract profit rate has been appropriately worked out and to make any adjustments **(clause 18)**.

Records and Reports

The SSCR will be required to make provisions requiring contractors to keep relevant records for the purposes of auditing and verifying costs, pricing, performance and sub-contracts. The period which those records should cover will also be specified in the SSCR. For those records relevant to pricing this will include the period before the QDC was entered into, in order to allow for the auditing of the contract pricing procedure **(clause 22)**.

The prime contractor will also be obliged to provide reports relating to QDCs to both the Secretary of State or GOCO contractor, and the SSRO. The SSCR will set down the issues to be covered in those reports, the timeframe for producing those reports and the form that they will take **(clause 23)**. Reporting requirements will also vary according to the type and value of the contract concerned. It is intended that, in the first instance, the SSCR will provide for three reports (at the beginning and end of the contract, and if any amendments are made) that will enable the MOD, over time, to compare the costs of comparable projects and allow the MOD to improve its independent estimates in both budgeting and in challenging contractor cost estimates. A further two reports will be required more frequently: a quarterly contract report setting out costs and an interim report that will allow the MOD to keep track of the baseline assumptions for costs and timeframe in relation to very long term projects.

Clause 24 obliges larger corporate groups, who are party to a QDC, to provide reports on more general overhead costs and forward planning issues associated with a QDC.

Clause 25 allows the SSCR to disapply a requirement on the prime contractor to provide access to records when such information is subject to commercial confidentiality. In order to stop confidentiality preventing compliance with the recording and reporting requirements the Secretary of State or GOCO contractor may refer a matter to the SSRO where it is considered that an obligation of confidentiality has been entered into for reasons other than genuine commercial ones.

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[46] The difference in these contracts is explained in paragraph 60 of the Explanatory Notes.

[47] An explanation of this contract is provided in paragraph 60 of the explanatory notes.

Under **clause 26** contractors are also obliged to notify the Secretary of State when they become aware of any issue, events or circumstances that are likely to have a material effect upon the costs, price or performance of their QDC.

Failure to comply with any of these clauses may lead to a financial penalty under clauses 30 and 31 (see below).

Single Source Regulations Office (Clauses 13, 34-36 and Schedule 4)

Clause 13 of the Bill establishes the Single Source Regulations Office (SSRO) which will have a duty to ensure that the regulatory framework for single source contracts provides the MOD with value for money, while also providing contractors with a fair and reasonable price. It will be a Non-Departmental Public Body and replace the existing Review Board for Government Contracts which currently monitors the 'yellow Book' arrangements, although its remit will be much broader.

Initial set-up costs will be met by the MOD and the Department will continue to provide its funding. Up to half of its funding will, however, be provided by deductions from the price payable under any single source contracts and will be taken from payments made to contractors. The Secretary of State will determine the amount of funding to be obtained in this manner each year on advice from the SSRO.

The functions of the SSRO are set out in several clauses throughout Part 2 of the Bill. Specifically the SSRO will:

- Advise the Secretary of State on setting key rates to be used in pricing contracts, including the baseline profit rate (clause 19 (2)).

- Keep the regulatory framework under review and propose changes to it to the Secretary of State (clause 38 (1) and (2)). In the first instance the SSRO will carry out a review within the first three years of the SSCR coming into force (by October 2017), and every five years thereafter.

- Issue statutory guidance on allowable costs under single source contracts (clause 20 (1)); any contract profit rate steps (clause 18 (1)); preparing reports (clauses 23 (2) (d) and 24 (6) (d); and how to determine the amount of a compliance penalty (clause 32 (3).

- Upon referral from the Secretary of State, the GOCO contractor or the primary contractor for a single source contract, the SSRO will provide a determination on:

    - any target cost incentive fee adjustments (clause 16 (2) (b))

    - whether the contract profit rate was appropriately determined at the time a contract was entered into, and make any adjustments (clause 18 (3))

    - whether cost under a contract is an allowable cost (clause 20 (5))

    - the amount of any final price adjustment for firm or fixed price contracts (clause 21 (3) (b)

- The SSRO will also provide a determination, upon referral from the Secretary of State or the GOCO contractor, as to whether obligations of confidentiality were entered into for genuine commercial reasons (clause 25 (3))

- A subcontractor may also appeal to the SSRO for a determination on whether a sub-contract is indeed subject to the provisions of Part 2 of this Bill (clause 28 (5)).

- A person may apply to the SSRO for a determination on any matters relating to the contravention of compliance regulations and/or penalty notice issued. The SSRO may substitute its own decision for that of the Secretary of State and its decision is final (clause 31 (8)).

- Upon referral the SSRO may be asked to provide an opinion on whether the Secretary of State or GOCO contractor has reasonably exercised its functions in relation to accessing contractor records for audit purposes and verifying costs, performance and qualifying sub-contracts (**Clause 22 (6 and 7))**.

Under **clause 34** the SSRO may also provide a determination or opinion on any matter relating to a qualifying defence contract, that is referred to it by the Secretary of State, the GOCO contractor, a primary contractor or any person who proposes to enter into such a contract. In such cases the SSRO may also require the payment of any costs by any relevant Party that it considers appropriate. For example, under subsection 5 the Secretary of State may be required to pay costs to a contractor which has been subject to a compliance notice that the SSRO has in turn determined was unreasonable. The SSRO may also provide a determination or opinion on any matter that is referred to it relating to a contract that was entered into before the Single Source Contract Regulations come into force.

The SSRO will also maintain records of single source contracts and their duration, monitor contractors' compliance with their reporting obligations and analyse reports and other information provided by contractors (**clause 35**). Under **clause 36** the SSRO could also provide assistance and other services to the GOCO contractor, although this will not be a duty and will be considered within the context of its overall workload at the time. The SSRO may charge the Secretary of State for any work that is undertaken under this clause.

Further provisions relating to the governance of the SSRO, including its membership, tenure of appointment of non-executive members and the circumstances in which they can be suspended from office, payments to non-executive members, staffing of the SSRO, the appointment of committees, audit and annual reporting, and its status are all set down in **Schedule 4**. Paragraph 17 of that Schedule specifically states that the SSRO will not be a servant or agent of the Crown, will not enjoy Crown status or immunity and its members and employees will not be civil servants.

A Framework Document setting out the arrangements between the MOD and the SSRO will be made publicly available.

Civil Compliance Regime (Clauses 30-33)

The compliance regime for this new statutory framework is established in clauses 30-33. Compliance notices may be issued to a contractor in the following circumstances:

- If they fail to comply with the record keeping, reporting and access requirements set out in clause 22-24.

- If they make misleading reports in relation to a QDC.

- If they fail to notify the Secretary of State of any relevant events that may affect the cost, price or performance of a QDC.

- If they fail to make an assessment on whether a sub-contract is subject to the Part 2 provisions of this Bill; fail to notify a prospective sub-contractor of any assessment, or incorrectly assess that a sub-contract does not qualify as a contract subject to Part 2.

All of these are examined in the various clauses above. A compliance notice will also set out the steps to be taken to remedy a contravention and any timeframe for doing so.

If a contractor fails to take the steps specified in a compliance notice, and has no reasonable excuse for not doing so; or there are no steps to be taken, then the Secretary of State can issue a penalty notice to that contractor, which will state the amount of the penalty and the due date for payment. Under **clause 31 (8)** a contractor has the right to refer any issue relating to a compliance notice or a penalty notice to the SSRO, whose decision will be final. There is no official appeal mechanism beyond this, although such decisions will be open to judicial review.

For most contraventions, the amount of the penalty will be a tariff up to a maximum set out in regulations (but not the SSCR). However failing to notify the Secretary of State of any relevant event related to a QDC and providing a misleading report will have no upper limit. The penalty will be calculated as if the contravention were a breach of the QDC itself and will be made in accordance with the general law of contract in England and Wales.

Where a penalty is not paid by its due date interest will be charged from the due date and the Secretary of State may recover unpaid amounts as a debt due to the MOD.

Disclosure of Information (Clause 37 and Schedule 5)

Clause 37 gives effect to Schedule 5 which creates a criminal offence of disclosing protected information. What constitutes protected information will be set down in the SSCR.

A person who is guilty of an offence under schedule 5 is liable either:

- On summary conviction, to imprisonment for up to 12 months[48], or to a fine, or both
- On conviction on indictment, to imprisonment for up to two years, or to a fine, or both.

Once the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* comes into force, the statutory maximum for a fine will be set by the new levels provided for by section 85 of that Act.

However, it will not be a criminal offence to disclose such information if consent has been given, the information is already available in the public domain, or for any of the reasons set out in paragraph 5, including response to a Freedom of Information request, for the purpose of allowing the SSRO to carry out its functions or in connection with the investigation of a criminal offence.

The Secretary of State will retain the power however, to create by way of secondary legislation, a statutory bar on the disclosure of protected information specifically in relation to a Freedom of Information request.

[48] Or 6 months if the offence is committed before the date on which section 154(1) of the *Criminal Justice Act 2003* comes into force, or in its application to Northern Ireland.

2.3 Part 3 – The Reserve Forces

Legislation governing the composition, terms and conditions, training obligations and call-out of the reserves is currently contained in the *Reserve Forces Act 1996* (RFA96).

Under Part 3 and Schedules 6 and 7 of this Bill four measures to strengthen and support the Reserve forces are introduced. Three of those measures amend RFA96, while the final measure amends the *Employment Rights Act 1996*.

The proposals in this Bill will affect the Reserve forces across all three services, although it is considered likely to have a greater impact on the Territorial Army because of the proposals for more integration with the Regular Army under *Army 2020*.

Renaming of the Army Reserve and the Territorial Army (Clause 42)

Broadly speaking there are two principal elements to the Reserve forces: the Regular Reserve who are ex-Regular service personnel who retain a call-out liability upon leaving the Service; and the volunteer reserves who are civilians who accept an annual training commitment and a liability to be called out for permanent service.[49]

At present the Regular Reserve element of the Army is called the Army Reserve[50] and the volunteer element is called the Territorial Army.[51]

Both the Independent Commission and the July 2013 White Paper recommended changing the name of the Territorial Army to the 'Army Reserve' in order to better reflect its changing role and the fact that it is going to become a more integral part of the Army under Future Force 2020. Subsection 2 of this clause gives effect to this change.

As a consequence the Regular Reserve within the Army also needs to be re-named. Subsection 1 therefore changes its name from the Army Reserve to the Regular Reserve.

Call out of the Reserve Forces (Clause 43 and Schedule 6)

At present Reservists can be called out under Sections 52, 54 and 56 of RFA96, Reservists can currently be mobilised:

- In response to imminent national danger, great emergency or an attack on the UK (s.52)
- For warlike operations (s.54)
- For the protection of life and property outside the UK, for operations anywhere in the world to alleviate distress or the preservation of life or property in time of disaster, or for urgent work of national importance (s.56) This latter provision was inserted into section 56 under the *Armed Forces Act 2011*.

Reservists called out under section 54 RFA96 are required to serve for a period of up to 12 months, with the possibility of extension (section 55); while personnel called out under section 56 are required to serve for a period not exceeding nine months, with the possibility

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49 This does not include the High Readiness Reserves or the Sponsored Reserves. The High Readiness reserves were established in RFA96 and are drawn from the Regular Reserve and the volunteer reserve. They are individuals who are trained to a higher standard and are available for call-out at an agreed minimum notice period. The sponsored reserve is formed of members of the civilian workforce who are required to volunteer as a condition of a contract which their employer has entered into with the MOD for the provision of services. Logistical services are often provided in this manner.

50 The Navy and RAF equivalents are the Royal Fleet Reserve and the Royal Air Force Reserve.

51 The Navy and RAF equivalents are the Royal Naval Reserve and the Royal Auxiliary Air Force.

of extension (section 57). Schedule 14 of the *Armed Forces Act 2006* also introduced three new clauses into RFA96 (sections 53A, 55A and 57A) which allow Reservists to enter into agreements to undertake further periods of permanent service beyond the current limitations that are set down in RFA96. These sections do not provide for the extension of a current term of service but are intended for use by those Reservists who have completed a term of permanent service, and have already been released from service but wish to volunteer for a further period. In the Explanatory Notes to the AFA06, the MOD explained:

> However, experience in recent operations has shown that many reservists want to be able to volunteer for further periods of permanent service, but are prevented from doing so by the current provisions; consequently in some areas of expertise we have experienced manning difficulties that we would not otherwise have encountered, as well as missing the opportunity to deploy reservists with valuable operational experience.[52]

As outlined above, the greater integration of the Reserves into the Regular Army will also require Reservists to be available for almost all military operations, often as small numbers of individuals but also, particularly in the case of the Army and as the situation demands, as formed sub-units or units. This will range from short notice contingent operations to longer term enduring operations, in addition to other activities supporting the UK's wider foreign policy aims or to meet the UK's standing commitments, which were summarised in the White Paper thus:

Abroad:

- Short term operations such as the evacuation of UK citizens from Lebanon in 2006 and the 2011 Libya operation.
- Longer term stabilisation operations such as in the Balkans, UN missions, Iraq and Afghanistan.
- Standing commitments abroad such as the Cyprus garrison and the defence of the Falkland Islands.
- Deployments overseas aimed at Defence engagement, conflict prevention, security sector reform and capability building in priority countries, such as the British Peace Support mission in East Africa and the EU operation in Mali.

At Home in the UK:

- Playing a general role in homeland security, including activities such as support to the Olympics and Paralympics, or specialist roles such as cyber.
- Delivering national resilience such as responding to the foot and mouth crisis, flood relief, and communications support to crisis management.
- Standing national commitments, such as defence of the UK's airspace.

Box 3 – Tasks that the Reserves will be Required to Undertake

Therefore, additional legal powers to mobilise the Reserves are now required. It is worth noting that there will be no change to the rights of employers or reservists to seek to defer or be exempted from mobilised service.[53]

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52 *Armed Forces Act 2006: Explanatory Notes*

53 The grounds under which an employer or reservist may seek deferral or exemption are set out in Schedule 1 of *Reserve Forces (Call-out and Recall) Exemption Etc Regulations 1997*.

The main purpose of **Clause 43** of this Bill is therefore to make provision for the following:

- Subsections 1 and 1A of section 56 RFA96, which reflect the wording set out above, are to be substituted with new subsection 1B which will allow the Secretary of State to authorise the call out of the reserves "for any purpose for which members of the regular services many be used" **(clause 43 (4))**.

- Section 57 RFA96, which established the maximum duration for service under a section 56 call-out, is to be amended so that under the new section 56 (1B) Reservists will be required to serve for the same amount of time as a Reservist called out under section 54 at present, i.e. up to 12 months. The period of time before any written agreement can be entered into extending that period of service will also be brought into line with the current arrangements for a section 54 call-out, i.e. no more than six months before the end of that original 12 month period **(clause 43 (6))**.

- Any periods of additional service that are entered into under section 57A RFA96 are also to be amended to 12 months, to bring a section 56 call out into line with a call out under section 54 **(clause 43 (7))**.

- **Clause 43 (1)** also amends the call out period for Reservists who have entered into a special agreement under Part 4 of RFA96 (i.e. high readiness reservists), to 12 months instead of nine, thereby bringing it into line with the maximum call out periods of other Reservists.

- The MOD's intention is for the circumstances in which the powers in sections 52, 54 and new 56 1B RFA96 may be exercised, to overlap. Therefore, **clause 43 (8)** inserts a new subsection into section 64 RFA96 setting this out.

- Clause 43 also gives effect to **Schedule 6**, which amends section 129 and Schedule 9 RFA96. Under this Schedule any person currently serving in the reserve and regular forces (who is not part of the original transitional class) [54] will become part of a class of personnel (to be known as the second transitional class) to whom the new provisions of clause 43 in this Bill will not apply and the powers governing their call-out will remain as they currently are under RFA96. Any personnel serving in the Regular forces before this Act comes into force may also become a member of the second transitional class on transfer to the reserve (paragraph 27). Under paragraph 28 of this Schedule, however, an individual can elect not to be a member of that class and be subject to the new provisions set out in clause 43.

Payments to Employers (Clause 44 and Schedule 7)

The majority of the Reserves White Paper is concerned with improving the relationship between employers and Reservists. One of the proposals in the paper is for improved financial support to employers, including more streamlined administrative arrangements.[55]

As such, the intention is to revise, by April 2014, the *Reserve Forces (Call-out and Recall) (Financial Assistance) Regulations*, which are currently set down in SI 2005/859.[56] However, clause 44 of this Bill introduces new financial incentives to the employers of Reservists,

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54 Similar provision was also made in RFA96 for reserve forces personnel who were serving before that Act came into force. Under those provisions the regulations set out in the Reserve Forces Act 1980 continued to apply specifically to that class of personnel, who in this Bill are referred to as the Original Transitional Class.

55 The current financial assistance available to the employers of mobilised volunteer reservists is summarised on page 45 of the Reserves White Paper.

56 The relevant piece of primary legislation is sections 83 and 84 RFA96.

which will also form part of those regulations. Therefore changes to SI 2005/859 cannot be made until this piece of primary legislation has passed.

Clause 44 inserts a new section (84A) into RFA96 which makes provision for the Secretary of State, through secondary legislation, to make additional payments to employers whose employees are called out, undertaking certain training or are performing certain other duties relating to their Reserve service, or to the business partners of mobilised Reservists. Although small and medium enterprises (SMEs)[57] are not specifically referenced in this primary legislation or the explanatory notes, the 2013 White Paper and Impact Assessment suggest that such financial incentives are aimed at these companies in recognition of the fact that the impact of employing a reservist is greater upon SMEs.

Those payments are also subject to caveats as set down in **subsections 3 and 5** of this new section. Under these subsections the Secretary of State must be satisfied that such payments are likely to encourage companies to continue to employ members of the reserve forces, or allow individuals to continue any business partnerships with Reservists; and that the payments made under this section do not replicate the financial assistance that is already available under RFA96 (section 84). Subsection 5 also ensures that payments may be made with respect to relevant reserve force activities, regardless of whether or not the company, or business partner, has suffered any financial loss as a result.

This new Section 84A will not, however, be applicable to 'special members' of the reserve forces, more commonly known as Sponsored Reserves (see footnote 50). Any individual making a claim under these regulations, who is dissatisfied with the outcome will also have the right of appeal to a Reserve Forces Appeal Tribunal (**clause 44 (6**)).

Clause 44 also gives effect to **Schedule 7.** This schedule amends section 85 RFA96, which makes provisions with respect to matters such as the type of individuals who are entitled to claim payments, and the sums to be paid. **Paragraphs 1-5** of this schedule amend section 85 to take account of the new provisions made under new Section 84A.

Section 86 RFA96 allows the Secretary of State to suspend the financial assistance regulations when a call-out order is made under either section 52 (imminent national danger or an attack on the UK) or section 68 which allows for the recall of officers and former servicemen in such a situation. **Paragraph 6** of this schedule also amends that section to take into account the new arrangements made under clause 44. The criminal offences associated with making false claims for payments are also extended to clause 44 **(paragraph 7)**; while **paragraphs 10-12** make transitional provision for new section 84A to apply to the sections of the *Criminal Justice Act 2003* and the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* that have yet to be commenced and which will change the penalties on conviction in the magistrates court for an offence related to financial assistance payments made under RFA96.

As outlined above, the full details of this financial assistance will be set out in secondary legislation. The Explanatory Notes suggest, however, that in addition to the general financial assistance available the award to SMEs is expected to be a flat-rate payment of £500 per reservist, per month when mobilised up to a cap of £6000 per annum.[58] These costs will be met from the existing MOD budget.

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[57] Defined by the department of Business, Innovation and skills as enterprises with fewer than 250 employees and an annual turnover of less than £25m

[58] *Explanatory Notes*, paragraph 172

Unfair Dismissal of Reservists (Clause 43)

Under the *Reserve Forces (Safeguard of Employment) Act 1985* Reservists are already protected from dismissal by their employer for any duties or liabilities related to their Service, and are afforded certain protections in terms of their continuity of employment.

However, an individual cannot currently claim for unfair dismissal at an Employment Tribunal until they have completed two years of continuous employment with their employer. Periods of mobilisation do not count towards continuous employment and therefore it can take a Reservist longer than two years to gain this protection.

The final clause relating to the Reserve Forces amends section 108 of the *Employment Rights Act 1996* to exempt Reservists from this statutory two-year qualifying period. This exemption will only apply, however, where the principal reason for dismissal is related to the employee's reserve service. It will not apply where a Reservist has been dismissed for any other reason, such as capability or conduct.

This provision does not replace section 17 of the *Reserve Forces (Safeguard of Employment) Act 1985* which makes it a criminal offence for an employer to dismiss a reservist because he/she is called out, or likely to be called out. This clause is also only applicable in England, Wales and Scotland as employment law is devolved in Northern Ireland and the *Employment Rights Act 1996* does not apply there.

Although not in this Bill, the MOD has also outlined its intention to gather evidence in relation to Reservists' employment and whether Reservists are being disadvantaged in or when seeking employment, as a direct result of their service. If the evidence justifies it, the MOD has stated its intention to consider additional employment protection measures in the next *Armed Forces Bill* which will be introduced in 2015-16.