Defence Reform Bill: Lords Amendments

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The intention of the Defence Reform 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.

The bill is split into three parts:

- Part 1 establishes the arrangements for reforming Defence Equipment and Support (DE&S), the procurement arm of the Ministry of Defence, and turning it into a Government-Owned, Contractor-Operated (GOCO) organisation. The Government is no longer pursuing the plan to transform DE&S into a GOCO but has retained Part 1 of the Bill to enable a future Government to do so.
- Part 2 creates a statutory framework for the governance of MOD single source contracts, which form a significant proportion of the contracts placed by the Ministry of Defence.
- Part 3 makes several amendments to the regulations governing the Reserve Forces.

The consolidated Lords amendments to the Bill are available as Bill 197 2013-14. The Bill will return to the Commons on 29 April 2014.

All the amendments to the Bill agreed in the House of Lords were tabled by the Government, largely in response to concerns raised by Members of both Houses about the level of Parliamentary oversight and scrutiny of the measures introduced in the Bill. The Government will now be required by statute to provide Parliament with a report on the options for carrying out defence procurement. An annual report on the capabilities of the Reserve Forces will be prepared by the Reserve Forces and Cadet Associations and laid before Parliament.

Members debated many other amendments but apart from two, all were either withdrawn or not moved. Two Opposition amendments were pushed to a vote at the Report stage and both were defeated.

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1 Introduction

The Defence Reform Bill provides for the reform of the way in which the Ministry of Defence procures equipment and support for the Armed Forces and, separately, extends the scope for the use of the Reserve Forces.

It implements 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.

The bill is split into three parts: Part 1 establishes the arrangements for reforming Defence Equipment and Support (DE&S), the procurement arm of the Ministry of Defence, and turning it into a Government-Owned, Contractor-Operated (GOCO) organisation; Part 2 creates a statutory framework for the governance of MOD single source contracts; Part 3 makes several amendments to the regulations governing the Reserve Forces.

All the amendments to the Bill are Government amendments and relate predominantly to Parliamentary oversight and scrutiny of the measures introduced in Parts 1 and 2 of the Bill. The amendments were brought in response to concerns raised by Members of the House of the Lords. The Government also brought forward an amendment discussed and committed to during proceedings in the House of Commons, to place a statutory requirement for an annual report on the volunteer Reserve Forces. All other Opposition or backbench amendments were either withdrawn or not moved.

Part 1 amendments:

Part one establishes the arrangements for reforming Defence Equipment and Support (DE&S) into a Government-Owned, Contractor Operated (GOCO) organisation. Since the Bill's introduction, the Ministry of Defence has since decided not to proceed along this path and instead turn DE&S into a bespoke central Government trading entity. Achieving the latter does not require legislation.

The Opposition and several Members of the House of Lords were concerned that leaving Part 1 in place enabled a future Government to change DE&S into a GOCO without adequate Parliamentary scrutiny. The Government amendments were in response to amendments tabled by a number of Lords calling for a White Paper and an Impact Assessment to be published if a future Government did decide to pursue the GOCO option. Lord Astor of Hever made it clear that the Government amendment, while not explicitly using the phrase White Paper, said "the information that would be provided under the amendment is effectively the information that would be included in a White Paper and impact assessment."[1] The Government also agreed to make Part 1 subject to the affirmative procedure before it can be implemented to increase Parliamentary scrutiny.

- **New clause 50(3)** requires that any statutory instrument containing an order of commencement in respect of Part 1 is to be subject to the affirmative procedure.
- In fulfilment of this, under **New clauses 50(3a) – (3e)** the Government will publish and lay before Parliament a report on the options for carrying out defence procurement; this report will include an impact assessment.

Part 2 amendments

1 HL Deb 2 April 2014 c964

The Ministry of Defence places on average 45% (by value) of its contracts on a single source basis over the last five years.[2] Part 2 of the Bill creates a new statutory framework for single source contracts and creates a new Non-Department Public Body, the Single Source Regulations Office, to oversee that framework and a civil compliance regime.

The Government amendments relate to the regulations that are to be made by statutory instrument under Part 2 and the parliamentary procedures by which those regulations are made. The Government replaced the requirement for two separate sets of regulations, the Single Source Contract Regulations and the penalty regulations), and instead provide for all the regulations under Part 2 to be made in one statutory instrument: the Single Source Contract Regulations. The new amendments were described as simplifying amendments to reflect the fact there is now just one set of regulations rather than two. Specifically:

- **Clause 33(1)** removes the reference to the regulations (plural) made by the Secretary of State and replaces it will a reference to the Single Source Contract Regulations, to reflect there being now only one statutory instrument rather than two sets of regulations.

- **Clause 33(6)** relates to the maximum penalty amounts. The clause originally provided for the penalty regulations to vary the maximum penalty amounts for two purposes: for ‘different purposes’ and, secondly, by reference to the value of contracts. As the maximum penalty values are now to be included in the SSCRs and clause 42(2) already provides for the SSCRs to make different provision for ‘different purposes’, new clause 33(6) deletes the reference in the original to ‘different purposes’ and instead refers only to the value of contracts.

- Original **clause 33(7)** was deleted because it dealt with the parliamentary process (affirmative procedure) for the penalty regulations and there is no longer a separate statutory instrument containing the penalty regulations. This is now provided for in **Clause 42(4c)** (see below).

- **Clause 39(1)** was simplified to refer only to the review of the SSCRs rather than to regulations under this Part, to reflect there being now only one statutory instrument rather than two sets of regulations.

In addition, the Government has also acted on the recommendations of the Delegated Powers and Regulatory Reform Committee, which called for the use of the affirmative, rather than negative, procedure[3] to ensure greater Parliamentary scrutiny of the Single Source Contract Regulations:

- **New Clause 42(4)** provides that SSCRs should be subject to the affirmative procedure the first time they are made and that any changes to the regulations related to Clause 14 (those regulations relating to qualifying defence contracts) be subject to affirmative procedure. It retained, but did not change, the requirement that any changes to regulations made under Clause 33 (amount of penalty) is subject to

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[2] *Better Defence Acquisition: Improving how we procure and support Defence equipment* Cm 8626, p24, para 62, for Financial Years 2007/8 to 2011/12

[3] The 'affirmative procedure' refers to statutory instruments which must be approved by both the House of Commons and the House of Lords to become law. Conversely the 'negative procedure' refers to statutory instruments which automatically become law unless there is an objection from either House – source: Parliament glossary. For a more detailed explanation see House of Commons, Delegated Legislation – A brief guide, August 2011

the affirmative procedure. In all other cases, the SSCRs will follow the negative procedure.

Part 3 amendments
Part 3 of the Bill focuses on the Reserve Forces. The new clause was tabled by the Government in response to an amendment tabled by Julian Brazier MP at Report Stage in the House of Commons. That amendment was withdrawn upon a commitment made by the Secretary of State for Defence to introduce an amendment in the House of Lords reflecting Mr Brazier's amendment.

- The Reserve Forces and Cadets Associations to prepare an annual report on the capabilities of the volunteer Reserve Forces and for the Secretary of State for Defence to lay the report in Parliament (**new Clause 47**). The report is to look particularly at the recruitment, retention and training of the volunteer Reserve Forces and the upkeep of land and buildings.

Defeated amendments
Two opposition amendments to Parts 2 and 3 were discussed at Report Stage were defeated on division. Amendment 2 concerned the independence of the proposed Single Source Regulations Office and would have shifted responsibility for it from Ministry of Defence to the Department for Business, Innovation and Skills. Amendment 8 called for an annual report on the Army's fighting power, reflecting a recommendation made by the Defence Committee in its recent inquiry *Future Army 2020.* Both amendments were defeated on division.

Passage through Parliament and Library material
The Defence Reform Bill was introduced in the House of Commons on 3 July 2013. The Bill completed its remaining stages in the House of Commons on 20 November 2013 and was introduced into the House of Lords on the 21 November 2013 (HL Bill 60 of 2013-14). The Bill had its Second Reading on 10 December 2013. Committee stage took place over four days on 3, 5, 11 and 25 February 2014 (amended bill available as HL Bill 90). Report took place on two days, 24 and 26 March 2014. Third Reading was on 2 April 2014. The Bill returns to the Commons on 29 April 2014. All the Bill's proceedings can be accessed via Parliament's website on Bills before Parliament.

Detailed background on the bill was provided in Library Research paper 13/45, *Defence Reform Bill,* which was prepared for the Bill's second reading in the Commons. Library Standard Note 06732 provided a briefing on the Commons Committee stage and Library Standard Note 07768 provided a briefing on the Commons report stage and third reading. The House of Lords Library Note on the Bill (LLN 2013/038) summarised the Bill and the stages in the Commons.

Sections 2 – 4 below examine in detail the amendments to each Part of Bill in turn, focusing only on those amendments that were accepted and amendments that were pushed to a vote.

2 Part 1: Defence procurement

Two amendments moved by the Government to increase parliamentary oversight of Part 1 of the Bill were accepted by Members of the House of Lords. Both were brought in response to concerns raised during the Bill's progression through the Lords.

Part 1 of the Bill establishes the arrangements for reforming Defence Equipment and Support (DE&S) and turning it into a Government-Owned, Contractor-Operated (GOCO) organisation.

When the Bill was introduced in the Commons in July 2013 the Ministry of Defence was exploring whether to turn the Defence Equipment and Support (DE&S) organisation into a Government-Owned, Contractor-Operated (GOCO) organisation. The final decision on whether to pursue a GOCO was not expected until summer 2014 but the relevant enabling legislation was put forward as part of this Bill.

However on 10 December 2013 the Secretary of State for Defence announced the MOD was halting the competition because it had only received one proposal from the two consortia remaining in the process. Philip Hammond said that with only one bidder remaining in the competition, the public sector comparator that the MOD had been developing (known as DE&S plus or DE&S+) would not generate enough competitive tension to ensure an effective outcome for the armed forces and value for money for the taxpayer.

Instead, the MOD will build on the DE&S+ proposition to enable it to become “match-fit” as the public sector comparator for a future market testing of the GOCO proposition. It was turned into a bespoke central Government trading entity on 1 April 2014. Legislation is not required to establish this entity.[4] The Government has ruled out re-starting the GOCO competition in this Parliament, meaning it will fall to a future Government to decide whether to weigh industry’s appetite to operate DE&S as a Government-Owned, Contractor-Operated organisation.

The announcement fell on the same day as the Second Reading of the Bill in the Lords. As such, it dominated Second Reading and was discussed at length in Committee and at Report. The discussions fell into two broad areas: whether Part 1 should remain in the Bill, in light of the Government’s decision not to proceed with the GOCO competition; and, if Part 1 is to remain in the bill, what level of parliamentary oversight is required by statute if a future Government decided to pursue the GOCO option.

The Government introduced two amendments concerning parliamentary oversight and scrutiny of any decision by a Government to enact Part 1 in response to concerns of Members of the House of Lords.

At the Committee stage the Government moved an amendment to provide for any statutory instrument containing an order in respect of part 1 to be made by affirmative procedure, thereby enabling both Houses the opportunity to consider Part 1 before its commencement. This is **new clause 50(3).**

The Government moved an amendment at Third Reading that makes it a statutory requirement for a future Government to publish information on the GOCO options before the order commencing Part 1 is brought forward. This was an endorsement of amendment 9 at Report, which had been moved by Lords Craig, Stirrup, Levene and Roper, which had called for a White Paper and impact statement to be published. **New clause 50(3a)-(3e)** requires the Secretary of State to publish and lay before Parliament a report on “the options for carrying out defence procurement”. This report must include an impact statement regarding the proposed arrangements. Lord Astor of Hever, Parliamentary Under Secretary of State and the Lords Spokesman on Defence, made it clear in the Third Reading debate that, although the new clause did not refer to publishing a White Paper, it “reflects that

[4] Third Reading of the Bill in the Lords fell the day after the Trading Entity was created. Lord Astor referred to it informally as DE&S++ or DE&S-plus-plus. HL Deb 2 April 2014 c964

commitment".[5] Lord Craig gave the Government's amendment at Third Reading his support, as did Lord Rosser for the Labour opposition.

2.1 Should Part 1 of the Bill be retained?

That the Government's decision to abandon the competition to turn DE&S into a GOCO fell on the same day as the Second Reading prompted a lengthy debate over the virtue of retaining Part 1 of the Bill at all, as part of a wider discussion about the merits of turning DE&S into a GOCO. This was further pursued in Committee and at Report.

Lord Astor of Hever summarised the argument in favour of retaining Part 1: "legislation is required to establish an effective GOCO and that remains a possible future option. If we do not have the legislation in place then, that could inhibit a future competition."[6]

Lord Astor argued that despite the Government choosing not to proceed with the GOCO competition at this moment in time, it remains the best potential future solution to the "challenge of transforming DE&S."[7] He expanded:

> We believe that a GOCO remains a potential future solution for transforming DE&S once we have put in place a more robust baseline from which to contract with a GOCO partner. It would therefore be prudent to have Part 1 in place should a future Administration decide to go the GOCO route. We very much hope that the new DE&S-plus organisation will be robust and successful. We should not be afraid of the competition that potentially testing the market for a GOCO in three to five years' time would provide. Keeping the possibility of a GOCO would provide an incentive for a new organisation to maximise its performance.[8]

He added "we do not envisage reopening the GOCO option for at least two to three years, certainly not before the next election."[9]

The Opposition's position was that Part 1 of the Bill should be withdrawn. Lord Rosser, Labour's Defence spokesperson in the House of Lords, argued that if a future Government wishes to pursue the GOCO option then they should bring forth the necessary legislation then:

> The position should be that if a Government decide that they want to achieve reform of defence procurement at some stage in the future through the GOCO route, they should be required to do so through means of a parliamentary Bill at the time to justify their stance and their new proposal, and not be able to do so without proper scrutiny using a parliamentary Bill that had been passed some time previously and during the course of which, before it had even been discussed in this House, the Government announced they no longer intended to proceed with the now non-existent competition and its single proposal or bid.[10]

At Committee Stage Lord Rosser pursued this further:

> Why then are the Government persisting with the retention of Part 1 when, even on their own admission, nothing will happen that needs the powers contained in Part 1 this side of a general election? Part 1 is not about giving this Government statutory powers

[5] HL Deb 2 April 2014 c964
[6] HL Deb 10 December 2013 c772
[7] HL Deb 10 December 2013 c728
[8] HL Deb 10 December 2013 c769
[9] HL Deb 10 December 2013 c769
[10] HL Deb 10 December 2013 c734

> that they plan to use; in fact, it is the exact opposite, it is about giving statutory powers that this Government have now explicitly said that they will not be using, following the collapse of the commercial competitive tendering process.
>
> Part 1 should be deleted because it provides for an untested and untried major change in defence procurement which this Government do not intend to introduce and for which they cannot and will not be able to produce any evidence that it will provide a better alternative at some time in future than either the existing arrangements—or, significantly, the further developed DE&S model, which does not even come into being until April this year.[11]

He added:

> It cannot be right to pass legislation now which enables a future, unknown Government to make a major change in defence procurement at some time ahead in circumstances that are currently unknown without having to come back to Parliament with a Bill so that they can be made to justify their proposals in detail in the light of the circumstances at the time, with their proposals subject to possible amendment as well as rejection. That is a further reason why Part 1 should be deleted from the Bill. Since it will be a future Government who will take the decision to make a radical change in our defence procurement arrangements, if that is what they decide, it is that Government, not a Government who have decided not to make the change during their term of office, who should have their proposals and reasons for the change subject to full scrutiny by Parliament through a Bill.[12]

He raised a number of questions but drew attention to the difficulty of questioning Ministers on the detail of the GOCO when they have already said it will be for a future Government to decide whether to pursue this further:

> How all these issues and considerations will be addressed and covered in the terms of a GOCO also requires answering, but by the Government who decide to make the switch to a GOCO and not by the Government who do not, and by the Government negotiating the arrangements with the successful GOCO operator and not by the Government who are not. Questions of that magnitude and importance cannot be addressed and considered in a discussion on an affirmative order, as opposed to a parliamentary Bill.[13]

He dismissed the Government's view that there would not be time for a further Bill dealing with defence procurement "because that would be a matter for the next or a subsequent Government to decide when determining their legislative priorities."[14]

Lord Tunnicliffe, a Labour deputy chief Whip, echoed Lord Rosser's position:

> The intention of legislation must be to deliver a tangible outcome. You have to have a concept when you are working on creating it: what is it going to deliver? The legislation to create the GOCO is quite complicated—I will come to that—but at least there was something there. We had a White Paper about it and there had been some description and discussion of it. There was some background about the tangible thing that we were debating. We will not now be debating something that is going to happen in a near timescale. It will be a debate in a vacuum. It will almost be a philosophy seminar,

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[11] HL Deb 3 February 2014 cGC9
[12] HL Deb 3 February 2014 cGC11
[13] HL Deb 3 February 2014 cCG12
[14] HL Deb 3 February 2014 cCG12

> as we will have to carry notions of "What if this?" and "What if that?", and of how it fits together.
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> Finally, it will have the most undesirable effects on DE&S because it will be like a sword of Damocles. At the whim of a Minister, with no scrutiny from this House or the House of Commons, the whole issue relating to defence procurement can be transferred to a GOCO if we pass Part 1 of the Bill. I implore the Government to withdraw Part 1.[15]

Other Members of the House of Lords agreed. Lord West of Spithead argued "I believe that Part 1 of the Bill is now redundant"[16], as did Baroness Dean of Thornton-le-Fylde: "I think that it is defunct and no longer needed, and that the other parts of the Bill could become an effective Act without it."[17] Lord Davies of Stamford suggested "we should junk the idea of the GOCO altogether."[18]

Others voiced their concerns. At Second Reading Lord Lee of Trafford expressed his concern about the uncertainty retaining Part 1 brings to staff:

> is it sensible or fair to retain the GOCO option in the Bill, almost as a sword of Damocles hanging over the future DE&S-plus? Is it going to encourage top personnel to give up their careers in the private sector and join this organisation if some future Government in a few years' time are going to go back to the GOCO option and argument?[19]

Lord Levene of Portsoken, who authored a report on defence reform in the Ministry of Defence,[20] said he had never believed that a GOCO was the right solution and the decision to drop the plan in favour of a DE&S+ option "is undoubtedly the right one."[21]

Not all opposed the GOCO option. Baroness Cohen of Pimlico expressed her disappointment that the GOCO proposal had fallen and argued "radical reform involving giving cash and authority to the GOCO is the only thing that will work."[22]

2.2 Parliamentary oversight and scrutiny

In response to concerns, outlined in the preceding section, that the bill allowed a future Government to commence Part 1 without further Parliamentary scrutiny, the Government moved two amendments to improve parliamentary oversight of any decision by a future Government to enact Part 1. Members of the House of Lords were particularly concerned because the Government had already said it does not intend to pursue the GOCO option in the current Government.

Any statutory instrument containing an order to commence Part 1 must now be made by affirmative rather than negative procedure. This is contained in new **clause 50(3).**

The Government then moved an amendment at Third Reading that makes it a statutory requirement for a future Government to publish information on the GOCO options before the

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[15] HL Deb 10 December 2013 c766
[16] HL Deb 10 December 2013 c743
[17] HL Deb 10 December 2013 c753
[18] HL Deb 10 December 2013 c762
[19] HL Deb 10 December 2013 c754
[20] "Defence Reform: an independent report into the structure and management of the Ministry of Defence" June 2011
[21] HL Deb 10 December 2013 c739
[22] HL Deb 10 December 2013 c759

order commencing Part 1 is brought forward. This was an endorsement of amendment 9 at Report, moved by Lords Craig, Stirrup, Levene and Roper, which had called for a White Paper and impact statement to be published. **New clause 50(3a)-(3e)** requires the Secretary of State to publish and lay before Parliament a report on "the options for carrying out defence procurement". This report must include an impact statement regarding the proposed arrangements. Lord Astor of Hever, Parliamentary Under Secretary of State and the Lords Spokesman on Defence, made it clear in the Third Reading debate that, although the new clause did not refer to publishing a White Paper, it "reflects that commitment".[23]

Lord Craig gave the Government's amendment at Third Reading his support, as did Lord Rosser for the Labour opposition.

An Opposition amendment to require a Super-Affirmative Order was discussed and withdrawn at Report. This is explored more fully below.

Affirmative procedure for commencement order

At the Committee stage the Government moved an amendment to provide for any statutory instrument containing an order in respect of part 1 to be made by affirmative procedure, thereby enabling both Houses the opportunity to consider Part 1 before its commencement. This is new **clause 50(3).**

The amendment was brought in response to Members of the House of Lords desire to ensure Parliamentary approval of any decision by the Ministry of Defence to enact Part 1. As Lord Craig of Radley acknowledged on the Second day of Report "the Government agreed that both Houses should be given a legislative opportunity to reconsider Part 1 prior to its commencement", although he caveated that by also moving an amendment (withdrawn) to demand a White Paper and an impact statement on any proposed GOCO option.[24]

Statutory requirement for report on the options for carrying out defence procurement

New clause 50(3a) – (3e), which makes it a statutory requirement for the future Government to publish information on options for the GOCO before an order to commence Part 1 is brought forward, was introduced by the Government at Third Reading.

The amendment was tabled in direct response to an amendment debated during Report, introduced by Lord Craig of Radley et al (amendment 9).

Lord Craig of Radley's amendment would have required the Secretary of State to publish a White Paper and an impact statement on any proposed GOCO compared with DE&S before Part 1 can be commenced. Lord Craig said he accepted the Part 1 of the Bill should stand and acknowledged the Government's amendment to require any statutory instrument containing an order in respect of Part 1 to be subject to affirmative procedure (see above). However he said although it is a step in the right direction, "it does not go far enough."[25]

Lord Craig argued the affirmative resolution approves only Part 1 commencement and therefore only agrees the technical and administrative processes to be followed by a GOCO. He argued that in addition, ahead of passing the affirmative resolution, Parliament needs to "consider as well the relative merits and risks of proceeding with a GOCO compared to those of what will be an up-and-functioning DE&S-plus." He referenced a letter from the Minister for

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23 HL Deb 2 April 2014 c964

24 HL Deb 26 March 2014 c553

25 HL Deb 26 March 2014 c553

Defence Equipment, Support and Technology, Philip Dunne, acknowledging the need for a White Paper and an impact assessment prior to the statutory instrument.[26] He said as such, the amendment does no more than introduce into the Bill undertakings given by the Minister in the letter. He concluded:

> Parliament and the Armed Forces should have confidence that a procurement GOCO will not be adopted —if ever—without full and detailed consideration at the time. Parliament should first have to hand, by means of a White Paper and impact assessment, the fullest exposition and consideration of any GOCO's merits and risks, compared with DE&S-plus. The amendment guarantees that security, whatever changes in personalities or Governments may happen.[27]

In response, Lord Astor of Hever indicated the Government's support of the amendment in principle and said the Government intended to bring forward a government amendment at Third Reading. He attributed the Government's change of heart to discussions held with Lords during the passage of the Bill:

> We acknowledge that the merit of some form of statutory requirement to provide detailed information on the GOCO proposals in future is needed and that it is reasonable to put such a requirement into the Bill. We did not initially think that a statutory requirement was necessary, but we have been convinced otherwise by noble Lords from all sides of the House. That is an example of what the Members of this House do best—ensuring that legislation is properly scrutinised, and amended where necessary. We will therefore bring forward a government amendment at Third Reading that will make it a legal requirement for a future Government to publish appropriate information on the GOCO options before the order commencing Part 1 is brought forward.[28]

The Opposition tabled an amendment (amendment 10) requiring the Ministry of Defence to consult with the Defence Select Committee on an impact assessment, for an independent report into the options be laid before Parliament and for the Defence Committee to review and scrutinise the independent report. Lord Rosser argued, in Committee, that:

> If the Government are determined to leave Part 1 in the Bill, we believe that the measures set out in our amendment would at least help to ensure that the next or a subsequent Government, if they decide to go down the GOCO route, would have to justify their decision to Parliament in some detail based on hard evidence relating to the circumstances at that time before they can proceed and that Parliament, when making its decision, would have the benefit of impact assessments, an independent view of alternative defence procurement arrangements and a review and report on that independent report by its own Defence Committee in the House of Commons. That will be the minimum necessary if Part 1 is not withdrawn from the Bill to at least ensure appropriate scrutiny of a future Government's proposals and reasons for establishing the GOCO option for defence procurement.[29]

Lord Astor of Hever outlined the Government's opposition to the amendment. He said placing such a requirement on the Defence Committee "effectively sets a statutory requirement for a future Government to consult the Defence Select Committee on the way forward." He said the Government needs to be very careful in setting out statutory requirements on a House of Commons Select Committee and it is for the Committee, not the Ministry of Defence, to

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[26] HL Deb 26 March 2014 c553
[27] HL Deb 26 March 2014 c554
[28] HL Deb 26 March 2014 c558
[29] HL Deb 3 February 2014 cGC13-14

decide what its programme of work should be.[30] He also rejected calls for both an independent report, and for the Defence Committee to review and report on that report. He said he could not see what an independent report would add to the impact assessment already agreed nor did he think it right to make it a legal requirement for the Defence Select Committee to review such a report. The amendment was not moved.

The Government then moved an amendment at Third Reading that makes it a statutory requirement for a future Government to publish information on the GOCO options before the order commencing Part 1 is brought forward. This was an endorsement of amendment 9 at Report, moved by Lords Craig, Stirrup, Levene and Roper, which had called for a White Paper and impact statement to be published. **New clause 50(3a)-(3e)** requires the Secretary of State to publish and lay before Parliament a report on "the options for carrying out defence procurement". This report must include an impact statement regarding the proposed arrangements. Lord Astor of Hever, Parliamentary Under Secretary of State and the Lords Spokesman on Defence, made it clear in the Third Reading debate that, although the new clause did not refer to publishing a White Paper, it "reflects that commitment".[31]

A super-affirmative order?

The Opposition moved amendments at both Committee and Report stage calling for a super-affirmative procedure to be used by both Houses before Part 1 could be brought into force.

Lord Rosser, speaking for the Opposition, proposed a Super-Affirmative procedure for orders under Part 1 during Report (amendment 11). He described this as very much the second-best option to withdrawing Part 1 completely. The super-affirmative procedure would require the Secretary of State, before making a commencement order for Part 1, consult with a range of people or bodies, including any recommended by the House of Commons Defence Select Committee; lay a draft order and explanatory document before Parliament and set a time frame.

To support his argument, Lord Rosser pointed to Crime and Courts Act as an example where the super-affirmative procedure was included. He acknowledged the Minister's statement that the Government intends to move an amendment at Third Reading to provide for a White Paper and an impact assessment. However he said it does not provide for an independent assessment or the involvement of the Defence Select Committee prior to an affirmative order being considered, nor does it provide any minimum timescale between the production of the White Paper and the impact statement for consultation and scrutiny before any vote in Parliament. He said "our super-affirmative would address those potential concerns about the quality of documentation as there is provision for independent assessment and the involvement of the Defence Select Committee."[32]

Other Members were less keen. Lord Roper said that while at the Committee stage he "initially saw some advantage" to the super-affirmative order, he ultimately felt the amendments were "too elaborate" and suggested the House should accept the Government's amendment (to be made at Third Reading).[33]

Lord Trefgarne described a super-affirmative resolution as "very much over the top in this particular circumstance", adding "the amendment will achieve nothing, save a further

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30 HL Deb 26 March 2014 c558
31 HL Deb 2 April 2014 c964
32 HL Deb 26 March 2014 c556
33 HL Deb 26 March 2014 c557

significant delay to a measure which all sides of the House agree has considerable merit and the potential to save the taxpayer a considerable sum in the future."[34]

Lord Astor rejected the call for the commencement order for Part 1 be subject to a super-affirmative procedure, arguing it was inappropriate:

> "Super-affirmative procedures may be appropriate where secondary legislation covers significant policy matters but not in relation to commencement orders. It is not clear what we would consult on given that the order will simply say when the provisions should come into force. Amendment 11 confuses the issues. I accept that there is a need for Parliament to consider any GOCO proposals but I fail to see what would be achieved by the requirements in Amendment 11. It would not provide the House with any more scrutiny of the proposals in question and introduces an unnecessary and overly complex procedure where none is required. I must therefore strongly resist Amendment 11, which I think is both unprecedented and wholly inappropriate."[35]

The amendment was ultimately not moved. No attempt was made to reintroduce such an amendment at Third Reading in the Lords.

3 Part 2: Single Source Contracts

Part 2 of the Bill creates the regulatory framework for the governance of single source contracts that are not subject to the usual legal obligation to be advertised and tendered competitively. The proportion of contracts placed on a single-source basis has averaged 45% by value in the last five years.[36] The Bill creates a new Non-Departmental Public Body, the Single Source Regulations Office (SSRO), to oversee that framework." It establishes a civil compliance and enforcement regime and allows for penalties to be imposed on a contractor for failing to comply with the reporting, record-keeping and notification requirements set out in the bill.

Part 2 of the Bill is largely enabling, in that it requires the provisions which are to apply to be made in regulations.

The Bill originally provided for two separate sets of regulations to be made by statutory instrument. The first is the Single Source Contract Regulations which would contain all the regulations with the exception of those made under the second set of regulations, the Penalty Regulations.

The amendments to Part 2 of the bill replace the need for the two separate sets of regulations with one set: the Single Source Contract Regulations (SSCRs). They also provide for greater Parliamentary oversight by requiring the SSCR's to be made by the affirmative rather than the negative procedure. Amendments concerning the latter were moved in response to recommendations made by The Delegated Powers and Regulatory Reform Committee, which called for the affirmative procedure to ensure greater Parliamentary scrutiny of the SSCRs.

The amendments (numbered 19-23) were moved by Baroness Jolly and Lord Astor of Hever and discussed at the 4th day of the Committee Stage.

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[34] HL Deb 26 March 2014 c557

[35] HL Deb 26 March 2014 c559

[36] *Better Defence Acquisition: improving how we procure and support Defence equipment,* Cm 8626

3.1 The Delegated Powers and Regulatory Reform Committee recommendations

The Delegated Powers and Regulatory Reform Committee made a number of recommendations in its report, two of which were subsequently agreed to by the Ministry of Defence.

The Committee recommended that regulations under Part 2 be subject to a first time affirmative procedure rather than the negative procedure the MOD originally provided for in the Bill:

> The Bill provides for regulations under Part 2 to be subject to the negative procedure. The reason given in the memorandum for this level of Parliamentary scrutiny is the fact that Part 2 deals with matters which are technical and uncontroversial. We are not convinced about the appropriateness of this description given the wide-ranging matters covered by the regulations, and the significant impact that the regulations will have on the way in which defence procurement contracts, which are not subject to a competitive process, will be awarded and regulated. This is the first time that the award of such contracts will be subject to statutory regulation and, given the importance of the subject matter of Part 2, we consider that the regulations should be subject to a first time affirmative procedure.[37]

The Committee similarly recommended that regulations under Clause 14 are to be made by statutory instrument subject to affirmative procedure rather than the negative procedure the MOD originally provided for in the Bill:

> Clause 14(2) - Meaning of "qualifying defence contracts"
>
> 9. The definition of the contracts (known as "qualifying defence contracts") which are subject to regulation under Part 2 is set out in clause 14(2). That clause provides for key elements of the definition to be set out in regulations. Subsection (2)(a) provides that a qualifying defence contract is a contract under which the Secretary of State procures goods, works or services for defence purposes. However, what is meant by "defence purposes" in this context is to be defined in regulations: see subsection (8). Another feature of a qualifying defence contract is that its award is not the result of a competitive process. Subsection (6) provides for the question of whether the award is a result of a competitive process to be determined in accordance with regulations. Clause 14 also provides for regulations to determine the threshold value which a contract must be at or above in order to be a qualifying defence contract (see subsection (2)(b)). It also allows the regulations to specify types of contract which are automatically excluded from being qualifying defence contracts.
>
> 10. Regulations under clause 14 are to be made by statutory instrument subject to the negative procedure. The Ministry of Defence explains in the memorandum that this procedure has been chosen because all the matters dealt with in the regulations are of a technical nature which are unlikely to be of interest to Parliament or contentious. We do not agree with this description of the powers delegated by clause 14. The structure of clause 14 is such that it leaves the type of contracts which are to be governed by Part 2 to be determined in regulations. This is acknowledged in the memorandum where it is stated that the purpose of the delegated power is to allow the Secretary of State to define when a contract is a qualifying defence contract**. Regulations under section 14 will therefore have a direct and significant impact on the scope of**

[37] Delegated Powers and Regulatory Reform Committee, *Seventeenth Report*, 20 December 2013, HL Paper 107 2013-14, para 4

application of Part 2. As such we consider that the regulations should on all occasions be subject to the affirmative procedure.[38]

Lord Astor of Hever, in his response to the Committee's report, said the Government is considering amendments to Part 2 in response to two of the recommendations in the report.

Baroness Jolly and Lord Astor of Hever duly introduced amendments at the Committee Stage to adopt the recommendations made by the Committee. The amendments, number 19-23, were grouped together. All were agreed without division. Lord Tunnicliffe observed during the debate "regulations of this importance should be exposed to public gaze and debate and should be accountable to Parliament through the affirmative procedure."[39]

3.2 The amendments in detail

Baroness Jolly, speaking for the Government, said that in order to make the recommended changes to the parliamentary process, the Government proposed to allow all the regulations under Part 2 to be made in one statutory instrument, the Single Source Contract Regulations (SSCRs) rather than two (the SSCRs and the penalty regulations). Amendments 19-23 make simplifying provisions in order to make all regulations under Part 2 via one statutory instrument, the SSCRs. Amendment 23 relates to the parliamentary process for the SSCRs.

Amendment 19 (**Clause 33(1)**) provides for the provision about maximum penalty amounts to be made under the Single Source Contract Regulations (SSCR) rather than in separate regulations. Baroness Jolly said:

> There is no change to the scope of provision that will be made under Part 2 as a result of this amendment, but using a single statutory instrument for all regulations under Part 2 allows for simpler provision for the parliamentary process to be used for that one statutory instrument.[40]

Amendments 20 to 22 are simplifying amendments to accommodate the fact there is now just one set of regulations.

Amendment 20 amends **subsection (6)** of **Clause 33.** Baroness Jolly said:

> Amendment 20 follows on from Amendment 19. Clause 33(6) currently provides for the penalty regulations, as a separate statutory instrument from the SSCRs, to vary the maximum penalty amounts for two purposes: first, for "different purposes" and, secondly, specifically by reference to the value of contracts. As a result of Amendment 19, the maximum penalty values will now be included in the SSCRs, while Clause 42(2) already provides for the SSCRs to make different provision for different purposes, which is a standard provision for regulations. Therefore the part of the current subsection (6) providing for different provision for different purposes is no longer required. This amendment replaces the current subsection (6) to provide only that different provision for the maximum penalty amounts may be made by reference to the value of contracts.[41]

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38 Delegated Powers and Regulatory Reform Committee, *Seventeenth Report*, 20 December 2013, HL Paper 107 2013-14, para 10

39 HL Deb 25 February 2014 cGC349

40 HL Deb 25 February 2014 cGC363

41 HL Deb 25 February 2014 cGC364

Amendment 21 deletes **Clause 33(7)** because it is no longer required now that the provisions for maximum penalty amounts will be in the SSCRs rather than in a separate statutory instrument.

Amendment 22 simplifies **Clause 39(1)** by replacing "regulations under this part" with "single source contract regulations" to reflect the fact there is now only one statutory instrument.

Amendment 23 amends **Clause 42(4)** to reflect the Delegated Powers and Regulatory Reform Committee's recommendation concerning the parliamentary process. It replaces the previous Clause 42(4) which provided that the SSCRs should be subject to negative procedure, and replaces it with a provision that they should be affirmative the first time they are made; that any changes to the regulations related to Clause 14 should always be affirmative; and that the affirmative procedure will also apply for any changes to regulations made under Clause 33 (which relates the to the maximum penalty amounts and was previously to be contained in the penalty regulations); the SSCRs will follow the negative procedure for all cases other than those just outlined.[42]

3.3 The independence of the Single Source Regulations Office

Only one Opposition amendment relating to Part 2 was moved to a vote. It was defeated on division.

Lord Tunnicliffe moved Amendment 2 on the first day of Report. Amendment 2 relates to the independence of the Single Source Regulations Office (SSRO) which, he described, "has an immensely important role."[43]

Part 2 of the Bill creates the framework for single source contracts and creates a new Non-Departmental Public Body – the Single Source Regulations Office – to oversee that framework and a civil compliance regime. The new body 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 replace the existing Review Board for Government Contracts.

The amendment would shift responsibility for the Single Source Regulations Office (SSRO) from the Secretary of State for Defence to the Secretary of State for Business, Innovation and Skills. Lord Tunnicliffe pointed out that the very essence of the SSRO "is that not only is it independent but it must be seen to be independent." He said "it is the Opposition's contention that it is not independent enough and certainly not seen to be independent enough."[44]

Lord Tunnicliffe argued the central problem was the appointment process for the non-executive chairman of the SSRO, namely that it is the Secretary of State for Defence who appoints the non-executive chairman. Lord Tunnicliffe said of the choice of non-executive chairman:

> The appointment is within his [the Secretary of State's] discretion, once the individuals have passed the appropriate fitness test. He also appoints the other non-executive members of the board; he decides on the reappointment or not of the chairman and the

42 HL Deb 25 February 2014 cGC364
43 HL Deb 24 March 2014 c368
44 HL Deb 24 March 2014 c368

> non-executive members; he decides their pay; he approves executive appointments; and he determines the SSRO's budget.[45]

He questioned whether, with these powers given to the Secretary of State, the SSRO would or could be sufficiently independent. As an alternative, he recommended the SSRO be placed in the Department for Business, Innovation and Skills. This was because, he argued, BIS is a big department with experience of regulation.

Baroness Jolly, in responding for the Government, rejected Lord Tunnicliffe's argument. She said:

> The Government are fully committed to the independence of the SSRO in order to achieve value for money for the taxpayer. The SSRO will succeed only if it is, and is seen to be, fair to both parties. If it is too biased towards the MoD we risk driving the best suppliers out of the market. It is precisely the need for an independent moderating authority that led the MoD to propose the creation of the SSRO in the first place.[46]

Baroness Jolly explained further than in framing the legislation, the MOD wanted to give the SSRO as much freedom as possible and did not want it to be a servant or agent of the Crown. Instead, it has been designated a non-departmental public body (NDPB). She added substantial guidance has been developed over the years to NDPB's and that these guidelines require they be allocated to a department, and the Secretary of State of that department must appoint the chair and the non-executives of that body and pay its budget. She also explained in detail the recruitment process for the chair and board members, which would be "in full accordance with the guidelines of the Office of the Commissioner of Public Appointments."[47]

The SSRO will be subject to external scrutiny by organisations such as the Competition and Markets Authority and the National Audit Office and the SSRO chair can be brought before a parliamentary committee at any time. Baroness Jolly added:

> All these points highlight the considerable efforts we have made to ensure that the SSRO will be independent and subject to appropriate public and parliamentary scrutiny. The fact that the Secretary of State appoints the chair and that he can dissolve it are not what will determine the independence and impartiality of the SSRO. While we fully share with the noble Lord his aspiration of protecting the independence of the SSRO and the framework, we do not believe that this amendment is a necessary or effective means of achieving it.[48]

Baroness Jolly argued against placing the SSRO in BIS on practical grounds – that the MOD has the technical expertise, understanding and contacts with the defence industry to understand how the framework will work; BIS would take time and effort to develop such knowledge and expertise and would duplicate the existing capability of the MOD; it would "create an unhelpful degree of confusion and inconsistency" and would "increase the number of parties involved in single-source procurement from two—the MoD and the supplier—to three. Adding BIS as a fourth party would add confusion."[49] She said Paul Everitt, of ADS (the trade organisation of Aerospace, Defence and Security industries) had told the MOD industry no longer had any concerns over the independence of the SSRO.

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45 HC Deb 24 March 2014 c69
46 HL Deb 14 March 2014 c371
47 HL Deb 14 March 2014 c372
48 HL Deb 14 March 2014 c372
49 HL Deb 14 March 2014 c373

Amendment 2 was defeated on Division by 227 to 169.[50]

4 Part 3: Reserve Forces

Part 3 makes several changes to the regulations governing 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. Part 3 would implement proposals set out in the Ministry of Defence White Paper *Reserves in the Future Force 2020,* Cm 8655.

The proposals 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 separate proposals for greater integration with the Regular Army that have been made under *Army 2020*.

4.1 RFCA annual report

The only amendment agreed during the Committee stage in the Lords appears as new **Clause 47** of HL Bill 90.

This requires the Reserve Forces and Cadet Associations to produce an annual report on the state of the Reserves for the Secretary of State for Defence and for the latter to lay a copy in Parliament.

The amendment was originally proposed by Julian Brazier MP at the Report Stage in the House of Commons. The Secretary of State for Defence, Philip Hammond, said towards the beginning of that debate that the Government were "minded to accept"[51] the principle of the new clause and made a further commitment at the conclusion of the report stage to introduce an amendment in the House of Lords to reflect the amendment.[52]

Amendment 18 was discussed on the third day of the Committee Stage. Defence Minister Lord Astor of Hever, in moving the amendment, said:

> The new clause recognises the importance of the receipt of independent reports from reserve associations to ensure programme success in growing and revitalising the Reserve Forces. The reporting requirement that the new clause introduces is working with the grain of what the Government are already doing. It is based on the existing non-statutory arrangement under which a scrutiny group, appointed by the Council of Reserve Forces' and Cadets' Associations, reports annually on the Future Reserves 2020 programme and overall health of the reserve forces.[53]

The clause will amend the *Reserves Forces Act 1996* by inserting a requirement for an annual report that sets out an assessment of four matters on the capabilities of the volunteer Reserve forces:

- The recruiting of members of the volunteer reserve forces;
- The retention of members of those forces;

[50] HL Deb 14 March 2014 c376
[51] HC Deb 20 November 2013 c1263
[52] HC Deb 20 November 2013 c1318
[53] HL Deb 11 February 2014 cGC235

- The provision of training for those forces
- The provision of training for those forces and the upkeep of land and buildings for whose management and maintenance the association is responsible.

Reports must also contain an assessment of the provision that is made as regards the mental welfare of members and former members of the volunteer Reserve Forces.

4.2 An annual report on the Army's Fighting power

Only one Opposition amendment was moved to a vote relating to Part 3 of the Bill. It was defeated on division.

Lord Rosser, speaking for the Opposition, moved an amendment requiring the Ministry of Defence to make an annual report on the Army's fighting power and provide an assessment of progress made and any setbacks incurred in implementation of the Army 2020 plan. Lord Rosser explained the 'parents' of the amendment were the House of Commons Defence Committee, who in its report on *Army 2020*, recommended the Government commit to providing a detailed annual report on the Army's Fighting Power before Parliament, starting in January 2015.[54] Lord Rosser said the amendment (amendment 7) would give effect to the conclusion reached by the House of Commons Defence Committee. Lord Rosser added:

> it seems rather odd that Parliament should be provided with annual reports about the Reserve Forces and their capabilities but not receive an annual report covering the position and progress of the Regular Army which, under Army 2020, is undergoing significant change, about which the Defence Select Committee has expressed real concerns and doubts in respect both of its implementation and its implications.[55]

Lord Palmer of Childs Hill asked the Minister a number of questions about such a report, including on the manpower needed to prepare such a report, how much information is already in the public domain and whether such an annual report would aid the UK's enemies. Lord Craig of Radley suggested any such report should cover all three services and not just the Army.

Lord Astor of Hever rejected the amendment. He argued narrowly focusing on the Army, rather than the whole Future Force 2020, is "not helpful and misleading." He said as Future Force 2020 will not come into effect until 2020 "it is only fair to judge the effectiveness of Future Force 2020 from that year onwards." [56] He worried that a year report on the Army's fighting power "could reduce defence to a series of knee-jerk reactions, concentrating on only a small timescale and not allowing any kind of strategic decision-making and long-term planning."[57]

Lord Astor further argued focusing a report on the narrow concept of fighting power would be unhelpful as it would not best reflect the development of the other capabilities the armed forces is involved in, for example conflict prevention, defence engagement, homeland resilience. He stated the MOD's reluctance to put in the public domain an assessment of fighting power because it would represent a statement of the relative strengths of defence which could be used by the UK's enemies and as such any report would be limited by what it could contain. Finally, he responded to Lord Rosser's question about why the Government is

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[54] Defence Committee, *Future Army 2020,* 6 March 2014, HC 576 2013-14, para 34
[55] HL Deb 26 March 2014 c541
[56] HL Deb 26 March 2014 c545
[57] HL Deb 26 March 2014 c546

willing to accept the need for an annual report on the Reserves but not the Regulars. Lord Astor said the reserves are a unique set-up and the Reserves Forces and Cadets Associations have specific expertise and knowledge to report effectively and independently on the Future Reserves 2020 programme. They would not be able to fulfil that same role for the Regular Army.[58]

The amendment was defeated on division by 281 to 179.

[58] HL Deb 26 March 2014 c547