

Armed Forces (Service Complaints and Financial Assistance) Bill

Memorandum by the Ministry of Defence

for the House of Lords

Delegated Powers and Regulatory Reform Committee

1. In this memorandum:
 - a. provisions referred to in bold are provisions relating to powers to make delegated legislation;
 - b. “AFA 2006” means the Armed Forces Act 2006 (c.52);
 - c. “AFA 2011” means the Armed Forces Act 2011 (c.18);
 - d. “2007 Defence Council Regulations” means the Armed Forces Redress of Individual Grievances (Procedures and Time Limits) Regulations 2007;¹
 - e. “2007 Redress of Individual Grievances Regulations” means the Armed Forces (Redress of Individual Grievances) Regulations 2007 (SI 2007/3353); and
 - f. “2007 Service Complaints Commissioner Regulations” means the Armed Forces (Service Complaints Commissioner) Regulations 2007 (SI 2007/3352).

2. This memorandum describes the purpose and content of the Armed Forces (Service Complaints and Financial Assistance) Bill; identifies the provisions of the Bill which confer powers to make delegated legislation; explains the purpose of the delegated power proposed; explains why the matter is to be dealt with in delegated legislation; and explains the nature and justification of any parliamentary procedures which apply.

¹ These can be found on the MOD’s gov.uk website at annex D of Joint Service Publication 831 “Redress of Individual Grievances: Service Complaints Issue 2.2” via the following link: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27866/jsp831_v22.pdf.

BACKGROUND

3. It has long been recognised that members of the armed forces require an effective way of being able to obtain redress of any grievances which they think they have suffered in relation to their service. This is because they do not have the protection of a contract of employment nor a system of collective bargaining and they have only very limited rights of access to an Employment Tribunal.

4. Sections 334 to 339 of AFA 2006 set out the current legislative framework for redress of individual grievances (referred to below as the “redress of complaints” system), with section 366 of AFA 2006 making provision for the office of Service Complaints Commissioner (hereafter “the SCC”). The essence of the existing system is that a complaint may be brought by a member of the armed forces, usually to his or her Commanding Officer and may be pursued up the chain of command to the very highest level (decision by the Defence Council). Under Letters Patent the Defence Council, which is composed of MoD Ministers, the most senior officers and the most senior MoD officials, exercises the highest level of command and administration of the Armed Forces under Her Majesty. In certain cases the matter may be referred further to Her Majesty. The 2007 Defence Council Regulations set out the procedure for making a complaint under the current system, the action required by the chain of command in response to a complaint and the time limits which apply. The 2007 Redress of Individual Grievances Regulations specify the matters which are excluded from the redress of complaints system and make provision in respect of the composition of service complaints panels², including independence requirements. The 2007 Service Complaints Commissioner Regulations prescribe the types of alleged wrong which the SCC may refer to the chain of command. They also prescribe the information which must be notified

² Under the existing system panels may be appointed to decide a case or to carry out other functions in relation to a complaint which has reached the highest possible level of the chain of command for a decision.

subsequently to the SCC in respect of an allegation which the SCC has referred.

5. The Government has decided that significant reforms to the current system are now required following criticisms that the system is ineffective and suffers delay.
6. The two principal changes to the existing system will be: the creation of a Service Complaints Ombudsman (hereafter “the SCO”) who will be able to investigate alleged maladministration in the handling of complaints which may have resulted in injustice; and the removal of the automatic right of every service person to have their complaint determined ultimately by the Defence Council.
7. Like the existing system, the new system is to be provided for by a combination of primary and secondary legislation. The basic right of complaint and the functions of the SCO are set out in the Bill (in new provisions to be inserted in AFA 2006). The Bill also sets out a number of matters relating to the new system which must be provided for, and others which may be provided for, in subordinate legislation. Detailed requirements on procedure, eligibility of decision-makers (including the need for independence) are to be provided for in Secretary of State and Defence Council regulations.

OVERVIEW OF THE BILL

8. Clause 1 provides for the new office of the SCO (by the insertion of a new section 365B of the AFA 2006). **Clause 2** inserts **new Part 14A** into AFA 2006. This provides the framework for the reformed system for dealing with the redress of complaints in **new sections 340A to 340O** of the 2006 Act. The reformed system will in many ways be similar to the previous one but changes will include making the system more streamlined by ensuring that the matter will be decided without more than one level of appeal. This will involve removing the current

right in all cases to go to the Defence Council and removing the ability of a limited number of Service personnel to have a service complaint referred to Her Majesty. The underlying policy aim is that the Defence Council will identify the lowest level with the necessary authority to deal with a complaint fully and to identify a higher level to provide a single level of appeal. In some cases, however, the sole decision will be at Defence Council level given their nature or wide-reaching potential implications.

9. As explained above, the Defence Council is responsible for the command and administration of the Armed Forces. It is accordingly considered to be the responsible body for the operation of the redress of complaints system in so far as that system is essentially a system provided by, and operated through, the chains of command which flow from the Defence Council. The Defence Council will, as now, be responsible for making regulations under new section 340B (covering at least those matters described in new sections 340B to 340D, 340F, 340G and 340M) providing in detail for the internal system of redress which meets the requirements of the new legislation.
10. The Secretary of State will also have powers to make regulations as to certain aspects of the redress of complaints system: under new section 340A(4) as to which matters are excluded from the internal system and under section 340E(1), as to who may be appointed to decide complaints and as to when independent members are required. The Secretary of State will also have power under new sections 340H, 340I, and 340L and a duty under section 340N, to make regulations about the role of the SCO.
11. **Clause 4** makes provision about financial assistance for the armed forces community. There are no delegated powers in this section of the Bill.

PROVISION FOR DELEGATED LEGISLATION

12. It is envisaged that the powers conferred upon the Secretary of State detailed below will be exercised by the Secretary of State for Defence. Some of the powers of the Secretary of State to make regulations are exercisable by statutory instrument subject to affirmative procedure and this is provided for in section 373(3)(d) of AFA 2006 as amended by paragraph 3(b) of the Schedule to this Bill. Some of the powers of the Secretary of State to make regulations are exercisable by statutory instrument subject to negative procedure where they relate to procedural matters concerning the SCO and their investigations.

13. As explained above, certain powers are conferred under Letters Patent on the Defence Council. The Defence Council will be empowered to make regulations under new section 340B, covering at least those matters set out in new sections 340B to 340D, 340F, 340G and 340M. These powers will be exercisable by statutory instrument subject to negative procedure. The authority for the Defence Council to make statutory instruments is provided for in section 373(2) of AFA 2006. That subsection, as amended by paragraph 3(a) of the Schedule to this Bill, will provide for Defence Council regulations made under the new sections of the AFA 2006 to be statutory instruments. By virtue of the existing section 373(4) of AFA 2006 those regulations will be subject to negative procedure.

14. There is also provision related to commencement and extent which are included in the memorandum for the sake of completeness.

SERVICE COMPLAINTS

Clause 2: Reform of system for redress of individual grievances

New section 340A Who can make a service complaint?

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Affirmative resolution

15. Under existing section 334(2) of AFA 2006, the Secretary of State has the power to make regulations with respect to the description of matters about which a person may not make a service complaint (i.e. excluded matters). The 2007 Redress of Individual Grievances Regulations are the current regulations and provide for a list of matters in Schedule 1 to those regulations about which a person may not make a service complaint. The 2007 Redress of Individual Grievances Regulations are subject to the affirmative resolution procedure.

16. **Clause 2** provides for the insertion of **new section 340A**. Like the current section 334, the new section provides that those subject to service law or those that have ceased to be subject to service law may make a complaint about any alleged wrong relating to his or her service. New section 340A(4) confers a power on the Secretary of State to specify matters about which a person may not make a service complaint. As excluded complaints are already specified in regulations, it is considered appropriate for that to continue. Regulations made under 340A(4) will be subject to the affirmative resolution procedure. This is considered appropriate as the 2007 Redress of Individual Grievances Regulations were subject to affirmative procedure and as with those regulations, any new instrument would put limits on access to the redress system.

New section 340B Procedure for making a complaint and determining admissibility

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

17. Under existing section 334(3) AFA 2006, the Defence Council is required to make regulations with respect to the procedure for making and dealing with service complaints. The 2007 Defence Council Regulations make such provision but the power to make these regulations is not exercisable by statutory instrument. Section 334(4) AFA 2006 sets out the matters which must be the subject of Defence Council regulations.
18. **Clause 2** provides for the insertion of a **new section 340B**, which gives the Defence Council a broad power to make regulations (referred to in the Bill as “service complaints regulations”) about procedure for making and deciding complaints. Certain key aspects must be covered in service complaints regulations. There must be provision for a complaint to go to an officer, who will decide whether the complaint is admissible. The officer will have to tell the complainant of his decision. If the officer rejects the complaint, the complainant will have to be able to go to the SCO for a final decision. The regulations may contain a time limit for bringing a complaint, but it must be at least 3 months after the thing complained about happened.
19. A number of issues may arise at this stage, such as whether the person has identified a potential wrong relating to his service in the armed forces, whether the allegations are about an excluded matter, or whether it is outside the time limit for complaining.
20. These matters are to be provided for in Defence Council regulations which will take the form of statutory instrument subject to the negative resolution procedure. The Defence Council regulations under the

existing redress of complaints provisions in AFA 2006 are not made by statutory instrument. This was considered appropriate for a system which, when introduced, was seen as essentially an internal Armed Forces process. The new powers of the Defence Council will be exercisable by statutory instrument. This is partly because the application of the regulations to particular cases will be subject to scrutiny by the SCO. More generally it is now thought appropriate to ensure that the regulations are more easily accessible. It is considered that it would be suitable for any such instrument to be subject to the negative resolution procedure as to allow flexible updating of provisions which are administrative and procedural nature.

New section 340C Decisions on service complaints

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

21. As explained in paragraph 8 above, it is intended the new complaints process will be more streamlined, with a maximum of one level of appeal in the internal process
22. **Clause 2** provides for the insertion of **new section 340C**. Under this section the Defence Council regulations will have to provide for it to appoint a person, a panel of persons, or the Defence Council itself, to decide a complaint and to grant any redress within the Defence Council's authority which is appropriate. Under new section 340C(3) the Defence Council will have to ensure that any person or panel appointed has authority to grant such redress.
23. The regulations providing for the matters specified in section 340C, governing as they will who is to decide complaints, are subject to the provisions of regulations made by the Secretary of State under new section 340E(1) governing eligibility of decision-makers and any requirements as to independence.

24. The provisions on appointments by the Defence Council form part of the general provisions for the process and handling of complaints. It is considered appropriate for these to be dealt with in Defence Council regulations made by statutory instrument subject to the negative resolution procedure. This will allow flexibility but with the safeguard that section 340C(3) provides an overriding requirement as to who may be appointed, and the Secretary of State will, as explained above, have an overriding power to lay down requirements as to eligibility and independence; any such overriding requirements imposed by the Secretary of State will be subject to affirmative procedure.

New section 340D Appeals

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

25. **Clause 2** provides for the insertion of **new section 340D**. Under section 340D(1), Defence Council regulations governing the general process of making and dealing with complaints will have to make provision enabling a complainant to appeal to the Defence Council. This reflects the intention of stage two of the reformed system, which will be applicable to service complaints not considered by the Defence Council itself in the first instance. Under this section the Defence Council will be able to consider the appeal itself or appoint a person or panel to do so.
26. Again the Defence Council will (under section 340D(4)) have to ensure that whoever is appointed has the necessary authority to grant appropriate redress within the Defence Council's authority, and the Secretary of State will, as explained above, have an overriding power to lay down requirements as to eligibility and independence; any such overriding requirements imposed by the Secretary of State in regulations will be subject to affirmative procedure.

27. Under section 340D(2), Defence Council regulations may contain a time limit for bringing an appeal, which (under section 340D(3)) must be at least six weeks from the time the complainant received the initial decision.
28. The regulations must also make provision for a complainant to ask the SCO to review a decision by the Defence Council not to consider an appeal, and for the SCO's decision on this to be binding (section 340D(6)).
29. The relevant Defence Council regulations will be made by statutory instrument subject to the negative resolution procedure. Again this is considered appropriate, as the power to appoint will be subject to the overriding requirements of the section and of regulations by the Secretary of State described above.

New section 340E Further provision about persons and panels deciding service complaints etc

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Affirmative resolution

30. Section 20 of AFA 2011 amended section 336 (and section 335) of AFA 2006 in response to a decision of the European Court of Human Rights in *Crompton v UK* (2009) (Judgment 27 October 2009; no. 42509/05) as to the compliance with Article 6 of the Convention (determination of civil rights by an independent and impartial tribunal) of the process for the redress of individual grievances. The changes allowed the Defence Council to decide on a case by case basis which independent members are required to meet the requirements of Article 6; but they also empowered the laying down of rules as to when a decision by independent members were required. So far, the developing case law has led to the view that it would not be helpful to lay down the rules in subordinate legislation.

31. Section 336 of AFA 2006 provides that the Secretary of State may by regulations require that if the Defence Council makes a delegation to a panel, that panel must have more than one, a majority or all independent members or that particular functions must be carried out by independent members.
32. **Clause 2** provides for the insertion of **new section 340E**. Under section 340E(1), the Secretary of State will have the power to make regulations regarding the eligibility and independence of any person or panel appointed by the Defence Council under section 340C or 340D, or as to how a panel is to be composed. Under the existing power, for example, persons who have been involved in considering the complaint are excluded. As now, the power will also be available to lay down rules as to when independent members are required.
33. Regulations made under section 340E(1) will be subject to the affirmative resolution procedure. This has been done on the basis that it is appropriate to maintain the procedure which applies to regulations under section 336 of AFA 2006.

New section 340F Investigation of complaints and delegation of Defence Council functions

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

34. As explained above, under the existing redress of complaints system, any complaint may be taken up to the Defence Council. Under section 335 the Defence Council is given various powers to delegate functions in relation to redress of complaints. Most importantly, the Defence Council can delegate to a service complaints panel its functions to decide a complaint.

35. **Clause 2** creates similar provision in **new section 340F**. Under section 340F(2), the Defence Council's power to make service complaints regulations will include power to provide for that body to delegate certain functions in relation to redress. These could include the power to decide who will deal with a complaint, to decide who will handle an appeal on a complaint and the appointment of a person or panel. This power does not allow delegation of the function of making service complaint regulations or the power to give authority to grant redress (section 340F(3)).
36. Any such Defence Council regulations will be made by statutory instrument subject to the negative resolution procedure. Again, this is considered appropriate for provisions allowing flexible arrangements to improve the speed and flexibility of handling of complaints. Moreover, such flexible powers of delegation resemble the powers of delegation of the Defence Council under section 335 of AFA 2006, referred to above.

New section 340G Service complaints: other time limits

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

37. The 2007 Defence Council Regulations make provision for the time-limits for making a service complaint.
38. **Clause 2** provides for the insertion of **new section 340G**. Under this section time-limits can be put in place by Defence Council regulations for taking different steps in the process. It is also envisaged that (under section 340G(3)) regulations will provide the SCO with the power to conduct a binding review of a decision not to proceed with a complaint because the complainant has failed to meet a time limit.

39. The Defence Council regulations making provision regarding time limits will be subject to the negative resolution procedure. Again the powers in question are considered to go to the making of processes which will reduce delay, but which need to be developed flexibly in the light of experience of the operation of the new system. At the same time this will reflect the introduction for the first time of Parliamentary process in the making of the regulations governing the basic redress of complaints process.

New section 340H Ombudsman investigations

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

40. **Clause 2** inserts **new section 340H**, which empowers the SCO to conduct investigations. It is intended that, if a complainant is unhappy about the way the internal process has worked, and he or she has exhausted the internal process, he or she will be able to go to the SCO with allegations that their complaint has not been handled properly – taking the language used in the Bill, that there has been “maladministration” in connection with the handling of the complaint. The SCO will be able to investigate the allegations, and decide whether there has been maladministration and whether that has, or may have, caused injustice.
41. Regulations by the Secretary of State will be able to set a time limit for applying to the SCO, but it must not be less than six weeks after the final decision in the internal process is notified to the complainant (section 340H(5) and (6)). This will be important in ensuring, not only that any allegations are examined while the circumstances are still reasonably capable of being investigated and can result in the correction of any failure, but also that, after a reasonable period, all involved can have some confidence that the matter is closed. Under 340H(8) it will be possible for the Secretary of State to make

exceptions to a general requirement that only one application to the Ombudsman will be possible in respect of a complaint. The regulations will also be able to provide for applications to the Ombudsman must to contain specified information, (section 340H(2)(b)). The overall aim is to ensure that the process of application to the Ombudsman, and the issues which the Ombudsman is being asked to consider, are reasonably clear and expeditious.

42. These regulations will be made by the Secretary of State, as providing the process for the external scrutiny of the performance of the Armed Forces' internal system. They will be subject to the negative resolution procedure as they will concern a procedural matter for the new SCO system, aimed at providing a flexible, developing but fairly simple process.

New section 340I Procedure on Ombudsman investigations

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

43. **Clause 2** provides for the insertion of **new section 340I**, which specifies that the SCO will be able to decide, based on an exercise of his or her own discretion, whether to begin, continue or end an investigation. It also gives the Ombudsman a general discretion for the Ombudsman to decide on appropriate procedures, but subject to a power of the Secretary of State under 340I(2) to make regulations as to the procedure, including the application of any time limits. By way of example, similar provision can be found in section 149(2) of the Pension Schemes Act 1993 in respect of the procedure concerning investigations carried out by the Pensions Ombudsman.
44. Such regulations, made by the Secretary of State, will be subject to negative resolution procedure. The purpose is to ensure consistency and that those involved with the Ombudsman have a clear

understanding of what procedures will apply. Again the attraction of ensuring a flexible and developing system is considered to justify a negative resolution procedure.

New section 340L Report and recommendations

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

45. **Clause 2** provides for the insertion of a **new section 340L**. Under this section, after completing an investigation into possible maladministration, the Ombudsman will be required to produce a report. This will have to set out his or her findings (as to maladministration and any resulting injustice). If there is a finding of maladministration, the report must also state what the SCO recommends as a result of that finding. These include any recommendations the SCO has for remedying the maladministration and any injustice which has, or may have, been caused. The report will have to be sent to at least the Defence Council and the person who brought the complaint and any other persons specified, or of a description specified, in regulations by the Secretary of State.
46. Any such regulations will be made by statutory instrument subject to negative resolution procedure, to allow reasonable flexibility in extending the requirements to others with an interest in the decision.

New section 340M Action following receipt of report

Power conferred on: The Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

47. **Clause 2** provides for the insertion of **new section 340M**, which sets out what the Defence Council must do in response to an SCO investigation report. The Defence Council will be responsible for

considering the SCO's recommendations; telling the Ombudsman what steps will be taken in response to them; and giving reasons for doing so, if it rejects any recommendation from the Ombudsman. The Defence Council's response may include reconsideration of the complaint by a person or panel appointed by the Defence Council or by the Defence Council itself. The way such reconsideration will operate in practice may not necessarily be straightforward, if, for example, the Ombudsman were to find that most aspects of consideration of a complaint had been done correctly, but certain aspects need to be looked at again. The aim will be to avoid, if possible, excessive time being taken in the process of reconsideration, where much of the previous consideration had worked properly. This is seen as going essentially to enabling the internal redress process to operate expeditiously and consistently where reconsideration is, to a greater or lesser extent, required.

48. This section also makes provision in respect of who will carry it out any reconsideration and the power of the Secretary of State to make regulations under 340E in respect of powers, eligibility and independence in respect of any person or panel appointed under 340C or 340D will also include a power to make provision in respect of appointments made under 340M.
49. Defence Council regulations may be made regarding the reconsideration of complaints, but it is unlikely that such regulations will be produced in full immediately upon the introduction of the new system. This is because the system will need to be able to operate with sufficient flexibility in the early stages so that in appropriate cases:
 - (a) the Defence Council can appoint a person/panel to reconsider the complaint and leave it to them as to how exactly they approach the response to the matters covered in the recommendations;
 - (b) the Defence Council can re-appoint the original decider but direct that they can only look at certain matters and decide how that affects the original decision; and
 - (c) there can be a category, or categories, of case where

when the Ombudsman makes a particular recommendation the deciders on reconsideration will always need to do certain things (which will have emerged through the experience of having operated the new system for a period of time). It is envisaged that, in relation to item (c), Defence Council regulations will be developed over time to reflect emerging best practice on the reconsideration of particular recommendations or types of case. Any such regulations that are made will be by the Defence Council and be subject to negative procedure as these will be of an administrative and procedural nature relating to a later aspect of the internal redress system.

New section 340N Referral of certain allegations

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Affirmative resolution

50. Under section 338 of AFA 2006, the SCC is able to refer an allegation of a wrong (within the Act) done to a member (or former member) of the armed forces to the officer to whom a complaint would be made. That officer must then check whether the potential complainant does wish to bring a complaint, whether they know what to do, and that they know about the effect of time limits). Regulation 3 of the 2007 Service Complaints Commissioner Regulations provides that the officer must keep the SCC informed when certain things have happened. These include that the person to who the allegation relates has been referred has been informed and whether that person wants to make a service complaint in respect of it.

51. **Clause 2** provides for the insertion of **new section 340N**, which will allow the SCO to refer any such allegations on the same basis. The receiving officer will have the same functions as to checking matters with the potential complainant.

52. As under the existing provisions, regulations by the Secretary of State will be made requiring the Ombudsman to be kept updated about whether a service complaint has been brought and, if so, how it progresses. Like the 2007 Service Complaints Commissioner Regulations, such regulations will be made by statutory instrument subject to affirmative resolution procedure. It is thought appropriate for the affirmative procedure to apply, because of the importance of these provisions in providing a safeguard especially for young and vulnerable members of the armed forces.

SUPPLEMENTARY

Clause 5: Extent

Power conferred on: Her Majesty

Power exercisable by: Order in Council

Parliamentary procedure: None

53. The Bill is UK-wide in extent. The clause provides for Her Majesty by Order in Council to extend the Channel Islands, the Isle of Man and British overseas territories any provision of the Bill, with any modifications provided in the Order in Council. The Orders in Council are not subject to Parliamentary procedure. They are an exercise of the prerogative and are mentioned only for completeness.

Clause 6: Commencement

Power conferred on: The Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: None

54. As is the practice in primary legislation, the Secretary of State has power (under **Clause 6**) to make regulations providing for provisions of this Bill to be brought into force on a day or days appointed. Clauses 4 to 7 come into force on Royal Assent. The power is the normal commencement procedure, being exercisable by statutory instrument but without being subject to parliamentary procedure. These

regulations will make transitional, transitory and saving provisions in order to ensure continuity of office (from the SCC to the SCO), continuity of functions and continuity of cases (so that cases which have already begun under the existing redress system will continue on that system rather than transferring to the new system provided for in this Bill).

Ministry of Defence

4 June 2014