

# The Welsh Government's Legislative Consent Memorandum on the Armed Forces Bill

March 2021

## 1. Background

### The UK Government's Armed Forces Bill

1. The Armed Forces Bill<sup>1</sup> (the Bill) was introduced to the House of Commons and given its first reading on 26 January 2021. It is sponsored by the Ministry of Defence.

2. The explanatory notes to the Bill state:

“The primary purpose of this Bill is to renew the *Armed Forces Act 2006*... and, in so doing, continue in force the primary legislation governing the armed forces. The Bill also provides for measures to maintain the effectiveness of the service justice system so that it continues to meet the needs of the armed forces and it will further incorporate the Armed Forces Covenant into law.”<sup>2</sup>

3. The Bill completed its second reading in the House of Commons on 8 February 2021. The next stage of the Bill is Committee Stage in the House of Commons, for which a date is yet to be scheduled.

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<sup>1</sup> Armed Forces Bill (Bill 244), January 2021

<sup>2</sup> Armed Forces Bill (Bill 244), Explanatory Notes, January 2021



## The Welsh Government's Legislative Consent Memorandum

4. In accordance with Standing Orders 29.1 and 29.2, a Legislative Consent Memorandum is required because provisions within the Bill modify or fall within the Senedd's legislative competence.
5. On 18 February 2021, the Deputy Minister for Housing and Local Government, Hannah Blythyn MS (the Deputy Minister), laid before the Senedd a Legislative Consent Memorandum<sup>3</sup> (LCM) in respect of the Bill.
6. The Business Committee agreed<sup>4</sup> that the Legislation, Justice and Constitution Committee (the Committee) should report on the LCM by 25 March 2021.

### Provision for which the Senedd's consent is required

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7. As outlined in paragraphs six to 10 of the LCM, the Welsh Government has determined that the Senedd's consent is required for clause 8 of the Bill.
8. Clause 8 makes provisions relating to the Armed Forces Covenant by amending Part 16A of the *Armed Forces Act 2006* ("the 2006 Act"). Clause 8 inserts new sections 343AA to 343AF to Part 16A of the 2006 Act. These new sections place a duty on specified bodies and persons exercising relevant housing, education and healthcare functions in England, Wales, Scotland and Northern Ireland to have due regard to the Armed Forces Covenant.
9. As outlined in paragraph eight of the LCM, the relevant sections inserted into the 2006 Act by clause 8 of the Bill, insofar as they apply to Wales, are as follows.

#### Section 343AB

1. Subsection (1) of section 343AB imposes a duty on specified persons and bodies in Wales which exercise a relevant function to have 'due regard' to the principles of the Armed Forces Covenant. These are:
  - the unique obligations and sacrifices made by the Armed Forces,

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<sup>3</sup> Welsh Government, [Legislative Consent Memorandum, Armed Forces Bill](#), February 2021

<sup>4</sup> Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Armed Forces Bill](#), February 2021

- the principle that it is desirable to remove disadvantages from Service in, or former Service in the Armed Forces, and
  - the principle that special provision may be justified for the effect that Service in the forces may have had on individuals.
- 2.** A relevant function is defined in subsection (2) of section 343AB as a relevant housing, education or healthcare function, which are devolved areas. The meaning of these functions are set out in subsections (4) to (6) with reference to the relevant legislation. The public bodies in Wales to whom the due regard duty will apply are local authorities, governing bodies of maintained school, Local Health Boards, Special Health Authorities and National Health Service trusts. These bodies are listed in subsection (3).

### Section 343AE

- 3.** Section 343AE provides that the Secretary of State may issue guidance in relation to the due regard duty and the relevant public bodies must have regard to guidance issued. Before issuing such guidance, the Secretary of State must consult the Welsh Ministers so far as the guidance relates to devolved Welsh functions. However, new section 343AE(5) provides that if the Secretary of State considers the revisions to the guidance are insubstantial, the Secretary of State has the power to publish revised guidance without consulting the Welsh Ministers in the first instance.

### Section 343AF

- 4.** Section 343AF provides the Secretary of State with a regulation making power to extend the due regard duty to additional persons and bodies in Wales, or to specify additional relevant functions that are to be caught by the duty. Before making such regulations the Secretary of State must consult the Welsh Ministers, so far as the regulations contain provisions that are within 'Welsh devolved competence'. This is defined as being a provision which would fall within the Senedd's legislative competence or one which could be made in subordinate legislation by the Welsh Ministers acting alone. The regulations will be subject to the affirmative procedure.

- 10.** Paragraph 9 of the LCM states:

“Consent is requested for these provisions because their purpose is about how Welsh public services carry out their functions. They impose functions on a number of Devolved Welsh Authorities and they have regard to, and impact upon devolved matters (i.e. the functions of public bodies exercising devolved functions in the devolved areas of housing, education and healthcare). Further, the Secretary of State’s regulation making power in Section 343AF could result in the due regard duty being conferred in more devolved areas, or on other Devolved Welsh Authorities. Accordingly this power has potential to impact on more devolved areas.”

**11.** Paragraphs 11 to 15 of the LCM set out the Welsh Government’s reasons for making these provisions for Wales in the Bill. The LCM states:

“The provisions inserted by Clause 8 of the Bill will impact upon the delivery of public services within the devolved areas of housing, education and healthcare in Wales.

Therefore it is reasonable to utilise the UK Bill to make these provisions, ensuring a level of consistency across the UK with regard to implementation of the Covenant, whilst still allowing devolved services and provision to implement additional policy to support the Armed Forces community.”<sup>5</sup>

**12.** The LCM concludes with confirmation that the Deputy Minister is of the view that it is appropriate to deal with these provisions in this UK Bill as:

- “It will improve overall delivery of public services in relation to the Armed Forces Community in Wales and across the UK.
- It will allow provisions to come into force at the same time across the UK.
- A UK-wide Bill is the most effective and proportionate legislative vehicle for raising awareness among service deliverers and policy makers of the unique obligations and circumstances facing the Armed Forces Community.

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<sup>5</sup> Welsh Government, Legislative Consent Memorandum, Armed Forces Bill, paragraphs 14 and 15

- It will build understanding of how the circumstances facing the Armed Forces community can affect their requirements of, and ability to access, key public services.
- The provisions cover both devolved and non-devolved matters.”<sup>6</sup>

## 2. Committee consideration

**13.** We considered the LCM at our meeting on 8 March 2021.<sup>7</sup>

### Our view

**14.** We note the Welsh Government's assessment that clause 8 of the Bill requires the Senedd consent as set out in the LCM. We also note the Welsh Government's reasons as to why, in its view, making provision for Wales in the Bill is appropriate.

**15.** We also note that, in making this provision for Wales in the Bill, the Secretary of State will be permitted to:

- issue guidance in relation to the due regard duty to relevant public bodies in Wales including local authorities, governing bodies of maintained schools, and Local Health Boards, after consulting the Welsh Ministers;
- publish revised guidance without consulting the Welsh Ministers if the Secretary of State considers that the revisions are not substantial;
- make regulations that will extend the due regard duty to additional persons and bodies in Wales, insofar that the regulations contain provisions that are within 'Welsh devolved competence', after consulting the Welsh Ministers;
- make regulations that will specify additional relevant functions that are to be caught by the due regard duty, insofar that the regulations contain provisions that are within 'Welsh devolved competence' after consulting the Welsh Ministers.

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<sup>6</sup> Welsh Government, Legislative Consent Memorandum, Armed Forces Bill, paragraph 17

<sup>7</sup> Legislation, Justice and Constitution Committee, 8 March 2021

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**16.** On the two latter points mentioned in the paragraph above, we have also had regard to the Welsh Government's view that the Secretary of State's new regulation-making power (provided by new section 343AF) could result in due regard duties being conferred in more devolved areas, or on other Devolved Welsh Authorities.

**17.** As new section 343AF (as currently drafted) provides the Secretary of State with a power to amend new section 343AB (i.e. the face of the Bill) by regulations, we note that any such regulations would trigger Standing Order 30A, meaning a Member of the Welsh Government would be required to lay a statutory instrument consent memorandum before the Senedd.

**18.** In our view, given the extent to which the Bill proposes enabling the Secretary of State to act in key devolved areas, we believe that the Secretary of State should obtain the consent of the Welsh Ministers before issuing guidance (or publishing revised guidance) and before making regulations (as detailed above in paragraph 15).

**Recommendation 1.** The Deputy Minister should pursue amendments to the Bill to the effect that the Secretary of State is required to obtain the consent of the Welsh Ministers before issuing or revising guidance under new section 343AE and before making regulations under new section 343AF (as inserted by clause 8 of the Bill).

**19.** Finally, in our recent report on the Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Environment Bill<sup>8</sup>, we noted an important constitutional point, as follows.

**20.** A Welsh Government Bill that has not been passed at the end of a Senedd falls. However, it would appear that our Standing Orders are silent on what happens to Legislative Consent Memoranda that relate to UK Bills that have not been passed in the UK Parliament before the end of a Senedd.

**21.** We reiterate the view we expressed in that recent report. As a matter of principle, if a new Welsh Government chooses to continue to seek the Senedd's consent for provisions in a UK Bill that has not been passed in the UK Parliament prior to a Senedd general election, we believe the new Welsh Government should lay a new legislative consent memorandum covering all provisions for which

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<sup>8</sup> Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Environment Bill](#), February 2021

consent is being sought. This approach would enable all Members of the Sixth Senedd and relevant committees, once established, to consider the matter of consent afresh and to reach an informed decision based on all relevant information.