

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

October 2021



1. Background

The UK Government's Armed Forces Bill

1. The Armed Forces Bill¹ (the Bill) was introduced in the House of Commons and had its first reading on 26 January 2021. It is sponsored by the Ministry of Defence. The Bill was reintroduced on 12 May 2021 following a carry-over motion.
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"²

3. The Bill completed its stages in the House of Commons on 13 July 2021, and had its first reading in the House of Lords on 14 July 2021. At the time of writing this report, the date for Committee stage in the House of Lords was yet to be confirmed

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4. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill modifies or falls within the Senedd's legislative competence.
5. On 28 May 2021, Hannah Blythyn MS, the Deputy Minister for Social Partnership (the Deputy Minister), laid before the Senedd a Legislative Consent Memorandum³ (the Memorandum) in respect of the Bill.
6. On 30 June 2021, the Deputy Minister laid a Supplementary Legislative Consent Memorandum⁴ (the Supplementary Memorandum) in respect of the Bill.

¹ [Armed Forces Bill, as introduced](#) (Bill 244 2019-21)

² Armed Forces Bill, [Explanatory Notes](#), January 2021, paragraph 1

³ Welsh Government, [Legislative Consent Memorandum, Armed Forces Bill](#), May 2021

⁴ Welsh Government, [Supplementary Legislative Consent Memorandum, Armed Forces Bill](#), June 2021

7. The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the Equality and Social Justice Committee, should report on the Memoranda by 14 and 21 October 2021 respectively.⁵

Provision for which the Senedd's consent is required

8. Paragraphs 6 to 10 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent, namely clause 8.

9. Clause 8 of the Bill makes provisions relating to the Armed Forces Covenant by amending Part 16A of the *Armed Forces Act 2006* ("the 2006 Act").

10. Clause 8 inserts new sections 343AA to 343AF of Part 16A of the 2006 Act, which 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. The relevant sections inserted by clause 8 of the Bill to the 2006 Act, insofar as they apply to Wales are:

1. **Section 343AB.** Subsection (1) 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 same principles as set out in section 343A(3), namely:
 - the unique obligations and sacrifices made by the Armed Forces;
 - to the principle that it is desirable to remove disadvantages from Service in, or former Service in the Armed Forces, and
 - to the principle that special provision may be justified for the effect that Service in the forces may have had on individuals.

A relevant function is defined in subsection (2) 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

⁵ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Armed Forces Bill](#), July 2021; Business Committee, [Timetable for consideration of the supplementary Legislative Consent Memorandum on the Armed Forces Bill](#), July 2021

Authorities and National Health Service trusts. These bodies are listed in subsection (3).

2. **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.
3. **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.

11. The Deputy Minister's view, as set out in the Memorandum, is that the Senedd's consent is required for clause 8 of the Bill because the provisions 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).⁶

12. The Welsh Government is also of the view that 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. As a result, the Welsh Government considers that this power has the potential to impact on more devolved areas.⁷

13. Paragraph 26 of the explanatory notes to the Bill as introduced in January 2021 provided that the legislative consent of the devolved legislatures was being sought with regards to clause

⁶ Welsh Government, Memorandum, paragraph 9

⁷ Welsh Government, Memorandum, paragraph 9

8 of the Bill as the clause “applies in policy areas of housing, education and healthcare which are areas within the legislative competence of the National Assembly for Wales [Senedd Cymru]”.⁸

14. However, the UK Government’s most recent explanatory notes, published on 14 July, provides that consent is not required from the devolved legislatures as “none of the matters to which the Bill relates are within the legislative competence of Senedd Cymru.”⁹ No further detail is provided or an explanation regarding the change in position by the UK Government.

15. Paragraph 10 of the Memorandum notes this change in position by the UK Government.

16. The Supplementary Memorandum provides an update on the changes to the Bill and the Welsh Government’s position in relation to it since the publication of the Memorandum in May.

17. Two further amendments have been made to clause 8 of the Bill, as requested by the Deputy Minister, and which require the consent of the Senedd. “Cross border Special Health Authorities” are excluded from the scope of section 343AB of the 2006 Act. The Supplementary Memorandum notes that these amendments were made to ensure that Special Health Authorities (SHAs) established jointly by the Welsh Ministers and the Secretary of State were excluded from the scope of the Bill, as the Welsh Government’s policy position is that only SHAs established by the Welsh Ministers and exercising only functions in Wales (i.e. Health Education and Improvement Wales and Digital Health and Care Wales) should be captured by the duty.¹⁰

Reasons for making provision for Wales in the Bill

18. Paragraphs 11 to 15 of the Memorandum set out the reasons for making the provisions for Wales in the Bill.

19. The Deputy Minister considers that the provisions included in clause 8 of the Bill will help improve overall delivery of public services in relation to the Armed Forces Community in Wales, should increase awareness among service deliverers and policy makers of the unique obligations and circumstances facing the Armed Forces Community, and build understanding of how these can affect their requirements of and ability to access key public services.¹¹

20. The Memorandum states:

⁸ Armed Forces Bill, Explanatory Notes, January 2021, paragraph 26

⁹ Armed Forces Bill, [Explanatory Notes](#), July 2021, paragraph 27

¹⁰ Welsh Government, Supplementary Memorandum, paragraph 10

¹¹ Welsh Government, Memorandum, paragraphs 11 and 12

"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."¹²

21. The Supplementary Memorandum also adds the Deputy Minister's view that the 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"¹³, and notes the Deputy Minister's support for the UK Government amendments to the Bill, as detailed in the Supplementary Memorandum.

¹² Welsh Government, Memorandum, paragraph 15

¹³ Welsh Government, Supplementary Memorandum, paragraph 22

2. Committee consideration

22. We considered the Memoranda at our meeting on 13 September 2021.¹⁴ We were not in a position to take evidence from the Minister given the timetable for scrutiny.

23. We note that the Bill was subject to scrutiny by our predecessor Committee in the Fifth Senedd.¹⁵

Our view

24. We note the Welsh Government's assessment that clause 8 of the Bill requires the Senedd's consent as set out in the Memoranda.

25. In doing so, we wish to draw attention to the UK Government's change in position on whether consent would be sought for clause 8 of the Bill since our predecessor Committee reported in the Fifth Senedd.

Conclusion 1. We are concerned that the UK Government's position on whether clause 8 relates to a devolved matter has changed and that no explanation has been provided. We are equally concerned that, while noted in the Memorandum, the Deputy Minister has not provided the Senedd with the Welsh Government's assessment of this change in position or indicated that she has any issues with this development.

26. Given the fact that the UK Government is no longer seeking the Senedd's consent for clause 8 of the Bill we would have expected this to have been reflected in the Deputy Minister's reasoning as to why, in her view, making provisions for Wales in the Bill is an appropriate course of action.

Recommendation 1. The Deputy Minister should, in advance of the Senedd's debate on the relevant consent motion, provide the Committee and the Senedd with the Welsh Government's assessment of the UK Government's change in position regarding the seeking of consent for clause 8 of the Bill, including details of any relevant discussions the Deputy Minister has had with the UK Government.

27. As stated above, we acknowledge that the Bill and an accompanying legislative consent memorandum were subject to scrutiny by our predecessor Committee in the Fifth Senedd. Our

¹⁴ [Legislation, Justice and Constitution Committee, 13 September 2021](#)

¹⁵ [Legislation, Justice and Constitution Committee, Report on the Welsh Government's Legislative Consent Memorandum on the Armed Forces Bill](#), March 2021

predecessor Committee recommended that 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).¹⁶

28. We welcome the fact that the Welsh Government did pursue this recommendation and a request was made in writing to the UK Government's Minister for Defence People and Veterans. We note, however, that the request was rejected by the UK Government.¹⁷

29. We further note that, in rejecting the Deputy Minister's request that the consent of the Welsh Ministers is sought before issuing or revising guidance under new section 343AE and before making regulations under new section 343AF, the UK Government said that any such changes "would only happen where there is benefit in doing so after consultation with key stakeholders, such as the Welsh Government, and after due Parliamentary process had been conducted"¹⁸.

Conclusion 2. In our view, and while we respect any intention to consult with stakeholders, the UK Government's response to the Deputy Minister's request that the consent of the Welsh Ministers is sought before issuing or revising guidance under new section 343AE and before making regulations under new section 343AF does not demonstrate an understanding of the Welsh Government's position as the elected Government in Wales.

30. We wish to highlight that, as new section 343AF provides the Secretary of State with a power to amend new section 343AB (i.e. the face of the Bill) by regulations, 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.

31. As our final comment we acknowledge the Minister's reasoning as to why, in her view, making provisions for Wales in the Bill is an appropriate course of action, and draw the Senedd's attention to the practical effect of these provisions whereby the Secretary of State will be permitted to:

¹⁶ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Legislative Consent Memorandum on the Armed Forces Bill](#), March 2021

¹⁷ Welsh Government, Supplementary Memorandum, paragraph 16

¹⁸ Welsh Government, Supplementary Memorandum, paragraph 16

- 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 as the regulations contain provisions that are within 'Welsh devolved competence' after consulting the Welsh Ministers.