These notes refer to the Armed Forces Act 2011 (c.18)
which received Royal Assent on 3 November 2011

ARMED FORCES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1: Duration of AFA 2006

15. The Bill of Rights 1688 declared that the keeping of a standing army in peacetime requires the consent of Parliament. Since then the legislation making the provision necessary for the army to exist as a disciplined force (and more recently the legislation for the Royal Navy and the Royal Air Force) has required regular renewal by Act of Parliament. Section 382 of AFA 2006 provides for that Act to expire a year after that Act was passed, unless renewed by an Order in Council approved by each House of Parliament; but it may not be renewed by such an Order for more than a year, and not beyond the end of 2011. The Armed Forces Act (Continuation) Order 2010 (SI 2010/2475) renews the Act until 8 November 2011. The section substitutes a new section 382, providing for AFA 2006 to expire a year after the Armed Forces Act 2011 (this Act) is passed, unless renewed by Order in Council approved by each House of Parliament. AFA 2006 may be renewed by such an Order for up to a year at a time, but not beyond the end of 2016.

16. As enacted, section 382 of AFA 2006 also provided for the expiry and renewal of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957.[1] This was necessary because, although repealed by AFA 2006, those Acts remained in force until AFA 2006 was brought into force on 31 October 2009. They are not renewed by the 2010 Continuation Order, and the substituted section 382 does not apply to them.

Section 2: Armed forces covenant report

17. The nature of service in the armed forces means that their members are subject to exceptional demands, including deployment at short notice to operational theatres and other places abroad. This may directly or indirectly affect the ability of members of the armed forces and their families to obtain the full benefit of welfare and other provision made in the United Kingdom. The main purpose of this section is to respond to the ways in which the demands of their service may affect current and former members of the armed forces and others connected with them in relation to that provision. Some effects may be limited to the immediate children or partners of members of the armed forces. In other circumstances, such as the death of a member of the armed forces, those affected may include a wider group of people connected with the member of the armed forces who has died.

18. The section inserts into AFA 2006 new sections 343A and 343B in a new Part 16A. The new section 343A requires the Secretary of State to lay before Parliament an annual report on effects of membership (or former membership) of the armed forces on members and former members of the armed forces, and on such persons connected with them as the Secretary of State may decide. The former members covered by new section 343A include both those who have left the armed forces before the section

1 These Acts provided for the single-Service discipline regimes which applied before AFA 2006.

comes into force and those who leave subsequently. But former members are covered by new section 343A only if they are ordinarily resident in the United Kingdom. This reflects the purpose referred to in paragraph 17 of responding to the effects of service on the ability to benefit from provision made in the United Kingdom. The members, former members and connected persons covered are referred to in the new section as "service people". The definition of "service people" is set out in new section 343B(1). Each annual report must address effects of membership or former membership in the fields of healthcare, education and housing and in the operation of inquests; but new section 343A does not require each report to cover all the effects of membership in these fields, and the effects the Secretary of State chooses to report on may relate to particular descriptions of service people. If the Secretary of State considers that any of the fields of healthcare, education and housing is not relevant to a particular description of people covered in a report, the requirement to report on each of those fields is relaxed to that extent. The Secretary of State may also decide to cover in a report effects in fields additional to the mandatory fields.

19. A report under new section 343A is referred to as an "armed forces covenant report". With reference to this, new section 343A(3) requires the Secretary of State, in preparing the reports, to have regard in particular to the unique obligations and sacrifices of the armed forces, to the principle of the desirability of removing disadvantages arising from membership of the armed forces and to the principle that special provision for service people may be justified by the effects of membership, or former membership, of the armed forces. Under new section 343A(4) the Secretary of State must obtain the views of any relevant government department and seek the views of any relevant devolved administration in relation to the effects to be covered by the report. The report must set out in full or summarise those views or, where the views of a relevant devolved administration have been sought but not obtained, the report must say so. Any summary of views must be approved by the relevant government department or devolved administration. Under new section 343A(7) each report must state whether, in the Secretary of State's opinion, any effects in a particular field covered by the report put service people, or a category of them, at a disadvantage compared with other people. Where such a disadvantage is thought to exist the report must, under new section 343A(8), set out the Secretary of State's response. Under new section 343A(9) the Secretary of State must also consider whether effects covered by the report would justify making special provision for service people, or a category of them. If the Secretary of State does consider that to be the case, the report must say so.

Section 3: Provost Marshal's duty in relation to independence of investigations

20. Each of the Services has its own service police force. The officers of the service police are called "provost officers" and are headed by the Provost Marshal for the service police force in question. This section inserts a new section 115A into AFA 2006, which provides that the Provost Marshal of a service police force has a duty to seek to ensure that its investigations are free from improper interference. Under new section 115A(3) "improper interference" includes an attempt by anyone who is not a service policeman to direct an investigation. The Provost Marshals owe their duty directly to the Defence Council, the highest level of the Ministry of Defence responsible for command and administration of the armed forces.

Section 4: Inspection of service police investigations

21. Her Majesty's Inspectors of Constabulary ("HMIC") are appointed under section 54 of the Police Act. Under that section HMIC have statutory functions of inspecting, and reporting to the Secretary of State on, Home Office police forces. They have similar functions in relation to the Ministry of Defence Police (who are referred to further in the note on section 6). The purpose of section 4 is to provide a similar requirement in relation to the service police forces, but focussed on the independence and effectiveness of investigations by those forces. This section inserts new sections 321A and 321B into AFA 2006.

22. The new section 321A provides that HMIC are to inspect, and report to the Secretary of State on, the independence and effectiveness of investigations carried out by each service police force. In this context "investigations" means investigations of matters where service offences have, or may have been committed, and includes investigations outside the United Kingdom.

23. Under the new section 321A, it will be for HMIC to decide how many inspections they carry out, and when. They will also be able to decide what matters relating to investigations they will cover in a particular inspection. However, the Secretary of State will be able to require HMIC to inspect and report to him on additional matters relating to service police force investigations.

24. Under the new section 321B the Secretary of State must lay before Parliament the reports made under the new section 321A but may exclude any material whose publication the Secretary of State believes would be against the interests of national security or might jeopardise the safety of any person.

Section 5: Provost Marshals: appointment

25. As explained in the note on section 3, each of the Services has a service police force, headed by the Provost Marshal for the force in question. The service police forces are accordingly part of the armed forces. Their investigations however are carried out independently of the main service chain of command. The purpose of this section is to highlight and support the special position, independent from the chain of command, of the Provost Marshals. This section accordingly adds a new section 365A to AFA 2006, which provides for the appointment of Provost Marshal by Her Majesty and that only provost officers are eligible for appointment as a Provost Marshal.

Section 6: Ministry of Defence Police: performance regulations

26. The Ministry of Defence Police ("the MDP") is a civilian force established under the Ministry of Defence Police Act 1987 ("the 1987 Act"). Each member of the MDP is both a constable and a civil servant. Section 3A of the 1987 Act allows the Secretary of State to make regulations for dealing with misconduct of members of the MDP. The Ministry of Defence Police (Conduct) Regulations 2009, which were made under this power, are similar to regulations made under section 50 of the Police Act 1996 in respect of misconduct of members of Home Office police forces. However, unlike members of Home Office police forces, underperformance (in the sense of lack of efficiency and effectiveness) on the part of members of the MDP is dealt with under civil service procedures rather than regulations.

27. The purpose of this section is to enable the Secretary of State to make regulations for dealing with underperformance of members of the MDP, in line with the position for members of Home Office police forces.

28. Accordingly, the section provides for the amendment of section 3A(1)(a) and 3A(1A) of the 1987 Act to allow the Secretary of State to make regulations for dealing with underperformance and to require such regulations to set out the procedures for the taking of disciplinary proceedings in respect of it.

29. The power in section 3A as so amended mirrors the existing power, in section 50 of the Police Act 1996, to make regulations in respect of underperformance of members of Home Office police forces.

Section 7: Power of judge advocate to authorise entry and search

30. Section 83 of AFA 2006 empowers a judge advocate, in specified circumstances, to issue a warrant authorising a service policeman to enter and search premises. It is based on section 8 of the Police and Criminal Evidence Act 1984 ("PACE"), which empowers a justice of the peace to issue a warrant upon the application of a constable.

31. PACE has been amended by the Serious Organised Crime and Police Act 2005. In particular, section 8 of PACE now enables a constable to apply for an "all premises warrant" if it is necessary to search all premises occupied or controlled by a particular person, but it is not practicable to identify all such premises at the time of the application. An all premises warrant authorises entry to all premises occupied or controlled by the person specified, whether or not specifically identified in the application. Section 83 of AFA 2006 is based on section 8 of PACE as it stood before the amendments made by the 2005 Act, and so does not permit the issue of all premises warrants.

32. As amended by the 2005 Act, section 8 of PACE also makes provision in relation to the issue of a warrant authorising entry to and search of premises on more than one occasion (a "multiple entry warrant"). Again these provisions were not reflected in section 83 of AFA 2006 as originally enacted.

33. Section 7 substitutes a new section 83 in AFA 2006. The new section mirrors section 8 of PACE, as amended, in relation to both all premises warrants and multiple entry warrants. However, the new section 83, like the current one, permits the issue of warrants only for the search of "relevant residential premises". These are defined by section 84(3) of AFA 2006 as "service living accommodation" (defined by section 96(1), which is amended by paragraph 4 of Schedule 3 to the Act: see paragraph 151 below), or premises occupied as a residence by a person subject to service law, a "civilian subject to service discipline" (explained in the note on section 22), or a person suspected of having committed an offence in relation to which the warrant is sought. Even an all premises warrant does not permit the search of premises which are not relevant residential premises.

Section 8: Power to make provision about access to excluded material etc

34. Under PACE and under AFA 2006 certain material is subject to special safeguards in relation to the grant of search warrants. That material may be "items subject to legal privilege", "excluded material" or "special procedure material". These expressions are defined in PACE and have essentially the same meanings in AFA 2006. Section 83 of AFA 2006 does not permit the issue of a warrant to search for items subject to legal privilege, excluded material or special procedure material, and this is equally true of the new section 83 substituted by section 7. However, section 86 of AFA 2006 empowers the Secretary of State to make provision equivalent to that of Schedule 1 to PACE, enabling a service policeman to obtain access to excluded material or special procedure material on relevant residential premises by making an application to a judge advocate. (For the meaning of "relevant residential premises", see paragraph 33 above). Provision to this effect is made by Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 (S.I. 2009/2056). The primary means by which a judge advocate can grant access is by making a "production order", requiring the person apparently in possession of the material to produce it to be taken away by a service policeman, or give a service policeman access to it. In limited circumstances, a judge advocate may issue a warrant authorising a service policeman to enter and search the premises.

35. Neither section 83 nor section 86 of AFA 2006 allows access to material held on premises other than relevant residential premises. This makes Schedule 1 to the 2009 Order largely ineffective because relevant material which qualifies as excluded material or special procedure material (such as bank records or social workers' files) is, by its nature, unlikely to be held on relevant residential premises. This section amends section 86. In addition to provision enabling a service policeman to obtain access to excluded material or special procedure material on relevant residential premises, the Secretary of State will also be able to make provision enabling a service policeman to obtain access to material (other than legally privileged material) on premises which cannot be searched under section 83 because they are not relevant residential premises. In both cases, section 86 as amended permits provision enabling a judge advocate to

grant access to the material by making a production order. The difference is that, in the case of material not on relevant residential premises, section 86 as amended does not permit provision enabling a judge advocate to issue a search warrant.

36. As amended by this section, section 86(2)(c) also permits provision to be made enabling a failure to comply with a production order to be treated as contempt of court.

Section 9: Unfitness through alcohol or drugs

37. The Railways and Transport Safety Act 2003 ("RTSA 03") provides, in its Parts 4 and 5, for an alcohol and drug testing regime in the shipping and aviation environments. The armed forces are exempt from the provisions of RTSA 03.

38. Section 306 of AFA 2006 provides for the testing of service personnel and "civilians subject to service discipline" (as to whom, see the note on section 22) for drugs or alcohol, but only after a dangerous incident has occurred. Sections 9, 10 and 11 address the fact that the armed forces have no testing powers before an incident where it is suspected that service personnel (or civilians subject to service discipline) may be under the influence of drugs or alcohol. The provisions made by these sections replace that in section 306, which is repealed (with related provisions within section 307) by section 11(2).

39. Section 20(1)(a) of AFA 2006 provides for an offence of unfitness for duty through alcohol or drugs. Section 9 adds a new subsection (1A) to section 20. The new subsection provides that the test of unfitness for duty is whether a person's ability to perform the duty is impaired. This makes the wording of section 20 consistent with that in section 4 of the Road Traffic Act 1988, which creates the offence of driving while unfit to do so because of drink or drugs.

Section 10: Exceeding alcohol limit for safety-critical duties

40. Section 10 adds a new section 20A to AFA 2006. That section creates a new offence where a member of the armed forces exceeds a prescribed alcohol level (the section does not cover drugs) when carrying out a prescribed duty. It also applies when a person might reasonably be expected to carry out such a duty. A duty may only be prescribed if its performance (while the ability to do so is impaired through alcohol) would carry a risk of death, serious injury, serious damage to property or serious environmental harm.

41. Under the new section the relevant duties and limits for breath, blood and urine are to be prescribed in regulations made by the Defence Council. It is likely that prescribed duties will include one relating to aviation and maritime functions and that in relation to such duties a strict limit will be prescribed.

Section 11: Testing for alcohol and drugs on suspicion of an offence

42. S*ubsection (1)* of section 11 adds new sections 93A to 93I to AFA 2006. New section 93A(1) empowers a commanding officer to require a member of the armed forces to take a preliminary test for exceeding a prescribed limit for alcohol or for impairment of ability due to alcohol or drugs (or more than one of these). The commanding officer must have reasonable cause to believe that the person is committing one of two "relevant offences", or has committed such an offence and is still affected by alcohol or drugs. The offences are an offence under the new section 20A, created by section 10 (breach of a prescribed alcohol limit for a safety-critical duty), and an offence under section 20(1)(a) (unfitness for duty).

43. However, under the new section 93A(2)(b) a commanding officer may only require the taking of a preliminary test for the offence under section 20(1)(a) (unfitness for duty) if the commanding officer reasonably believes that performance of the duty with the ability to do so impaired by alcohol or drugs would carry a risk of causing death, serious injury, serious damage to property or serious environmental harm.

44. Accordingly, the combined effect of the new section 20A and the new section 93A is that there is a power (based on reasonable belief of commission of a relevant offence) to test: for alcohol in respect of the breach of prescribed limits for prescribed, safety-critical duties, and for alcohol or drugs in respect of an impaired ability to carry out any duty which the commanding officer reasonably believes is safety-critical.

45. The new section 93A also applies to a "civilian subject to service discipline" (see the note on section 22), when the commanding officer has reasonable cause to believe that the person is committing an offence under AFA 2006 which corresponds to maritime or aviation offences under the Railways and Transport Safety Act 2003. It also applies where the commanding officer has reasonable cause to believe that such a person has committed such an offence and is still affected by alcohol or drugs.

46. The sections of AFA 2006 added by section 11 make further provision for preliminary testing and for the provision of specimens for analysis. New sections 93B to 93D of AFA 2006 closely reflect the provisions for preliminary tests by Home Office police forces in section 6 of the Road Traffic Act 1988 ("RTA 1988"). The preliminary breath test in new section 93B is for the presence of alcohol. It is intended that the device used to measure this will be the same as that approved for Home Office police forces. The preliminary impairment test under section 93C will enable a service policeman to observe a suspect's performance of simple tasks. The tasks will be very similar to those used by Home Office police forces under RTA 1988 (for example, walking in a straight line). Like those under RTA 1988 the tasks will be set out in a code of practice (under new section 93C(3)), issued jointly by the Provost Marshals (the heads of the three service police forces). New section 93D provides for a preliminary test for drugs, also to be administered by a service policeman and based on a specimen of sweat or saliva. Under new section 93A(6) a person who, without reasonable excuse, fails to co-operate with these tests commits an offence.

47. Under new section 93E, where an offence referred to in new section 93A is being investigated, a service policeman may require samples of breath, or of blood or urine, for analysis. A person who, without reasonable excuse, fails to provide a sample commits an offence (new section 93E(10)). The provisions on samples mirror certain provisions of RTA 1988 applicable to motorists.

48. The new regime provided by sections 10 and 11(1) would overlap with the power in section 306 of AFA 2006 to test after a dangerous incident, as the new power to test could arise before or after an incident. This would mean that different regimes could apply in the same circumstances. To avoid this, *subsection (2)* of section 11 provides for the repeal of section 306 (and of related provisions in section 307).

Section 12: Amendments relating to new rank of lance corporal in RAF Regiment

49. Under AFA 2006 (section 132) a commanding officer can only impose service detention as a punishment on the lowest rank of non-commissioned officer. Until after AFA 2006 was passed, the lowest such rank in the Royal Air Force was that of corporal. This remains the case for most of the RAF, but the RAF has introduced the lower rank of lance corporal within the RAF Regiment. *Subsection (1)* of section 12 accordingly provides so the power to award detention under section 132 is limited in the case of the RAF Regiment to lance corporals. This makes them subject to the same punishment regime as members of the army or Royal Marines of equivalent rank. Section 135 of AFA 2006 provides for the effect of a reduction in rank by a commanding officer of a corporal in the RAF (he is reduced to the highest rank he has held as an airman). *Subsection (2)* of section 12 makes express provision (for what is already implicit in section 135) that in the case of the RAF Regiment the commanding officer's power of reduction in rank to airman is from lance corporal, not corporal.

Section 13: Reduction in rank or rate

50. Section 293 of AFA 2006 applies where a warrant officer or non-commissioned officer is given a custodial sentence or a sentence of service detention but is not dismissed from the Service. The offender is automatically reduced in rank to the lowest rank to which he could be reduced as a punishment. The effect of the reduction is substantive. It does not apply only while the person is in custody serving the sentence. It continues to apply afterwards, subject to the possibility of the person being promoted again. *Subsection (2)* of section 13 removes the automatic reduction by repealing section 293. But it is envisaged that it will normally be appropriate for the offender to be reduced in rank. Accordingly *subsection (1)* of section 13 amends section 138 of AFA 2006 to enable commanding officers to combine the punishment of service detention with reduction in rank. The Court Martial retains its existing power to combine custodial sentences with reduction in rank.

Section 14: Court Martial sentencing powers

51. Section 14 gives effect to Schedule 1, which deals with sentencing powers of the Court Martial where an accused has elected trial by the Court Martial instead of by the commanding officer. A detailed note is given under Schedule 1.

Section 15: Increase in maximum term of detention for certain offences

52. Section 305 of AFA 2006 empowers a drug testing officer to require a person subject to service law to provide a sample of urine to test for controlled drugs[2]. It is an offence to fail to comply with such a requirement. Any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks.

53. Section 4 of the Reserve Forces Act 1996 empowers Her Majesty to make orders, and the Defence Council to make regulations, with respect to the reserve forces. Section 95 of that Act creates various offences in relation to orders and regulations under section 4 (such as fraudulently obtaining pay contrary to orders or regulations, and making false statements when giving information required by orders or regulations). Again, any sentence of imprisonment or service detention imposed by the Court Martial in respect of these offences must not exceed 51 weeks.

54. *Subsections (1) and (2)(a)* amend these provisions so that the maximum of 51 weeks applies only to imprisonment, and not to service detention. The effect is that, as in the case of other service offences, the maximum term of detention that can be imposed by the Court Martial is two years (under section 164 of AFA 2006).

55. In the case of an offence under section 305 of AFA 2006 committed before section 281(5) of the Criminal Justice Act 2003 comes into force, paragraph 4 of Schedule 2 to the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 (S.I. 2009/1059) substitutes a maximum of 6 months instead of 51 weeks. This is because section 281(5) of the 2003 Act, when commenced, will increase the maximum term of imprisonment for summary offences from 6 months to 51 weeks. Due to an oversight, this transitory provision does not apply to the offences under section 95 of the Reserve Forces Act 1996. *Subsection (2)(b)* corrects the error by providing that, where such an offence is committed before section 281(5) of the 2003 Act comes into force, the maximum term of imprisonment that may be imposed by the Court Martial is 6 months.

Section 16: Enforcement of financial penalties

56. This section provides for the enforcement of financial penalties imposed by the Court Martial. *Subsection (1)* inserts new sections 269A to 269C into AFA 2006.

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2 This is a provision for random testing, quite separate from the provision in section 306 for testing after a dangerous incident, which is referred to in the notes on sections 9 and 11, and which is repealed by section 11(2).

57. The new section 269A requires the Court Martial, when imposing a fine on a person aged 18 or over, to fix the term of imprisonment which may be imposed if the fine is not paid. This section is modelled on section 139 of the Powers of Criminal Courts (Sentencing) Act 2000, which imposes a similar requirement when a fine is imposed by the Crown Court in England and Wales. However, an order under the new section 269A will take effect only if the fine is registered by a civil court in the United Kingdom or the Isle of Man, in accordance with regulations made under section 322 of AFA 2006. *Subsection (2)* amends section 322 so that the regulations may provide for the way in which the civil court is to implement an order made under 269A.

58. The new section 269B empowers the Court Martial, when making a service compensation order against a person aged 18 or over, to specify the maximum term of imprisonment which may be imposed if the compensation is not paid. The court may only do so if it thinks that the maximum term which could otherwise be imposed by a magistrates' court in England and Wales (following registration of the compensation order in accordance with regulations under section 322) is insufficient. Section 269B corresponds to section 41(8) of the Administration of Justice Act 1970, which confers a similar power on the Crown Court in England and Wales. As in the case of an order under section 269A, an order under section 269B will take effect only if the fine is registered by a civil court, and the amendment made to section 322 by subsection (2) enables the regulations to provide for the effect of the order on the powers of the civil court.

59. The new section 269C makes provision for appeals to the Court Martial Appeal Court where an order under section 269A or 269B is made against the service parent or guardian of the offender.

Section 17: Service sexual offences prevention orders

Service sexual offences prevention orders

60. Large numbers of service families live outside the United Kingdom, especially on bases in Germany and Cyprus. Part 2 of the Sexual Offences Act 2003 ("SOA 2003") gives both civilian and service courts the power to make sexual offences prevention orders ("SOPOs") when dealing with an offender for certain sexual offences or offences of violence. Such orders are to protect members of the public generally, or any particular members of the public, from serious sexual harm from the defendant. But this protection can only be made for members of the public in the United Kingdom. Section 17 extends the powers of the Court Martial and the Service Civilian Court (the "service courts") so that they can make service sexual offences prevention orders ("service SOPOs"), which are very closely based on SOPOs but are for the protection of members of the service community outside the United Kingdom. *Subsection (1)* inserts new sections 232A to 232G into AFA 2006.

61. The new section 232A(1) enables the service courts to make a service SOPO where a defendant is convicted of an offence under section 42[3] of AFA 2006 and the corresponding civilian offence is listed in Schedule 3 or 5 to SOA 2003 (which list the offences in relation to which a SOPO may be imposed). As with a SOPO, the Court Martial can make a service SOPO where it makes a finding of insanity or unfitness to plead.

62. New section 232A(3) provides that a service SOPO (like a SOPO) may prohibit the defendant from doing anything described in it and lasts for a fixed period of at least 5 years. The order can only be made for the purpose of protecting members of the service community outside the United Kingdom from serious sexual harm from the defendant. This is defined in section 232A(6)(a) as protecting the service community outside the United Kingdom, or particular members of that community, from serious physical or

3 Section 42 of AFA 2006 makes it an offence under service law to do anything which is a criminal offence under the law of England and Wales or which would be if done in England or Wales.

psychological harm caused by the person committing a serious sexual offence. The new power sits alongside the existing provisions in Part 2 of SOA 2003, so that a service court can impose a SOPO and a service SOPO at the same time.

63. Service SOPOs are only available against the persons listed in section 232A(2): principally members of the armed forces, those civilians who under AFA 2006 are "subject to service discipline" (see the note on section 22) and persons who, a service court is satisfied, are intending or likely to become such civilians. Accordingly a service court can make a service SOPO in respect of a person who is not for the time being a civilian subject to service discipline, but is going to become a civilian subject to service discipline at a later stage. An example would be where the defendant is a member of a service family who has returned to the United Kingdom (and so is no longer a civilian subject to service discipline). If the court is satisfied that the defendant is intending or likely to rejoin his family outside the United Kingdom and so become a civilian subject to service discipline again, it may make a service SOPO if this is necessary for the protection of the service community outside the United Kingdom.

64. Under new section 232A(4) the prohibitions within the order must be necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the defendant. Prohibitions could include, for example, preventing a defendant from having any contact directly or indirectly with a named person or persons, or preventing a defendant from being in the home of any female under the age of 16 if that person is there.

65. New section 232B enables a defendant to appeal to the Court Martial Appeal Court where the Court Martial makes a service SOPO following a finding of insanity or unfitness to plead. It does not deal with cases where the order is made on conviction, since a right of appeal in such cases already exists under the Court Martial Appeals Act 1968.

66. New section 232C(1) provides for variation and revocation of service SOPOs. An application to vary or revoke a service SOPO can be made to the Court Martial by a Provost Marshal (the Provost Marshals are the heads of the service police forces: see the note on section 3) or by the person subject to the order. For these purposes "variation" includes extending the order. However, the term of the order may be extended, and additional prohibitions may be imposed by the Court Martial when varying an order, only if this is necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the person subject to the order.

67. The default position is that a SOPO made by the Service Civilian Court or the Court Martial under SOA 2003 may only be varied or revoked by the Crown Court in England and Wales (section 108 of SOA 2003). However, it is important that, if a service court has imposed a SOPO and a service SOPO in respect of the same matter (the same conviction or the same finding of insanity or unfitness to plead), the SOPO should not be varied or revoked without regard to the service SOPO, while the person subject to the orders is still part of the service community. Accordingly, in certain circumstances new section 232C(2) and (3) (read together with the amendment made to section 108 of SOA 2003 by *subsection (2)* of section 17) give control over the variation or revocation of such associated SOPOs and service SOPOs to the Court Martial, instead of the Crown Court. Under new section 232C(2) and (3), where a service court has made a SOPO and an associated service SOPO, the power to vary or revoke the SOPO is given to the Court Martial while the person subject to the orders is subject to service law or a civilian subject to service discipline or where an application to vary or revoke is made in respect of both orders.

68. *Subsection (2)* (by amending section 108 of SOA 2003) removes the power of the Crown Court to vary or revoke a SOPO where new section 232C(3)(a) applies. This prevents applications being made in both the civilian and service jurisdictions, where one court may be unaware of the other court's decision.

69. Where the person subject to both a SOPO and a service SOPO is no longer subject to service jurisdiction, an application to vary or renew the SOPO can be made to the Crown Court in England and Wales under section 108(1) of SOA 2003. An application to vary or revoke both orders can only be made to the Court Martial under section 232C(3)(b).

70. Section 232D enables a person to appeal against the variation or revocation of a service SOPO or the refusal of the Court Martial to vary or revoke a service SOPO. Appeals lie to the Court Martial Appeal Court.

Extended prohibitions orders

71. As explained above, the new section 232A empowers a service court to make an order (a service SOPO) related to the protection of the service community outside the United Kingdom when it makes a SOPO for the protection of the public within the United Kingdom. This does not allow a risk to the service community outside the United Kingdom to be dealt with where the offender has been dealt with by a civilian court, as a civilian court can only impose a SOPO. Nor does it deal with the situation where a service court has imposed a SOPO and it subsequently becomes apparent that the offender may be a danger to members of the service community outside the United Kingdom.

72. In response to this problem, section 17(1) also adds a new section 232E to AFA 2006. The new section empowers the Court Martial to make extended prohibitions orders ("EPOs") in respect of members of the armed forces or civilians subject to service discipline. The orders can be made where such a person is subject to a SOPO, whether this has been made by a civilian or service court. In these circumstances the Court Martial's discretion is limited. On application by a Provost Marshal the Court Martial must make the EPO if it is satisfied that the person is subject to a SOPO and that there are members of the service community outside the United Kingdom who would be protected by the SOPO if they were in the United Kingdom. The EPO can then only include prohibitions which are substantially the same as those in the SOPO, subject only to such modifications as are necessary to secure that the prohibitions work for the protection of relevant persons outside the United Kingdom.

73. An EPO is a mirror order which stands or falls with the SOPO. It lasts until the expiry of the SOPO; if the SOPO is varied or revoked, the extended prohibitions order lapses.

74. Section 232F provides for an appeal against the making of an EPO. The section enables the Secretary of State to make provision by order governing the powers of the Judge Advocate General in respect of these appeals. As the EPO largely stands or falls with the SOPO, and a SOPO can be appealed against, it is envisaged that the right of appeal against an EPO will be limited to matters specific to it, such as whether the court was right to be satisfied that there were members of the service community outside the United Kingdom who would be protected by the SOPO if in the United Kingdom. This would not, for example, be the case if the SOPO was made to protect only a particular person, and that person has not left the United Kingdom.

75. Under section 232G a breach of a service SOPO or of an EPO without reasonable excuse is a service offence punishable with five years' imprisonment. This is the same maximum penalty as applies for conviction on indictment for breach of a SOPO (section 113 of SOA 2003).

Section 18: Place of sitting of Service Civilian Court

76. Section 18 removes the geographical limit under which the Service Civilian Court can only sit outside the United Kingdom, the Isle of Man and the Channel Islands. The removal of this limit means that, in common with the Court Martial and Summary Appeal Court, the Service Civilian Court will be able to sit in the United Kingdom or elsewhere.

Section 19: Administrative reduction in rank or rate

77. The armed forces have a system of administrative action to deal with failures of performance where the bringing of a charge for a disciplinary offence under AFA 2006 is inappropriate. The powers are similar to those of a civilian employer. They cover a wide range of actions, including warnings, reduction in rank (or, in naval terminology, "rate") and even discharge from the Service. Section 332 of AFA 2006 provides that, in the case of a warrant officer or non-commissioned officer, a reduction in rank by administrative action may only be by one acting or substantive rank.

78. Section 19 amends section 332. It enables a commanding officer to use administrative processes to reduce a warrant officer or non-commissioned officer by more than one rank or rate. The intention is to allow greater flexibility and discretion in cases which are not serious enough to merit discharge from the service, but for which a single rank reduction is insufficient.

Section 20: Service complaint panels

79. Under section 334(1) of AFA 2006 a person who is, or has been, a member of the armed forces may make a complaint if he thinks himself wronged in a matter relating to his service. Section 334(3) requires the Defence Council to provide by regulations for the procedure for dealing with such complaints. Under section 334(4) the regulations must include provisions allowing referral of a complaint up to the Defence Council. Under section 334(8) where a decision is made that a complaint is well-founded the appropriate redress (if any) must be decided and granted. Under section 335(1) of AFA 2006 the Defence Council has power to delegate to a panel (called a "service complaint panel") all or any of its functions under section 334.

80. Under section 336(1) a member of a service complaint panel must be either a senior officer (of or above the rank of commodore, brigadier or air commodore) or a civil servant. That is subject to a power in section 336(5) for the Secretary of State by regulations to make further provision about the composition of service complaint panels. Under section 336(6)(a) those regulations may require a service complaint panel to include one independent member. Under section 336(3) at least one member of all service complaint panels must be a senior officer.

81. *Subsection (1)* of section 20 substitutes a new subsection (3) for section 335. Under that new subsection the Defence Council must determine the size of a service complaint panel. This is subject to a required minimum (in section 336(2)) of two members and subject to any provision made by virtue of section 336(6), as amended by *subsection (6)* of section 20). *Subsection (3)* of section 20 makes the provision in section 336(1) subject to the new provisions relating to independent members. *Subsection (4)* removes the requirement for all service complaint panels to have at least one senior officer as a member.

82. *Subsection (5)* of section 20 inserts further subsections into section 336 of AFA 2006. These empower the Defence Council to determine that a service complaint panel (for a particular complaint or for a description of complaint) shall include a specified number of independent members, and to determine that certain functions of a service complaint panel are to be carried out by independent members. The Defence Council is also empowered to delegate these determinations to a civil servant or officer.

83. *Subsection (6)* of section 20 amends section 336(6). Instead of being limited to requiring one independent member, the Secretary of State may by regulations provide that, where the Defence Council decides to delegate complaint functions to a service complaint panel, the panel must include a prescribed number of independent members, or is to be composed mainly or entirely of independent members. The regulations may also provide for prescribed functions of a panel to be carried out by independent members.

84. *Subsection (7)* of section 20 adds a new section 336A to AFA 2006. Under that section the Secretary of State may by regulations require the Defence Council, in a prescribed description of complaint, to delegate to a service complaint panel some or all of the Defence Council's functions under section 334. But the regulations may only require delegation to a panel where they also either require the majority, or all, of the panel to be independent members and/or where they require certain functions to be carried out by independent members of the panel.

85. In the new provisions "independent member" has the same meaning as it currently has in AFA 2006 (see section 336(7)). An independent member must not be a member of the armed forces or a civil servant.

Section 21: Persons eligible to be prosecuting officers

86. Under AFA 2006 the Director of Service Prosecutions has a number of functions, in particular in relation to the bringing of charges and proceedings. Under section 365 of that Act the Director of Service Prosecutions may appoint officers of the armed forces to carry out these functions. The officers must also have a prescribed legal qualification. Section 21 amends section 365 so that the Director may also appoint civilians with the prescribed qualifications to carry out these functions.

Section 22: Civilians subject to service discipline

87. The purpose of this section is to amend some of the circumstances in which a person is a "civilian subject to service discipline" (referred to in the note to this section as "CSSDs"). AFA 2006 provides for a jurisdiction for service courts (the Service Civilian Court and the Court Martial) over defined groups principally of persons who work or reside with the armed forces in certain areas outside the United Kingdom, or are travelling on service ships or aircraft. The groups are defined in Schedule 15 to AFA 2006. Under section 370 of AFA 2006, a person who is not subject to service law is a civilian subject to service discipline if he or she is within any paragraph of Part 1 of Schedule 15.

88. The main jurisdiction under AFA 2006 arises in relation to criminal conduct. A CSSD commits an offence under AFA 2006 if he does anything which is an offence under the law of England and Wales or which would be such an offence if the conduct had been committed in England or Wales. CSSDs may also commit a small number of the disciplinary offences provided for in AFA 2006. Those which a CSSD may commit include looting, breach of standing orders and obstructing a service policeman.

89. Paragraph 4 of Schedule 15 currently covers Crown servants if they work mainly or wholly in support of the armed forces and are in a designated area.[4] Those designated for the purposes of paragraph 4 include the Falkland Islands, Germany and Gibraltar. The result is that a Crown servant who mainly works in support of the armed forces in (for example) Gibraltar is a CSSD when in Germany even if he is there on holiday. This is considered excessive and impractical. *Subsection (2)* of section 22 limits paragraph 4 so that a Crown servant who works solely or mainly in support of any of the armed forces in a designated area is only a CSSD in two circumstances. One is if he is the designated area in which he usually works. The other is if he is in another designated area, but he has come there wholly or partly to work in support of the armed forces.

90. Paragraph 5 of Schedule 15 currently applies to a person whenever they are outside the British Islands, if he or she is employed in a specified naval, military or air-force organisation by reason of the United Kingdom's membership of the organisation. The only organisation currently specified (by the Armed Forces (Civilians Subject to Service Discipline) Order 2009) is NATO. The effect of paragraph 5 is considered too wide, because it purports to apply service jurisdiction wherever the employee is (outside

4 Areas are currently designated for the purposes of each of a number of paragraphs of Schedule 15 by the Armed Forces (Civilians Subject to Service Discipline) Order 2009 (S.I. 2009/836).

the British Islands) and regardless of the purpose for which he is there. *Subsection (3)* of section 22 amends paragraph 5 in a way which parallels the amendment to paragraph 4. It limits paragraph 5, so that the employee is only a CSSD in two circumstances. One is if he is in the foreign country or territory where he usually works. The other is if he is in another foreign country or territory wholly or partly for the purposes of that work.

91. *Subsection (4)* makes a parallel amendment to paragraph 6 of Schedule 15. Paragraph 6 applies to members and employees of specified organisations whenever they are in a designated area. The organisations currently specified include the Navy, Army and Air Force Institutes and the Soldiers, Sailors, Airmen and Families Association (Forces Help). The areas designated are the same as for paragraph 4. The same problems exist as to width of the jurisdiction, with the result that paragraph 6 applies when they are in any designated area and whether or not they are there for their work. The amendment made by subsection (4) to paragraph 6(1)(b) limits paragraph 6 to members and employees of the organisations specified, but only while they are in the designated area in which they normally work for the organisation or they have come to another designated area wholly or partly for the purposes of that work.

92. Broadly speaking, paragraph 10 of Schedule 15 applies to a person who stays outside the British Islands with someone within paragraph 5 of Schedule 15 (employees of specified military organisations). *Subsection (5)* of section 22 amends paragraph 10 so a person staying with such an employee is only within the paragraph in two circumstances. One is if the person stays with the employee in the country or territory in which the employee normally works. The other is if he stays with the employee in a country or territory to which the employee came for the purpose of his work.

Section 23: Protected prisoners of war

93. Articles 82 and 102 of the Geneva Convention Relative to the Treatment of Prisoners of War 1949 oblige the United Kingdom to make prisoners of war detained by United Kingdom forces subject to United Kingdom service law and to the same courts and procedures as United Kingdom armed forces.

94. The current regime governing prisoners of war for the purposes of meeting these requirements is set out in a Royal Warrant dated 7 August 1958. The Royal Warrant contains the Prisoners of War (Discipline) Regulations 1958 ("the 1958 Regulations"). These regulations govern the custody and maintenance of discipline amongst prisoners of war detained by United Kingdom forces. They are based on provisions in the Army Act 1955. That Act was repealed and replaced by AFA 2006. Accordingly, the 1958 Regulations are now out of date. Section 23 allows for their replacement by new regulations made by Royal Warrant and based on provisions in AFA 2006.

95. The section provides for the insertion of a new section 371A into AFA 2006. The new section provides that Her Majesty may by Royal Warrant apply relevant provisions of AFA 2006, subject to modifications, to protected prisoners of war (as defined by section 7(1) of the Geneva Conventions Act 1957) detained by United Kingdom forces. Alternatively Her Majesty may make provision for such protected prisoners of war equivalent to relevant provisions in AFA 2006, again subject to modifications.

96. The purpose is to ensure that the provision made by Her Majesty can cover any aspect of the services' system of justice, and in particular to allow Her Majesty by Royal Warrant to extend to certain institutions whose powers and functions are defined in AFA 2006 (such as the Court Martial) powers and functions in respect of prisoners of war. Accordingly the only provisions of AFA 2006 which are not relevant provisions for the purposes of new section 371A are those in Parts 14 (enlistment, terms of service etc), 15 (forfeitures and deductions) and 16 (inquiries).

97. New section 371A also imposes a duty on the Secretary of State to publish any such Royal Warrant in such way as appears to him to be appropriate.

Section 24: Byelaws for service purposes

98. The Secretary of State has statutory powers to make byelaws as to the use of land held for military purposes. Section 2(2) of the Military Lands Act 1900 ("the 1900 Act") deals with areas of the sea, tidal water or shore. Paragraph (b) of the proviso to section 2(2) currently requires the consent of the Board of Trade if a byelaw is to affect adversely any public right of navigation, anchoring, grounding, fishing, bathing, walking or recreation. Responsibility for these different uses of the sea and shore no longer rest with one body (except perhaps, by virtue of transfers of functions, the Secretary of State for Transport).

99. Section 24 removes paragraph (b) of the proviso to section 2 and accordingly the requirement for the Board of Trade's consent. Instead section 24 adds a new section 2(2A) to the 1900 Act. This requires the Secretary of State, before making any such byelaws, to take all reasonable steps to ascertain whether the byelaw would adversely affect any public rights mentioned above. If he considers that it would, he must satisfy himself that the restriction of the particular right is required for the safety of the public or for the military purpose for which the area affected is used, and that the restriction imposed is only to such extent as is reasonable. These requirements are broadly equivalent to the provisions which govern the grant of consent by the Board of Trade.

100. The amended section 2 of the 1900 Act will continue to apply to byelaws made by virtue of that section and to those made by virtue of section 7 of the Land Powers (Defence) Act 1958 ("the 1958 Act").

101. Section 24 also removes section 2(3) of the 1900 Act, which makes provision for the giving of notice by, and the making of objections to the Board of Trade. The Secretary of State's duty to give an opportunity for objections, and to consider any objections made, is provided for in section 17 of the Military Lands Act 1892 ("the 1892 Act").

102. Section 24 also amends section 17 of 1892 Act. That section also governs the procedure for publishing byelaws, whether made by virtue of the 1892 Act, the 1900 Act or the 1958 Act. The section removes the requirement that the Secretary of State for Defence shall publish the byelaws in such manner as appears to him necessary to make them known to all persons in the locality, and replaces it with a requirement that he publish the byelaws in such manner as appears to him appropriate.

Section 25: Claims against visiting forces: transfer of liability

103. The NATO Status of Forces Agreement (an agreement between the parties to the North Atlantic Treaty regarding the status of their forces signed in London on 19 June 1951, referred to below as "the Agreement") is an agreement between NATO member states governing the status of the armed forces of one NATO state ('sending state') while in the territory of another ('receiving state').

104. Article VIII(5) of the Agreement concerns the handling of claims arising from the activities of the armed forces of a sending state while they are in the territory of the receiving state.

105. The Article requires claims in tort arising out of certain acts or omissions of members of a visiting force or of the civilian component of such a force to be dealt with by the receiving state. These are acts done in the performance of official duty and anything else for which a visiting force or civilian component is legally responsible which causes damage in the territory of the receiving state to anyone but the receiving state itself.

106. Under the Article claims must be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving state with respect to claims arising from the activities of its own armed forces.

107. The Article also provides for the amount of the costs incurred and any award to be shared by the sending state and the receiving state in specified proportions. For example, where one sending state is responsible, the amount is to be borne as to 75% by the sending state and as to 25% by the receiving state.

108. Section 9 of the Visiting Forces Act 1952 provides for the Secretary of State to make arrangements to handle claims and to settle them but not to defend proceedings for a claim. This is different from the practice of other NATO member states. If the Secretary of State does not succeed in settling the claim and the matter is to be decided by the courts, the sending state has to act for itself. This is not necessarily easy for the sending state, which finds itself in unfamiliar proceedings.

109. To remedy this, the section provides for the insertion of a new section 9A into the Visiting Forces Act 1952. This enables the Secretary of State, if a sending state requests it, to transfer any liability in tort in respect of a relevant claim to the Ministry of Defence. He does this by a written declaration specifying the claim and the time from which any liability in tort is transferred. This will enable him to be substituted as a party in the proceedings in place of the sending state. It does not prevent the Secretary of State defending the claim. He will have only the same liability, and accordingly any defence, that the sending state would have had in the proceedings.

Section 26: Judge advocates sitting in civilian courts

110. The section gives effect to Schedule 2. A detailed note is given under Schedule 2, but its broad effect is to provide for judge advocates, except those appointed temporarily, to exercise some of the jurisdiction of the Crown Court and to have the powers of a justice of the peace who is a District Judge (Magistrates' Courts). Part of the purpose of the provision is to enable judge advocates to broaden their experience. The provisions are in Schedule 2.

Section 27: Repeal of Naval Medical Compassionate Fund Act 1915

111. The Naval Medical Compassionate Fund Act 1915 provides for the management of the Naval Medical Compassionate Fund ("the Fund"), which exists to provide relief to any orphan, surviving spouse or civil partner of any person who has contributed to it, or who becomes a member of the Fund and pays a subscription. Section 1 of the 1915 Act requires that changes to the way in which the Fund is managed or regulated are to be made by Order in Council. This is not in accordance with modern charity law practice. The Naval Medical Compassionate Fund Order 2008 (S.I. 2008/3129), made under section 1 of the 1915 Act, is the latest order regulating the Fund.

112. Section 27 repeals the 1915 Act so that the Fund can be immediately transferred to, and administered by, a Charity Commission scheme under section 16 of the Charities Act 1993. The 2008 Order is revoked in consequence of the repeal of the 1915 Act.

Section 28: Call out of reserve forces

113. The armed forces include both regular forces and reserve forces (such as the Territorial Army). The obligations of reservists to attend for duty are covered mainly by the Reserve Forces Act 1996 ("the 1996 Act"). These obligations include a duty to serve if "called out" in accordance with an order made under the 1996 Act. Broadly speaking, this duty relates to the defence of the realm, but section 56 of the 1996 Act empowers the Secretary of State to make an order authorising the call out of reservists in certain other circumstances.

114. Under regulation 6 of the Defence (Armed Forces) Regulations 1939 the Defence Council may by order authorise members of the armed forces to be temporarily employed in agricultural work or such other work as may be approved by the Defence

Council as being "urgent work of national importance"[5]. The Defence Council is the body with the function under the Sovereign of command of the armed forces. It consists of the Defence Ministers, senior officers and senior Ministry of Defence civil servants. The power was used, for example, to allow the use of the armed forces in response to a major outbreak of foot and mouth disease in 2001.

115. The current power under section 56(1) of the 1996 Act is in different terms from the power under regulation 6 of the 1939 Regulations. The intention is to provide so that the power to call out reservists under section 56 covers the circumstances in which use of the armed forces may be authorised under regulation 6. Accordingly section 28 adds new subsection (1A) to section 56 of the Reserve Forces Act 1996, which extends the Secretary of State's power to call out reservists to where the Defence Council have authorised use of members of the armed forces for urgent work of national importance.

Section 29: Minor amendments of service legislation

116. This section gives effect to Schedule 3, which makes a number of minor amendments to service legislation. A detailed note is given under Schedule 3.

Section 30: Consequential amendments and repeals

117. This section gives effect to Schedules 4 (consequential amendments) and 5 (repeals and revocations). Schedule 4 sets out the consequential amendments to AFA 2006 and other Acts that are required as a consequence of the provisions of this Act. Schedule 5 sets out the repeals and revocations in AFA 2006, other Acts and certain pieces of subordinate legislation that are required as a result of the Act.

Section 31: Meaning of "AFA 2006"

118. Section 31 provides for "AFA 2006" in the Act to mean the Armed Forces Act 2006.

Section 32: Commencement

119. This section provides for certain sections to come into effect on Royal Assent. The sections are:

- section 1, which provides for the duration of AFA 2006;
- section 31, which provides for the interpretation in the Act of "AFA 2006" as the Armed Forces Act 2006;
- section 33, which provides for extent to the Channel Islands, Isle of Man and British overseas territories; and
- section 34, which provides for the short title of the Act to be the Armed Forces Act 2011.

It also provides for section 28 (call out of reserve forces) to come into effect two months after Royal Assent.

120. The section also provides for the Secretary of State to bring into force the other provisions of the Act on days appointed by order. These commencement orders are statutory instruments but are not subject to parliamentary procedure.

121. The section also provides for the commencement orders to contain transitional, transitory and saving provision. *Subsection (5)* makes particular provision for transitional provisions related to the coming into force of the new Schedule 3A to AFA 2006. That Schedule is provided for by section 14 of, and Schedule 1 to, this Act. The new Schedule affects the powers of punishment of the Court Martial, where an accused elects trial by that court instead of by his commanding officer. Those powers are to

5 Regulation 6 was made permanent by section 2 of the Emergency Powers Act 1964.

be decided by reference to the punishments that the commanding officer could have awarded. But, where the election is before commencement and the trial afterwards, transitional provision will be needed as to what powers of punishment it is assumed the commanding officer would have had. This is because the Act itself (for example in section 12) affects what a commanding officer can do.

Section 33: Extent

122. The Act extends to (i.e. forms part of the law of) every part of the United Kingdom. Section 33 provides for its extent outside the United Kingdom. *Subsections (1) and (2)* enable the Act to be extended to any of the Channel Islands, to the Isle of Man and to any British overseas territory by Order in Council. If such an order is made it can modify the way the Act works in any of those territories.

123. *Subsection (3)* provides for the extension to the Channel Islands, the Isle of Man and to British overseas territories of the new section 9A of the Visiting Forces Act 1952, which is inserted by section 25. The extension of new section 9A would be effected under section 15(1) of the 1952 Act.