These notes refer to the Armed Forces Act 2001
(c.19) which received Royal Assent on 11 May 2001

ARMED FORCES ACT 2001

EXPLANATORY NOTES

THE ACT - COMMENTARY ON SECTIONS

Part 1 – Continuance of Services Acts

11. The need for the periodic renewal of the SDAs originates in the Bill of Rights of 1688, which declared the raising or keeping of a standing army within the United Kingdom in time of peace, unless with the consent of Parliament, to be against the law. Since then, the maintenance of a standing army in peacetime has depended on the consent of Parliament, with this consent being renewed from time to time. At one time, the consent derived from annual Acts of Parliament, but the present practice is for the Army Act 1955 to be continued in force annually by Orders in Council for up to five years in total.

12. The legal basis for the existence of the Royal Navy and the Royal Air Force is different from that of the Army. The Naval Discipline Act 1957 and the Air Force Act 1955 are continued in force and periodically re-enacted in the same way as the Army Act.

Section 1: Continuance of Services Acts

13. Section 1 of the Armed Forces Act 1996 provided that the SDAs would expire in the following year unless extended by Order in Council for a further 12 months. It allowed similar extensions until, but not beyond, the end of 2001. That is why a further Armed Forces Act is now necessary, to continue the life of the SDAs for another five years beyond 31 December 2001.

14. Section 1 provides for the continuation of the SDAs on the same basis as in previous Armed Forces Acts.

- Subsection (1) provides for the SDAs to continue in force until 31 August 2002, instead of expiring on 31 August 2001. The last Order in Council made under the 1996 Act expires on 21 August 2001.
- Subsection (2) provides for the continuance in force of the SDAs for further periods, each of no more than 12 months. This is to be done by Order in Council. Under subsection (4) drafts of the Orders in Council must be approved by each House of Parliament. This provides each House with the opportunity to debate the orders in every year except those in which a five-yearly Armed Forces Act re-enacts the SDAs.
- Subsection (3) prevents the continuance of the SDAs by Order beyond the end of 2006. By then, Parliament will have been asked to consider and pass a further Armed Forces Bill.

Part 2 – Powers of Entry, Search and Seizure

Sections 2 to 16

The previous position and the new arrangements in outline

15. Prior to this Act, the SDAs did not set out the powers, which might need to be exercised during the investigation of offences allegedly committed by members of the armed forces or other persons who are subject to the SDAs. Instead, those powers were exercised on the authority of the commanding officer under his inherent powers. The principal powers were those to stop and search members of the armed forces or of other persons subject to the SDAs, and those to enter and search their living accommodation. However, it has been recognised for some time that the scope of those powers was unclear and that it was desirable they should be clarified and put on a statutory footing. The aim was to ensure that both those who exercise those powers and those who are subject to them were clear about the limits of the powers and the safeguards which apply to the exercise of those powers.

16. The Act replaces those powers. Instead, the Service police are given statutory powers based on those available to the civilian police, although they will be modified to suit the needs of the Services. Each of the armed forces has a force of Service police, i.e. the Royal Navy Regulating Branch, the Royal Military Police, the Royal Air Force Police and the Royal Marines Police. They have many of the functions of civilian police but are members of the armed forces with no constabulary powers. This means Service police cannot exercise statutory powers conferred on constables; any powers they require must be specifically applied to them. Commanding officers are given, by Part 2, more limited versions of the powers of investigation given to the Service police.

17. One of the main provisions is about searching for evidence of suspected serious offences. The Service police will be able to apply for a warrant to search the living accommodation of persons subject to the SDAs for evidence of such offences. Judicial officers are to have the necessary powers to grant warrants. (Judicial officers are legally qualified persons appointed under the SDAs to deal with a range of matters arising under those Acts). This brings the Services broadly into line with the position in civilian life, where members of Home Department police forces have to obtain a warrant to search from a magistrate. It also provides greater certainty and, by providing that extra certainty and independent legal supervision of applications for permission to search, is intended to avoid the risk of a challenge to those searches succeeding under the European Convention on Human Rights.

18. A commanding officer retains a residual power to authorise searches of living accommodation of persons subject to the SDAs in exceptional circumstances, where, broadly speaking, he reasonably considers that a warrant cannot be obtained by a Service policeman or (in the United Kingdom) by a member of a Home Department police force in time for the search to be effective. An example of where this power may be necessary is during operational deployments overseas. However, the exercise of this power will be subject to retrospective review by a judicial officer. There is more detail about these powers of search in paragraphs 33 and 34 below.

19. The Police and Criminal Evidence Act 1984 allows the Secretary of State to use subordinate legislation to apply a number of the civilian powers of investigation to the investigation of offences under the SDAs with appropriate modifications. Some of the changes outlined above fell outside this order-making power and, to that extent, primary legislation was required to provide a coherent system of investigation.

Section 2: Powers to stop and search persons, vehicles, etc.

20. This section gives the Service police the power to stop and search anyone reasonably believed to be subject to the SDAs, any vehicle driven by such a person and any Service vehicle in the charge of any person. The power may only be exercised if

the Service policeman has reasonable grounds for suspecting that he will find stolen or prohibited articles (very broadly, offensive weapons, other than those possessed for Service reasons, and things which could be used for theft or similar offences), unlawfully obtained stores or controlled drugs. The section is based on section 1 of the Police and Criminal Evidence Act 1984. Like section 1 of the 1984 Act, it allows stop and search in public places. It also allows stop and search in places occupied or controlled by any of the armed forces, and this includes vessels, aircraft and hovercraft (section 2(1)(c) and the definition of "premises" in section 16). "Premises" include bases of any of those forces, except those parts which are defined (in section 15 of the Act) as service living accommodation.

21. With the increased employment by the armed forces of civilian contractors, it is not unusual for Service vehicles to be driven by civilians who are not subject to Service law. These drivers cannot be searched as they are not subject to the SDAs. However, the vehicles may be searched, if there are reasonable grounds for doing so. Although the driver is free to go, in practice the act of stopping and searching a Service vehicle may result in the driver being detained. The section allows for this detention.

22. The section also gives a Service policeman the power to seize any articles he finds if he reasonably suspects that they are stolen, prohibited, etc.

Section 3: Provisions relating to search under section 2

23. This section sets out some additional provisions relating to the powers of search which may be exercised under section 2.

24. This section is based on section 2 of the Police and Criminal Evidence Act 1984, which mainly provides for safeguards against misuse of the power to stop and search. In particular, section 3 provides that a person or vehicle may only be detained under section 2 of this Act for a period reasonably needed to make a search; and that persons cannot be required to remove anything other than an outer coat, jacket or gloves in public if they are searched. It also allows the Secretary of State by regulations to make provision equivalent to that made by sections 2 and 3 of the 1984 Act. For example, one of the safeguards in section 2 of the 1984 Act is the duty of a policeman to inform the person whom he intends to search of his name, the object of the search and the grounds for the search.

25. As explained in paragraph 20 above, the power to search persons applies on board vessels, aircraft and hovercraft, as well as in other places. Section 3 provides that the power to search vehicles applies to these other forms of transport. It also provides that the rules on search under section 2 do not apply to premises used for custody, detention and imprisonment. These are subject to separate rules on search, made under other provisions of the SDAs.

Section 4: Power of Commanding Officer in relation to stopping and searching of persons, vehicles etc.

26. Section 4 confers upon the commanding officer the powers of search which a Service policeman has under section 2. Commanding officers may only use these powers, or authorise someone under their command to use them, in limited circumstances. The powers of search under this section may only be used in relation to a person under the commanding officer's command, or a vehicle in the charge of such a person. Moreover, commanding officers will only be able to use these powers if they reasonably believe that a criminal offence will be committed or an offender will avoid arrest, and if it is not possible to act until the assistance of a Service policeman or a member of a UK civilian police force is obtained.

Section 5: Power of judicial officer to authorise entry and search of certain premises

27. This section gives judicial officers the power to issue warrants authorising the search of certain premises on application by a Service policeman investigating an offence under the SDAs. The powers are limited in that they can only be applied to premises used as living accommodation for Service purposes or to the homes of persons subject to the SDAs. The section also permits the Service police to seize and retain anything for which the search has been authorised. It is based on section 8 of the Police and Criminal Evidence Act 1984.

28. It may be noted that the provisions on powers of entry refer generally only to entry to accommodation. There is no reference to other areas under Service occupation. This is because commanding officers and Service police need no special statutory power to enter these other areas. They will only need the agreement of anyone who is entitled to refuse admission. This is expressly made clear in section 16(7).

29. The section sets out the requirements for the issue of a warrant. For example, there must be reasonable grounds for believing that a relevant offence has been committed and that certain conditions have been met, e.g. the purpose of the search would be seriously prejudiced if immediate entry cannot be secured upon arrival at the premises. The offences which are relevant are defined in section 5(2). They include the criminal offences for which a warrant may be obtained by civilian police, but also certain serious Service offences, such as assisting the enemy and looting. Evidence searched for must not include items subject to legal privilege, excluded material or special procedure material. Searches for excluded material and special procedure material are provided for in section 6.

30. The section allows the Secretary of State to make an order permitting the use of live television links (or similar arrangements) for hearing an application for a warrant. This is because of the possibility of the need for Service police to act in places where a judicial officer might not be on hand, most obviously in some places abroad. The section also provides for the making (by order) of provision equivalent to sections 15 and 16 of the Police and Criminal Evidence Act 1984. Those sections include safeguards relating to the issue and execution of warrants; for example, searches under a warrant must usually be made at a reasonable hour and the policeman intending to search must identify himself to the occupier.

Section 6: Special provisions as to access

31. Section 6 allows the Secretary of State to make orders to establish procedures that would enable Service policemen investigating an offence under the SDAs to apply to a judicial officer for a warrant for access to excluded or special procedure material that is held in any premises for which a search warrant is needed, i.e. premises used as living accommodation for service purposes or the homes of persons subject to the SDAs. The section corresponds to section 9 of the Police and Criminal Evidence Act 1984, and "excluded material" and "special procedure material" have the same definitions (under section 16) as in the 1984 Act. As mentioned in paragraph 29 above, there is no power under section 5 to search for such material. Special procedures, including extra safeguards, apply under the 1984 Act to obtaining a warrant to search for such materials. Excluded material includes, for example, personal records, such as medical records, if held in confidence, and also journalist's materials if held in confidence. An example of special procedure material would be journalist's material not held in confidence.

32. The section allows the civilian procedure for applying for this type of warrant to be adapted for use in the Service discipline system, with modifications, to enable the application procedure to work effectively within that system. The section also allows for application procedures to include the use of live television links.

Section 7: Power of commanding officer to authorise entry and search of certain premises

33. Section 7 gives commanding officers a limited power to authorise the search, without a warrant, of the living accommodation of persons under his command. The powers of search under this section may only be exercised where the conditions for obtaining a warrant under section 5 exist, but the commanding officer reasonably believes that it is likely that the time needed to obtain a warrant would result in the purpose of the search being frustrated or seriously prejudiced. The section also allows the person conducting the search to seize and retain any articles for which the search was authorised.

34. The section requires such a search to be carried out by a Service policeman, unless none is available and it is likely that the time necessary to obtain the assistance of a Service policeman would result in the purpose of the search being frustrated or seriously prejudiced. In cases where a commanding officer authorises someone other than a Service policeman to conduct a search, the section restricts the range of premises that may be searched. The sort of premises which a commanding officer may need to have searched when Service police are not available is likely to be shared, temporary accommodation which Service personnel use on operation or on exercise, whether in tents, buildings or on board ship. Search by Service personnel who are not Service police is specifically ruled out in the case of accommodation provided for the exclusive use of a person subject to the SDAs, or for such a person and his or her family, although they are unlikely, in any case, to be in places where Service police are unavailable. It is thought appropriate that such accommodation, which is closer to a private home, should only be subject to search by a Service policeman.

Section 8: Review by judicial officer

35. This section requires the seizure and retention of anything seized during a search authorised by a commanding officer without a warrant to be reviewed by a judicial officer. This review is a safeguard to ensure that searches without warrants are still subject to an appropriate level of judicial scrutiny.

36. The section enables the Secretary of State to make orders governing the powers and duties of judicial officers in respect of these reviews. An order under this power will be subject to the affirmative procedure and must be approved by both Houses of Parliament before being made (section 35).

Section 9: Entry for purposes of arrest etc.

37. Section 9 provides that entry to and search of certain premises is permissible for the purposes and in the circumstances specified in the section. It is based on section 17 of the Police and Criminal Evidence Act 1984, but with a number of differences. An important one is that section 17 of the 1984 Act applies to a list of powers of arrest under various pieces of civilian legislation. Section 9 of this Act refers instead to the existing powers of arrest under the SDAs (which apply to any offence under those Acts).

38. The section authorises Service police to enter and search, without a warrant, premises used as living accommodation for Service purposes, and the homes of persons subject to the SDAs, to make arrests under any of the SDAs or to prevent death, serious injury or serious damage to property. If the purpose of the entry is to make an arrest, the Service policeman must have reasonable grounds for believing the person he wishes to arrest is on the premises. Service police may also enter and search, for the purposes of arrest, the residences of persons who are no longer in the Services but are still subject to Service law for the purposes of dealing with them for an offence committed whilst they were subject to Service law. The extent of any search under the section is restricted to searching for the person to be arrested. Thus the section does not, for example, give a power to look for evidence while effecting an arrest.

39. Section 9 also allows a commanding officer to authorise a member of the forces, other than a Service policeman, to enter and search, without a warrant, the living accommodation (whether provided for Service purposes or otherwise) of a person under his command in order to arrest that person or to prevent death, serious injury or serious damage to property. (Powers of arrest are given by the SDAs to a wide range of Service personnel.) The commanding officer's authority to enter for the purposes of an arrest may only be given if the offence is one for which a search warrant could be issued under section 5 by a judicial officer. The commanding officer must have reasonable grounds for believing that waiting to obtain the assistance of a Service or civilian policeman might result in the person to be arrested evading capture, concealing or destroying evidence or being a danger to himself or others, or result in discipline being undermined.

40. The authority to enter for the purposes of saving life, preventing serious injury or preventing serious damage to property may only be given by the commanding officer if it is not practicable to obtain the assistance of a Service policeman in time to prevent the harm occurring.

41. The section also provides that regulations may be made by the Defence Council allowing commanding officers to delegate their powers. Such delegation could be used to allow a duty officer to authorise entry if, for example, an emergency arose in the commanding officer's absence.

Section 10: Search upon arrest

42. This section allows a person who makes an arrest under the SDAs, or a Service policeman, to search the person arrested if he has reasonable grounds for believing that that person may be a danger to himself or others. The section corresponds to subsections 32(1) and 32(2)(a) of the Police and Criminal Evidence Act 1984.

43. The section also allows a Service policeman to search a person if he has reasonable grounds for believing that that person may be concealing something which may assist him to escape or something which may be evidence of an offence. Searches must not go beyond what is reasonably necessary, and the section does not authorise the removal of any clothing in public other than an outer coat, jacket or gloves, but it does allow the search of a person's mouth. Anything found by a Service policeman during such a search may be seized and retained, other than an item subject to legal privilege, if the Service policeman has reasonable grounds for believing that it may be used by the person searched to assist him to escape, that it is evidence of an offence, or that it has been obtained as a result of committing an offence.

44. Where an arrest is made by a person other than a Service policeman, the commanding officer of the arrested person may order the person making the arrest to undertake a search. In that case the commanding officer must have reasonable grounds for believing that that person may be concealing something which may assist him to escape or something which may be evidence of an offence. A commanding officer may instead leave the decision to search to the discretion of the person making the arrest. Then, the person effecting the arrest may only undertake a search if he has reasonable grounds for believing that the person under arrest may be concealing anything which may assist him to escape or anything which may be evidence of an offence. These searches are subject to the same limitations that apply to searches carried out by Service policemen.

45. The commanding officer may only authorise the search of a person if he has reasonable grounds for believing that it is likely that the person arrested would escape, or would conceal or destroy evidence, before the assistance of a Service or civilian policeman could be obtained.

46. This section also provides for the making, by order, of provisions equivalent to the powers under section 32 of the Police and Criminal Evidence Act 1984 to enter and search premises. The section also allows the Defence Council to make regulations in relation to the delegation of the commanding officer's powers.

Section 11: Power to make provisions equivalent to that made by sections 18 to 22 of the Police and Criminal Evidence Act 1984

47. Section 11 allows the Secretary of State to make orders dealing with entry and search after arrest (equivalent to section 18 of the Police and Criminal Evidence Act 1984) and the seizure and retention of material found during those searches (equivalent to sections 19 to 22 of that Act). As with the civilian system, such searches will not require a search warrant, but the power only applies to the premises of persons being held in Service custody prior to any charge being made. The section allows the Secretary of State to include in the orders any modifications he thinks fit in the Service context.

Section 12: Property in possession of service police or commanding officer

48. This section allows the Secretary of State to make regulations dealing with the disposal of property which has been acquired by the Service police during the investigation of an offence. A number of Acts contain provision for the disposal of property which has come into the hands of the civilian police in such circumstances. Of these, section 1 of the Police (Property) Act 1897 gives magistrates a wide power to make orders for the disposal of property. Section 12 of this Act enables a regime for such disposals to be set up in relation to cases within the Services' disciplinary systems. In particular, regulations under section 12 may enable a Service court or judicial officer either to order the return of property to the person appearing to be the owner or, if the owner cannot be found, to order its disposal as they see fit. The regulations may also allow the commanding officer to determine to whom the property is delivered, and make provision for appeals against decisions. They may also establish time limits after which a decision on disposal by a Service court or judicial officer could not be challenged in civil proceedings. Similar provision applies under section 1(2) of the Police (Property) Act 1897. Such limits may not, however, be applied where a decision on disposal is made by a commanding officer. Any decision by the commanding officer is without prejudice to the right of an individual to challenge a decision before the courts.

Section 13: Orders and codes of practice under section 113 of the Police and Criminal Evidence Act 1984.

49. Section 113 of the Police and Criminal Evidence Act 1984 enables the Secretary of State to make orders applying, with modifications, the provisions of that Act which relate to the investigation of offences by civilian police to the investigations of offences under the SDAs. The section also requires the Secretary of State to issue codes of practice for persons who are concerned with the investigation of offences under the SDAs.

50. Section 13 of this Act amends section 113 of the 1984 Act to take into account the provisions of this Act. It narrows the scope of the power under section 113 because the substantive provisions and order-making powers in Part 2 of this Act make the power in some respects unnecessary. Section 13 of this Act also requires additional codes of practice to be issued covering the exercise of the new powers under Part 2 of the Act.

Section 14: Power to use reasonable force

51. This section provides that reasonable force may be used by a person exercising the powers conferred by the previous sections, or any regulations made under them. It corresponds to section 117 of the Police and Criminal Evidence Act 1984.

Section 15: Meaning of "service living accommodation"

52. Section 15 defines service living accommodation. The definition is important, because persons who may need to conduct a search in a particular case must be clear whether they need to apply for a warrant. The definition is complex because of the need to include all the different sorts of living accommodation in which the Services may find themselves in such a way that different powers may be related to some types of accommodation but not others. The first part of the definition refers to Service

accommodation for the particular use of an individual or an individual and his or her family. This would cover a family quarter, but not a barrack dormitory.

53. However, on board ship, in barracks or on operations, accommodation may well be shared, for example in a room containing bunk beds, with lockers for personal effects sometimes in a separate area such as a corridor. Despite the communal nature of these arrangements, every person is considered to have a private living space of some sort. In both individual and shared accommodation a warrant under section 5 will generally be needed to search in connection with the investigation of an offence. The powers of commanding officers under section 7 to authorise searches other than by the Service police are only exercisable over shared Service accommodation.

54. The section excludes from this definition any area where a person is being held in custody, detention or imprisonment.

Section 16: Part 2: Supplementary provisions

55. Subsections (1)-(6) of section 16 define various phrases and words used in the preceding sections. Subsection (7) is designed to avoid any doubt about the effect of sections 2 to 15. Some of those sections give and define powers in relation to certain types of accommodation. They are not intended to affect the rights of Service police or of commanding officers to go into other places under Service control. Section 16 provides expressly that the earlier sections of Part 2 of the Act do not restrict the powers of Service police and commanding officers to enter and search any Service premises which are not Service living accommodation or to search any Service vehicle when it is not in the charge of a person. It also provides that those sections do not limit any powers of the commanding officer to enter and search Service living accommodation, or to stop and search persons or vehicles, for reasons unconnected with the investigation of offences, for example, for a health and safety inspection.

Part 3 – Trial and Punishment of Offences

Sections 17 to 30

56. This part of the Act contains a number of largely unconnected provisions concerning the administration of justice in the armed forces. The overall aim in reviewing the system was to check whether there were areas in which it might be changed either to reflect developments in the civilian system or to meet the Services' own requirements more effectively. The five yearly Armed Forces Acts are the principal means for effecting any changes that require primary legislation.

Section 17: Summary dealing or trial and functions of the prosecuting authority

57. Section 17 introduces *Schedule 1*.

58. One of the main changes made by the Schedule is to the provisions for summary proceedings against officers. Most disciplinary matters in the armed forces are dealt with summarily by the accused's commanding officer. The alternative is trial by court-martial. In the Army and RAF a case against an officer can only be dealt with summarily by an officer superior in rank to the commanding officer, known as an appropriate superior authority but, prior to this Act, officers in the Royal Navy could not be dealt with summarily at all. In the Army and RAF, only officers of ranks up to and including major/squadron leader could be dealt with summarily.

59. These limitations meant that, in the Royal Navy, court-martial trials were necessary for all offences alleged against officers, however minor the offence. A review of these procedures led to the changes in this Act, which will enable officers in the Royal Navy to be tried summarily. This applies to officers up to and including the rank of commander. To ensure that there is a degree of uniformity across the Services, the most senior ranks capable of being dealt with summarily in the Army and Royal Air Force will now be

those Services' equivalents of commander, i.e. lieutenant colonel and wing commander respectively (paragraphs 1 and 5 of the Schedule).

60. Paragraphs 9 and 12 of the Schedule set out requirements as to the rank of any commanding officer or appropriate superior authority responsible for the summary trial of an officer in the Royal Navy. A commanding officer or appropriate superior authority hearing such a case is to be of the rank of commander or above and at least two ranks higher than the accused. The effect of paragraph 10 is that where these requirements are not met by the commanding officer, the case will be tried by an appropriate superior authority. Paragraph 13 amends the regulation-making power to allow further provision to be made about appropriate superior authorities.

61. The main effect of paragraph 11 is to give officers in the Royal Navy facing summary trial the right to elect to be tried by court-martial instead.

62. Elsewhere, the Schedule (particularly paragraphs 3, 7 and 14) closes a gap in the procedures. Previously, once a case was referred from the commanding officer and higher authority to the Service prosecuting authority, there was no statutory mechanism for the case to be referred back for disciplinary action if, in the view of the prosecuting authority, the case was unsuitable for trial by court-martial. The new provisions in this Schedule provide such a mechanism, which may be applied to part or all of a case. If a reference back is made, the commanding officer is then to consider the case afresh.

63. Schedule 1 (paragraphs 4, 8 and 15) also gives a power to the Service prosecuting authorities to advise police forces on all matters relating to offences under the SDAs. The Service prosecuting authorities perform functions akin to those of the Crown Prosecution Service (CPS), in deciding whether cases should be brought to trial and in being responsible for the conduct of prosecutions. The CPS also advises police forces on matters such as the evidence that will be needed to justify a particular charge. The CPS power is conferred by section 3(2)(e) of the Prosecution of Offences Act 1985. The new power of the Service prosecuting authorities provided by Schedule 1 is in very similar terms.

Section 18: Abolition of naval disciplinary courts

64. The Naval Discipline Act 1957 provided for the trial of naval officers of the rank of lieutenant commander or below by disciplinary courts in certain circumstances, particularly where the force with which the officer was serving was on active service. The purpose of such courts was to provide the facility to administer discipline quickly in such circumstances, in cases where only a relatively limited punishment was likely to be warranted - disciplinary courts could not award a punishment greater than dismissal.

65. A disciplinary court had never been convened under the Naval Discipline Act 1957. With the introduction of summary trial for naval officers (section 17), there is no further need to provide for them to be dealt with by disciplinary courts. Section 18 therefore removes this provision.

Section 19: Membership of courts-martial

66. Section 19 introduces *Schedule 2*.

67. Until now, only officers could sit as lay members (i.e. members apart from the judge advocate) of courts-martial of members of the armed forces (there is provision for civilians to sit as members where the accused is a civilian subject to the SDAs). Following a review of policy, it was decided that eligibility for court-martial membership should be extended, to allow substantive warrant officers (i.e. warrant officers who are not on only temporary promotion to that rank) to sit on the courts-martial of ranks subordinate to them. This was announced by the then Minister of State for the Armed Forces on 17 February 1998 (Commons Hansard Col 556).

68. This change required amendments to the SDAs, and this is the main effect of the Schedule. It adds references to warrant officers where, previously, only officers were mentioned, in the context of court-martial membership. Paragraphs 2, 9 and 16 set out the composition of courts-martial under the amended SDAs. The president of the court will continue to be an officer and, in cases where warrant officers are members of the court, they will not constitute a majority of the lay members.

69. The Schedule also provides that, where a warrant officer is subsequently commissioned, he will still be eligible to be a court-martial member as an officer, but only in trials where he could have sat before being commissioned, i.e. where the accused is below the rank held by the officer before receiving the commission. Like other officers, commissioned warrant officers will require a specified period of commissioned service before being eligible to be members of the generality of courts-martial.

Section 20: Eligibility of warrant officers for membership of summary appeal courts

70. Summary Appeal Courts were established on 2 October 2000, to hear appeals against summary proceedings under the SDAs. The courts consist of a judge advocate and two officers as lay members. There is no intention at present to alter the composition of the courts, but it is recognised that there may be a case for doing so, to enable warrant officers to be eligible. This will be kept under review in the light of experience with the new courts and also of warrant officers sitting as members of courts-martial (section 19).

71. Section 20 provides powers to extend eligibility for Summary Appeal Court membership to warrant officers by order. This will enable the Secretary of State, if he considers it desirable, to make this change without being required to wait for an opportunity to do so in primary legislation. The order would be subject to the negative resolution procedure. As with court-martial membership, section 20 limits the circumstances in which a warrant officer may sit on a Summary Appeal Court to cases where the appellant is of subordinate rank.

Section 21: Review of sentences by Courts-Martial Appeal Court

72. In the civilian criminal justice system, certain sentences imposed by the Crown Court may be referred by the Attorney General for review by the Court of Appeal, on the basis that he considers the sentence to be unduly lenient (section 36 of the Criminal Justice Act 1988). There was no corresponding power in relation to the sentences of courts-martial.

73. Section 21 confers such a power on the Attorney General. It inserts in each of the SDAs provisions enabling him, with the leave of the Courts-Martial Appeal Court (CMAC), to refer certain cases to that court. The main function at present of the CMAC, which comprises civilian judges from the Court of Appeal or its Scottish or Northern Irish equivalents, is to hear appeals on finding or sentence from courts-martial.

74. The new power largely mirrors that in the Criminal Justice Act 1988. It applies in respect of any offence tried by court-martial which could be tried by a civilian court only on indictment (i.e. by the Crown Court) and also to any offences specified by order. In cases referred to it, the CMAC will be able to substitute another sentence that would have been available to the court-martial.

75. One consideration in the Service system that does not apply in the civilian courts is that court-martial sentences are subject to review by the Service chain of command. The reviewing authority may not increase a sentence, but it may substitute one equivalent to or less severe than that imposed by the court-martial. This then becomes the sentence of the court and, under the amendments made by section 21, this (rather than the original sentence) would be subject to referral by the Attorney General in relevant cases.

76. Section 21 also provides that the outcome of the review by the CMAC may be the subject of an application to the House of Lords, by either the Attorney General or the accused, on a point of law.

Section 22: Required custodial sentences

77. This section introduces *Schedule 3*, which amends the SDAs to clarify how the rules about mandatory sentences are to apply to courts-martial. It also provides that Schedule 3 will only apply to offences committed after the commencement of those amendments.

78. Sections 109 to 111 of the Powers of Criminal Courts (Sentencing) Act 2000 provide for mandatory sentences in circumstances where an accused is repeatedly convicted of certain offences. Section 109 provides that anyone over 18 convicted of a second serious offence is to receive a sentence of life imprisonment unless the court is of the opinion that there are exceptional circumstances which justify not imposing such a sentence. If the court imposes an alternative sentence, it must state in open court its reasons for doing so. The offences which this provision covers are listed in the section and include attempted murder, manslaughter, rape, robbery and carrying a firearm with criminal intent.

79. Sections 110 and 111 are similar in their application. They provide for minimum custodial sentences to be imposed where the accused is convicted of a third offence of class A drug trafficking or domestic burglary. In both cases, the court may vary the sentence if it is of the opinion that there are particular circumstances which justify doing so. Reasons for not imposing the minimum sentence must be given.

80. Paragraphs 1 and 2 of Schedule 3 replace the provisions about mandatory sentences in the Army and Air Force Acts with more detailed provisions equivalent to those mentioned above. Paragraph 3 inserts in each of those Acts provisions based on section 152 of the Powers of Criminal Courts (Sentencing) Act 2000, which allows a shorter sentence to be imposed where the accused has pleaded guilty to a class A drug trafficking offence or a domestic burglary.

81. Paragraph 4 makes clear that civilians who are subject to the SDAs and tried under the provisions of the Army or Air Force Acts may not be given an absolute or conditional discharge where they are tried for one of the offences attracting a mandatory sentence, unless the court is of the opinion that there are circumstances (as described above) which justify not imposing a mandatory sentence.

82. Paragraphs 5 to 7 replace the provisions about mandatory sentences in the Naval Discipline Act with more detailed provisions equivalent to those mentioned above.

Section 23: Restriction of judicial review of courts-martial

83. In the civilian system, the High Court's powers of judicial review over the Crown Court are limited, so that it is unable to review the Crown Court's jurisdiction in matters relating to trial on indictment (section 29 of the Supreme Court Act 1981). Appeal to the Court of Appeal (Criminal Division) is considered the appropriate way of obtaining a remedy in relation to a decision made in such a trial.

84. Section 23 of this Act extends this restriction on the High Court's powers of judicial review to court-martial proceedings, by amending the 1981 Act. The restriction applies to two types of court-martial proceedings. The first, corresponding to that applicable to Crown Court proceedings, relates to court-martial trials of offences. The second applies to courts-martial hearing appeals from Standing Civilian Courts. Where a court-martial hears an appeal, there is a right of further appeal to the Courts-Martial Appeal Court, making the availability of judicial review unnecessary.

Section 24: Offences in relation to courts-martial etc.

85. The SDAs make it an offence for anyone subject to Service law to refuse "to produce any document in his custody or control which a court-martial has lawfully required him to produce" (for example, section 57(1)(c) of the Army Act 1955). Section 24 of this Act extends this, so that a refusal to produce other things that are likely to be material evidence is also an offence.

86. The SDAs include similar provisions (for example, section 101(1)(c) of the Army Act 1955) in relation to persons not subject to Service law. If such a person refuses to produce a document when required to do so by a court martial, then the court-martial may certify that as a contempt, to be dealt with by the civilian courts. Section 24 extends this to apply to the refusal to produce other things as well as documents.

Section 25: Powers to compel attendance of witnesses

87. The failure of Service personnel and others who are subject to the SDAs to attend as a witness at a court martial, a custody hearing before a judicial officer or proceedings of the summary appeals courts in response to a summons, is an offence under the SDAs. However, such a failure on the part of persons who are not subject to the SDAs could only be certified as a contempt, to be dealt with by the civilian courts (under, for example, section 101(1) of the Army Act 1955 - see note on section 24). This procedure did not directly address the immediate problem of proceedings being frustrated by the absence of a witness.

88. Section 25 deals with expected and actual failures to respond to witness summonses by persons not subject to the SDAs. It inserts new sections in each of the Acts, providing that a judicial officer or judge advocate may issue a warrant for the arrest of a witness (including someone who may be able to produce a document or other thing that is likely to be material evidence), if satisfied that the individual concerned is unlikely to attend or produce the evidence voluntarily or to respond to a summons to do so.

89. Section 25 also provides that the judge advocate at a court-martial may issue a warrant for the arrest of such a witness who fails, without any apparent just excuse, to attend the proceedings in response to a summons.

90. The section makes equivalent provision in relation to custody proceedings before a judicial officer and to hearings of summary appeals courts, and specifies who may issue arrest warrants in these cases.

91. The purpose of arrest is to ensure the attendance of the witness. Because the person arrested would not be subject to the SDAs, section 25 provides for the arrest to be carried out by a civilian police constable, not by the Service police.

Section 26: Provisions for orders as to costs

92. Under section 19 of the Prosecution of Offences Act 1985, a party to criminal proceedings in the civilian courts may be ordered to pay costs where unnecessary or improper action taken by him, or on his behalf, has resulted in another party incurring costs. There was no corresponding provision in relation to proceedings in Service courts. Section 26 of this Act enables such provision to be made.

93. The section enables the Secretary of State to make regulations providing for courts-martial, the summary appeals courts, the Courts-Martial Appeal Court and Standing Civilian Courts to make orders as to the payment of such costs. The regulations may allow the court to take account of any other costs orders which have been made and may deal with matters such as appeals against costs orders.

Section 27: Costs against legal representatives

94. Section 26 deals with costs orders made against a party to any proceedings. Section 27 empowers the same courts as are referred to in section 26 to make costs orders against the legal, or other, representative of a party to proceedings. Like section 26, section 27 corresponds to a power of civilian courts under the Prosecution of Offences Act 1985 (section 19A). An order under section 27 may be made if the improper, unreasonable or negligent action of a representative results in the other party incurring costs. This section requires the Secretary of State to make regulations providing for appeals against such orders.

Section 28: Provisions supplementary to sections 26 and 27

95. In the civilian system, criminal prosecutions are brought by the Crown Prosecution Service (CPS). An example of the type of costs that the CPS might seek to recover, in an order analogous to that in sections 26 and 27, is the costs it had incurred for the travel and accommodation of witnesses. In the Services, the budgetary system means that the travel and accommodation costs of witnesses would be met by a budget other than that of the Service prosecuting authority, who is only an individual officer. Strictly speaking, therefore, prosecution costs are not incurred by the Service prosecuting authority but by the Service itself. It is the Service, therefore, which is to be able to recoup the same types of costs which the other party could legitimately claim.

96. Section 28, accordingly, provides that costs incurred by the Services which result from the functions of the prosecuting authority as a party to the proceedings are deemed to have been incurred by the prosecuting authority. Regulations made under section 26 or 27 dealing with costs orders may identify the costs in question. Regulations under those sections may also specify the budgetary authority to be paid. The section also allows for any incidental provisions to be made in the regulations.

97. The regulations are to be made by statutory instrument subject to the negative resolution procedure.

Section 29: Custody

98. This section introduces *Schedule 4*, which concerns detailed aspects of the custody arrangements for those charged with offences under the SDAs.

99. Paragraphs 1, 3, 8 and 10 are all related. Previously, the SDAs provided that, once a trial had started, it was the judge advocate hearing the case who was responsible for reviewing the need for the accused to be held in custody, and for imposing conditions for release or ordering arrest, rather than a judicial officer (who is generally responsible for these matters before trial). However, trials may occasionally be adjourned for considerable periods. In these circumstances, the trial judge advocate may be assigned to another trial or be otherwise unavailable, and it would be more practical for the exercise of these powers to revert to a judicial officer. Paragraph 1 amends the Army and Air Force Acts and allows the trial judge advocate to order, on an adjournment, that these powers are be exercisable by a judicial officer, instead of by the judge advocate. Paragraph 3 is consequential on this. Paragraphs 8 and 10 have the same effect in relation to the Naval Discipline Act.

100. Once an accused has been charged, he may be released from custody subject to conditions to ensure his attendance at a hearing. There was no power in the SDAs to vary or discharge these conditions, although such a power is available in the civilian system. Paragraph 2 of the Schedule amends the Army and Air Force Acts to allow any conditions that have been imposed to be varied. Either party may apply for a variation. Paragraph 9 has the same effect in respect of the Naval Discipline Act. Paragraphs 5 and 11 of the Schedule amend the rule-making sections in the 1955 and 1957 Acts respectively, to allow the Secretary of State to make rules dealing with the procedure for applications to vary conditions.

101. Paragraphs 4, 6 and 7 of the Schedule concern Standing Civilian Courts, which deal with offences by civilians subject to the SDAs. (Because civilians are not generally subject to the SDAs in the United Kingdom, these Courts only operate overseas.) These provisions only apply to civilians connected with the Army and Royal Air Force. The Royal Navy does not have Standing Civilian Courts, because it is very rare for families of naval personnel to live with them on duty abroad. Paragraphs 6 and 7 insert a new Schedule (Schedule 1A) in each of the Army and Air Force Acts. These Schedules give Standing Civilian Court Magistrates powers to order an arrest or to deal with custody applications during a trial. The powers are similar to those available to judicial officers or judge advocates.

Section 30: Conditional release from custody

102. In the civilian system, a person who is appealing against conviction or sentence may apply to be released on bail pending the outcome of the appeal. There was no equivalent provision within the Service discipline system. Section 30 enables the Secretary of State by order to make such provision in relation to Service appeals.

103. An order under section 30 may apply to persons who are appealing from a conviction by a court-martial, a summary appeal court , a Standing Civilian Court or against a decision of the Courts-Martial Appeal Court. The section lists a number of matters which may be dealt with by order, for example, how and to whom an application for release may be made and the criteria to be applied when considering an application. It also provides for a power to make orders in relation to the arrest of those who fail to comply with conditions imposed on their release and the offences thus committed. Orders under this section will be made by affirmative procedure if they amend any Act and otherwise by negative resolution procedure (section 35).

Part 4 – Miscellaneous and General

Sections 31 to 39

104. This part of the Act contains miscellaneous provisions about the armed forces. It also contains general provisions governing matters such as the commencement and extent of the Act.

Section 31: Power to make provisions in consequence of enactments relating to criminal justice

105. This section provides a general order-making power which enables the Secretary of State to make for the armed forces provisions equivalent to those contained in any future civilian criminal justice legislation or any existing legislation that it amends.

106. The areas of criminal legislation which may be the subject of such equivalent provisions are identified in the section. The power may be exercised so far as is desired, i.e. the entire civilian legislation does not have to be adopted. Modifications or any incidental, consequential or transitional provisions which the Secretary of State thinks fit may be made.

107. Any order under the power will be made by statutory instrument subject to the negative resolution procedure except in the case of an order which amends any primary legislation. In this case, orders will be subject to the affirmative procedure and must be approved by both Houses of Parliament before being made (section 35).

108. In general, the armed forces aim to keep their system of investigation, trial and punishment under Service law as consistent as possible with the corresponding procedures in the civilian system. Until the passing of this Act, the principal means of amending Service law has been the five yearly Armed Forces Bills, which meant that differences could exist for a considerable period before an opportunity to make the relevant amendments of Service law arose.

Section 32: Powers to test for alcohol or drugs after a serious incident

109. The SDAs create offences of unfitness for duty because of drugs or alcohol. Previously, there was no power which allowed the taking of a test to see if anyone was under the influence of drugs or alcohol, other than the provision for random drug testing introduced in the Armed Forces Act 1996. This section introduces a power to order testing for drugs and alcohol after a serious incident, to show whether the use of drugs or alcohol was a contributory factor to the incident. The section also creates an offence (in Schedule 5) of failing, without reasonable excuse, to provide a sample (normally of breath or urine) when requested to do so under the powers in the section. This provision applies to anyone subject to the SDAs working for or in connection with the armed forces, whether military or civilian. The section also provides for officers to be designated by Defence Council regulations for the purpose of exercising the powers conferred by the section.

110. The existing provisions which create an offence of refusal to take a test are amended (in Schedule 5) to clarify that they do not extend to testing for either alcohol or drugs in the circumstances now envisaged.

111. This section applies where there has been an incident which, in the opinion of a designated officer, results in or creates a risk of death, serious injury or serious property damage. In a simple case where a member or members of only one unit could have been involved, the designated officer is likely to be their commanding officer and he may request anyone under his command whom he thinks may have caused or contributed to the incident, its consequences or the risk of such consequences, to give a sample for the purpose of testing for alcohol or drugs.

112. The position is more difficult where more than one unit, and perhaps more than one Service, may have been involved. An example would be a collision between two aircraft from different commands, or the crash of an RAF aircraft into a Royal Navy ship. The section provides a framework for deciding who is to decide whether testing is needed and who is to decide which individuals should be asked to take a test. Under the section, where a designated officer decides that any persons to whom the section applies may have contributed to the incident or its consequences, he may make a direction. This may direct the commanding officer of certain persons to request that they give samples or may direct a commanding officer to consider whether anyone within a defined group within his command should be tested. Thus, for example, a direction might be to test the pilot whose aircraft crashes, or to test anyone in the CO's command involved in air traffic control whom the CO considers might have contributed to the incident.

113. The section allows the Defence Council to make regulations specifying who may be a designated officer in relation to a particular incident or category of incidents. These regulations would need to address the question of who, in a complex case, should take the key decisions on testing referred to above. Regulations under the section may also specify how many samples may be requested, the procedure to be used and the qualifications of the persons taking the samples. The section also specifies that the samples taken may not be used in evidence against anyone in any disciplinary proceedings. They may, however, be used to inform Service Boards of Inquiry (which are explained in more detail in paragraph 138).

114. The section also introduces *Schedule 5*.

115. Paragraph 1 inserts new subsections in section 34A of the Army and Air Force Acts; section 34A creates an offence of failure to provide a sample. The purpose of these new subsections is to clarify the position in relation to the existing powers available under the random drug-testing programme, providing that the drug testing officer cannot be in the chain of command of the person being tested; that the power of random testing cannot be used where the new power arises (i.e. in relation to serious incidents); and that the results of any test are not used as evidence in any subsequent disciplinary action.

116. Paragraphs 2 and 3 insert new sections in the Army and Air Force Acts creating a new offence of failure to provide a sample where requested under the new power (i.e. after a serious incident). This offence is designed to reinforce the power under section 32 to request that samples be taken.

117. Paragraph 4 amends the provisions which apply Service law to civilians, so that this new offence also applies to persons employed by or in connection with the armed forces whilst they are subject to the SDAs. It does not apply to Service dependants, although they are subject to the SDAs while abroad. These changes are consequential upon and reflect the provision of section 33 which defines those to whom the new provision applies.

118. Paragraphs 5 to 7 make corresponding provision in the Naval Discipline Act. Paragraph 5 also removes the reference to "on conviction by court-martial" in section 12A of that Act so that offences of refusal to provide a sample may be dealt with summarily by the commanding officer (as is the case in the Army and Royal Air Force). It also amends the definition of drug testing officer in section 12A, so that references to a non-commissioned officer are replaced with the corresponding Royal Navy ranks.

Section 33: Interpretation of section 32

119. This section contains definitions of "drug" and "sample" for the purposes of section 32. It also provides that the Secretary of State may make an order specifying that other samples may be taken, but this power is restricted to samples which can be taken from the mouth or are non-invasive, for example, saliva or perspiration.

120. The section also defines who is subject to section 32 and relates the definition of the commanding officer in this section to the definition in other sections of the SDAs.

121. Orders under this section will be made by statutory instrument subject to the negative resolution procedure.

Section 34: Miscellaneous amendments

122. This section introduces *Schedule 6* which contains a number of minor amendments.

Part 1 – Amendments of Sexual Offences (Amendment) Act 1992

123. The Sexual Offences (Amendment) Act 1992 provides for the anonymity of alleged victims of certain sexual offences. Broadly, the purpose of this Act is to prevent the publication of anything which may identify the complainant.

124. The purpose of the Schedule is to ensure that the 1992 Act applies to relevant offences tried under the SDAs world-wide. Paragraphs 1 to 3 amend the 1992 Act to provide that the provisions of that Act apply to corresponding offences under the SDAs, to amend the provisions relating to the definition of an accusation so that it includes reference to the Service charges, and to include necessary definitions. Paragraph 4 amends the section in the 1992 Act dealing with courts-martial to take account of the changes mentioned above.

Part 2 – Abolition of office of Deputy Judge Advocate

125. The Lord Chancellor has not appointed any Deputy Judge Advocates for some years, since there are no practical, jurisdictional or other reasons for distinguishing between this post and Assistant Judge Advocates General. Thus, any references in legislation to this Deputy Judge Advocates are now redundant, and the office is to be abolished. This is done by paragraph 5 of the Schedule. Paragraphs 6 to 10 make consequential changes.

Part 3 – Amendments of Reserve Forces Act 1996

126. Paragraphs 11 to 13 amend the Reserve Forces Act 1996.

127. Part 4 of that Act sets out the obligations of members of the reserve forces who enter into special agreements relating to service. They may then be called out by notice. Section 31 of the 1996 Act allows the Secretary of State to terminate the agreement, and section 35 allows him to delegate certain functions. Paragraph 11of this schedule inserts a reference to section 31 in section 35 of the 1996 Act, so that the ability to terminate an agreement under section 31 may be delegated.

128. Section 41 of the Reserve Forces Act 1996 refers to persons who "have given" notice under subsection (1). A later subsection wrongly referred to them as persons who "have been given" notice. Paragraph 12 corrects the reference by removing "been" from the later subsection.

129. Paragraph 13 amends section 125 of the Reserve Forces Act 1996, which provides that members of the reserve forces are not liable to punishment for absence when voting in specified elections. The provision is expanded to include in the list references to elections for members of the National Assembly for Wales and the Northern Ireland Assembly.

Part 4 – Amendments consequential on section 21(5) of Human Rights Act 1998

130. On 24 July 1998, the then Minister of State for the Armed Forces announced that the death penalty for Service offences would be abolished (Commons Hansard Col 1374). This policy was given effect in a general provision in section 21(5) of the Human Rights Act 1998. Paragraphs 14 to 22 remove certain references to the death penalty from the SDAs and, where these relate to specific offences, replace them with references to a penalty of imprisonment or any less punishment authorised by the SDAs.

Part 5 – Queen Alexandra's Royal Naval Nursing Service and former Women's Royal Naval Service

131. Nursing services for the Royal Navy and the Royal Marines are provided by Queen Alexandra's Royal Naval Nursing Service (QARNNS). Until 31 March 2000, QARNNS was a separate Service from the Royal Navy. Although QARNNS personnel had already adopted the Royal Navy's badge and rank structure, and Royal Naval terms and conditions of service, one consequence of their being a separate Service was that they had no reserve liability - once they had left the Service they could not be recalled to duty in time of crisis. In order to provide this reserve liability, QARNNS was incorporated into the Royal Navy on 1 April 2000. This was similar to the incorporation of the Women's Royal Naval Service (WRNS) into the Royal Navy in 1993, the only difference being that QARNNS became the nursing branch of the Royal Navy and retained the 'QARNNS' name in the title of that branch. Personnel who were already in QARNNS before 1 April 2000 have preserved rights to their original terms of service.

132. Because of the incorporation of QARNNS into the Royal Navy, most references in legislation to the QARNNS were redundant. Paragraphs 23 to 30 amend the legislation containing such references. They remove references to the QARNNS in the armed forces' legislation and in other Acts. They also remove certain obsolete references to the WRNS.

Part 6 – Other amendments

Marriages in Service Chapels

133. Section 68 of the Marriage Act 1949 details the categories of people who are eligible to be married in Service chapels. At least one of a couple wishing to be married in such a chapel must belong to one of these categories, the principal of which consists of serving and former members of the armed forces. Previously, daughters of eligible individuals were also eligible, but their sons were not. Moreover, the section expressly excluded step-daughters from eligibility.

134. Differentiating between members of the family in this way is no longer considered justifiable. Paragraph 31 amends section 68 of the 1949 Act to provide that sons, step-daughters and step-sons of qualifying personnel are also eligible to be married in Service chapels.

Retirement age for assistants to Judge Advocate General

135. Paragraph 32 increases the retirement age for the Vice Judge Advocate General and Assistant Judge Advocates General from 65 to 70, to bring it into line with the retirement age for judges in civilian courts. The retirement age for the Judge Advocate General is already 70.

Sentence where penalty fixed by law as life imprisonment

136. The provisions in the SDAs which provided that persons convicted by courts-martial of Service offences corresponding to murder or genocide are liable to imprisonment for life did not make it clear that the sentence is a mandatory sentence of life imprisonment. Paragraphs 33 and 34 amend the provisions to make this clear.

Qualification for appointment as a judicial officer

137. Before this Act, the SDAs specified that a person might be appointed as a judicial officer if he was qualified to be appointed as a judge advocate or if he had had, for a minimum of five years, rights and duties in a Commonwealth country or colony similar to a barrister or solicitor in England or Wales and was subject to punishment for breach of professional rules. Paragraphs 35 and 36 widen the range of eligible persons to allow persons in Commonwealth countries and colonies with functions equivalent to certain types of judges in England and Wales to be appointed as judicial officers as well.

Evidence given before boards of inquiry

138. Boards of inquiry (BOIs) are used by the Services as a mechanism to help establish the cause of accidents. To encourage witnesses to give full and frank evidence without the worry of self-incrimination, the SDAs provide that evidence given before BOIs is inadmissible in disciplinary proceedings (unless those proceedings are for perjury in relation to evidence given at the inquiry). Previously, this exclusion of evidence only applied where a person was giving evidence before a BOI set up by his own Service, even though members of one Service can find themselves giving evidence before a BOI set up by another of the Services. Paragraphs 37 and 38 amend the Army and Air Force Acts to ensure that evidence before any BOI cannot be used in disciplinary proceedings. There is no corresponding amendment to the Naval Discipline Act as the Navy provisions for BOIs are in regulations. It is intended to make an equivalent change to those regulations.

Compensation for loss

139. Paragraphs 39 and 40 amend the Army and Air Force Acts and the Naval Discipline Act respectively, so that the power to order Service personnel to pay compensation for damage to public or Service property caused by a wrongful act or negligence by that person only applies where that person is still a member of the Services. An order made during an individual's service would still apply after the conclusion of that service, but any attempt to recover compensation which was not the subject of an order made during service would have to be made through the civil courts.

Redress of Complaints

140. The SDAs allow a person subject to Service law to make a complaint (and seek redress) through his chain of command about any matter relating to his service. There are exceptions to this right where an alternative remedy is available, for example, where an appeal from a decision of a court-martial to the Courts-Martial Appeal Court may

be made. Previously, the legislation did not exclude the right to complain in respect of the decisions of judicial officers and judge advocates when exercising their powers to authorise continuing custody or hearing cases before the summary appeal court or, under the provisions in Part 2 of this Act, granting search warrants. It was considered inappropriate for the chain of command to be able to review judicial decisions in such circumstances, so paragraphs 41 and 42 exclude such decisions from the redress provisions.

141. Paragraph 43 also applies to the redress procedure referred to above. It will give officers and other ranks attached to another Service the right to seek redress under the SDA of the host Service. As the Naval Discipline Act does not contain the same restriction on the right to redress, this amendment is only necessary in the Army and Air Force Acts.

Civilian contractors attached to or accompanying a force

142. The categories of civilians who are subject to Service law whilst overseas are set out in the SDAs and include civilian contractors. There was some doubt whether the definition included self-employed persons. Paragraphs 44(a) and 45(a) clarify the definition of contractors to include persons with their own businesses. Civilian contractors become subject to Service law when authorisation is granted by the Defence Council. To provide some flexibility, paragraphs 44(b) and 45(b) provide that the power to grant these authorisations may be delegated by the Defence Council.

Interpretation of references to "Royal Air Force Police"

143. In the Royal Air Force, commissioned officers exercising the powers of Service police are referred to as provost officers. Those persons referred to as RAF police do not hold a commission. However, the distinction is not clear to persons outside the RAF. Paragraphs 46 and 47 insert a definition of the Royal Air Force Police in the SDAs to clarify that it includes provost officers. Paragraph 48 makes a related amendment to the Armed Forces Act 1996.

Interpretation of references to a "constable"

144. The definition of "constable" in each of the SDAs includes persons having powers corresponding to those of a constable. Because Part 2 of the Act gives Service police certain powers similar to those of a constable, it could be argued that they would fall within this definition. Paragraph 49 therefore amends the definition of constable in the SDAs to make it clear that the expression does not include Service police ("provost officers" as they are termed in the SDAs).

Application to civilians

145. Paragraphs 50 to 53 make miscellaneous amendments to the SDAs in relation to civilians subject to Service law. Paragraph 50(2) changes the provisions of the Army and Air Force Acts which allowed civilians to be tried by Service courts for attempts to commit certain offences, so that they may also be tried for aiding and abetting any of those offences. The Royal Navy already has this provision. Paragraph 50(3) amends the provisions in the Army and Air Force Acts defining commanding officer in relation to civilians so they no longer apply only to provisions relating to custody and investigation of offences. Paragraph 50(4) and paragraphs 51 to 53 rectify an anomaly arising from a previous amendment to the SDAs. The intention at the time of that amendment was to disapply a time-limit in relation to breaches of a community supervision order, but its effect was to disapply the time-limit in relation to other offences as well. The new amendments give effect to the original intention.

Arrest of civilian whose sentence is deferred

146. Paragraph 54 amends paragraph 2A of Schedule 5A to the Army and Air Force Acts in relation to Standing Civilian Courts. Because directing officers no longer exist, the

provisions referring to the powers of directing officers to order arrest are replaced with references to the magistrate hearing the case, as are other consequential references to the directing officer or his superiors. The paragraph also amends a reference to civilians being subject to Service law with wording to reflect the fact that they are only subject to certain provisions of that law.

Right of appeal to Courts-Martial Appeal Court

147. Paragraph 55 makes various amendments to the Courts-Martial (Appeals) Act 1968. It replaces a reference to "those Schedules", which identified the relevant Schedules by reference to a now repealed provision, with wording which simply lists the relevant Schedules.

148. Paragraph 55 also clarifies the provisions dealing with timing of appeals to the Courts-Martial Appeal Court (CMAC). Court-martial decisions are automatically reviewed by an internal reviewing authority, although an accused may petition for a review as well. Previously, an appeal to the CMAC could not be submitted until the end of the prescribed period for petitioning for review or until the accused has been notified that the petition has not been granted, whichever was earlier. These provisions did not state what was to happen if the reviewing authority substituted an equivalent or lesser sentence on petition, before the end of the prescribed period. The amendment to section 8(2) makes it clear that an appeal may be brought. A further change relates to late appeals. The CMAC could allow an appeal to be brought outside the prescribed period, but only if the accused had already petitioned for a review. But all decisions are reviewed, even if the accused does not petition for review. If, after such an automatic review, a convicted person wished to appeal out of time, he had to make a fictitious petition for review. This anomaly is removed by paragraph 55.

Children in respect of whom protective orders may be made

149. Paragraphs 57 and 58 relate to sections 17 and 19 the Armed Forces Act 1991, which deal with the protection of children in families with the armed forces abroad. These provisions give certain officers power to make assessment and protection orders in respect of certain children in emergencies. However, the definition of which children may be made the subject of these orders appeared to exclude certain categories, for example, those who are staying with, rather than residing with, the families of persons subject to the SDAs. The new paragraphs apply the power to any child who is residing, or staying, with such a family abroad.

Amendment relating to abolition of naval disciplinary courts

150. Paragraph 59 is consequential on the abolition by section 18 of naval disciplinary courts.

Section 35: Orders and regulations

151. The section deals with orders or regulations made by the Secretary of State under provisions of the Act. (It does not apply to new powers to make subordinate legislation which are added by the Act to the SDAs or other Acts). The section provides for orders and regulations to be made by statutory instrument. They may include incidental, consequential or transitional provisions. These instruments will, in most cases, be subject to the negative resolution procedure. The first exception is that orders under section 8(2) are subject to the affirmative resolution procedure. The other exceptions include certain orders under the power in section 30 to provide for release from custody pending an appeal and under the broad order-making power relating to criminal justice enactments (in section 31 of the Act). Orders under these powers which amend primary legislation and orders under section 31(2)(h) affecting the meaning of "criminal justice enactment" in section 31 will be subject to affirmative resolution procedure.

Section 36: Application to Channel Islands, Isle of Man, etc.

152. This section provides for an order making power to apply the various provisions in the Act which are not being incorporated into the SDAs to the Channel Islands and the Isle of Man. The amendments being made to the SDAs will automatically apply to the Islands by virtue of their inclusion in the SDAs.

Section 37: Interpretation

153. This section defines the terms " the 1955 Acts " and "the 1957 Act" for the purposes of the Act.

Section 38: Repeals

154. This section introduces *Schedule 7* which lists all the provisions to be repealed by this Act. Schedule 7 includes a number of repeals which are consequential on the abolition of naval disciplinary courts (section 18) and on the abolition of the death penalty (Schedule 6, Part 4).

Section 39: Short title and commencement

155. This section provides that in general the provisions of the Act (except sections 1, 35-37 and 39, Parts 4 and 5 of Schedule 6 and Parts 4 to 6 of Schedule 7, which came into force on Royal Assent) are to come into force on a day or days to be appointed by a commencement order by the Secretary of State. This commencement order may contain any transitional provisions thought necessary. The section also repeals section 1 of the Armed Forces Act 1996 on 1st September 2001.