

## **ARMED FORCES ACT 2006**

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### **EXPLANATORY NOTES**

#### **SECOND GROUP OF PARTS – MISCELLANEOUS MATTERS**

##### **Part 14 – Enlistment, Terms of Service Etc**

##### **Enlistment, terms of service etc**

650. The sections relating to enlistment and terms of service are almost exclusively applicable to those holding the rank or rate of warrant officer and below. One (section 330) applies equally to officers, but this relates to disciplinary matters where it is thought right that the same rights or restrictions should apply.
651. Enlistment is the process by which a person joins the regular forces without being commissioned. A person offering to enlist becomes a member of a Service when he takes an oath of allegiance (or affirms his allegiance) to the Sovereign and the validity of his enlistment is attested by a recruiting officer. However, with regard to the Royal Navy, at present a person “enters” service and does not swear an oath of allegiance to the Sovereign. Under the provisions of the Act the Royal Navy will align its procedures and terminology with those of the other Services.
652. A person who enlists into one of the Services agrees to join for a specified period of regular service and perhaps also for a subsequent period in the reserves. In the Army, the person enlists on the understanding that he will serve in a particular corps, although this is subject to the recruit successfully completing training. A recruit’s enlistment may be subject to a final approval process to take account of any significant changes in circumstances since his offer to enlist was originally accepted by the Service.

##### ***Section 328: Enlistment***

653. This section provides that the Defence Council may make regulations by statutory instrument about the process of enlistment into the regular forces. It is envisaged that the regulations will provide in particular for matters such as the appointment and duties of recruiting officers; prohibiting the enlistment of persons under the age of 18 without the consent of prescribed persons; the validity of enlistment; rights to discharge and the creation of offences of knowingly giving false answers during the enlistment procedure (which are subject to specified maximum punishments).

##### ***Section 329: Terms and conditions of enlistment and service***

654. This section empowers the Defence Council to make regulations by statutory instrument about the terms and conditions of service of a person who is about to enlist or a person who has already enlisted. They cover in particular the period of service as a regular and in the reserves, the ability of a person to seek to end his service, the ability to continue in service, restrictions as to where some persons might be required to serve and the compulsory transfer of members of the army between corps.

***Section 330: Desertion and absence without leave: forfeiture of service etc***

655. Where any person is convicted of an offence of desertion, he will forfeit service for the time that he was absent. Forfeiture of service results in loss of pay for the relevant period. Such a person might be required to continue to serve beyond his original discharge or transfer date for the relevant period to complete his engagement. This section provides that the Defence Council may make regulations by statutory instrument with respect to confessions by members of the regular forces to the offence of desertion under section 8, including whether a trial may be dispensed with in such cases, and the forfeiture of service and the restoration of such service in such a case. It also gives power to the Defence Council to make regulations about the forfeiture of service of a member of the regular forces who has been convicted by the Court Martial of an offence of desertion and the circumstances where such service may be restored.
656. The section further provides that the Defence Council may make regulations about the issue of certificates for members of the regular forces who are absent without leave and the effect of the issue of such a certificate, for example, loss of pay.

***Section 331: Discharge etc from the regular forces and transfer to the reserve forces***

657. When the enlisted person leaves regular service he will be transferred to the reserves if he has a liability for such service. Otherwise he will be discharged from his Service. This section provides that the Defence Council may make regulations about the discharge and the transfer to the reserve of enlisted persons.
658. The section also provides for the Defence Council to make regulations conferring a right on warrant officers to discharge following reduction in rank or rate.

***Section 332: Restriction on administrative reduction in rank or rate***

659. A person's rank or rate relates to the authority, responsibility and the professional competence of a person. The Services may need to reduce an enlisted person in rank or rate for reasons of, for example, inefficiency or misconduct, which is distinct from reduction in rank for disciplinary purposes. This section places limitations upon the power to reduce a person's rank or rate administratively.
660. A CO with the appropriate higher authority permission may order a person who is a warrant officer or non-commissioned officer to be reduced either by one acting rank or, if there is no acting rank, one substantive rank. Higher authority permission is not required, however, if the person to be reduced in rank is a lance corporal or lance bombardier or if the CO holds the rank of Rear Admiral, Major General, or Air Vice Marshal or above. A corporal in the air forces may be reduced to the highest rank which he has held as airman (defined in section 374).
661. The section does not cover reversion from or relinquishment of acting rank when an individual is posted from or replaced in a post for which he has been granted acting rank.

***Section 333: Pay, bounty and allowances***

662. The main purpose of this section is to provide harmonised, tri-service provision governing the pay, bounty and allowances of the armed forces. Under the existing law (a mixture of prerogative and statute) various forms of promulgation are used, including Orders in Council under the Naval and Marine Pay and Pensions Act 1865, Royal Warrant and orders under section 2 of the Air Force (Constitution) Act 1917.
663. This section provides for the use of a Royal Warrant to make provision on pay, bounty and allowances for members of the regular and the reserve forces. It also specifies some important provisions which may be made in his way. They include provision for persons to exercise a discretion (some allowances are, for example, discretionary). It also provides that the Royal Warrant may be used to authorise deductions from pay

(for example to recover an overpayment). But it cannot be used to authorise a forfeiture of pay. So it cannot be used to authorise the right to pay to be removed, as opposed to authorising that right to be offset by another right, such as the right to recover an overpayment. Forfeiture of pay may only be authorised by or under an Act of Parliament (section 341).

664. Money which can be distributed under the Naval Agency and Distribution Act 1864 (for example payments in relation to salvage and certain naval bounties) will continue to be dealt with under the procedures in that Act. They are excluded from the operation of this section.

### **Redress of individual grievances**

665. The statutory right of complaint is considered a fundamental right of a service person. It dates back to at least the 19th century and largely reflects the fact that the terms of service of service personnel are not governed by domestic employment law. As a result service personnel do not have a contract of employment and their rights of legal remedy, in respect of matters arising from service, are limited. The internal statutory redress system has therefore always been of importance if a member of the armed forces is to be able to complain about any matter where he thinks himself wronged in relation to his service. Currently a redress of complaint proceeds through a service person's CO, through various layers of the command chain, to the Defence Council. In those circumstances the Service Board of the complainant's Service acts for the Defence Council. At any stage of the redress process, if satisfied with the decision of the decision-making authority then dealing with the complaint, the complainant can withdraw his complaint. If dissatisfied, the complaint will proceed on to the Service Board where two Board members decide the complaint.
666. These procedures have been found, in practice, to be slow. Service Boards have been overloaded with cases, and this has led to delay in cases being resolved. The sections in the Act are in part designed to speed up the process. In most cases a complaint will still be considered by a service person's CO and then go to one further level within the command chain. If a complaint is not capable of resolution by the command chain, most cases will proceed immediately to a service complaints panel. Service complaint panels are designed to take work away from the Service Boards and panels will be given delegated powers to act on behalf of the Defence Council. The panels will usually comprise serving officers of the rank of commodore, brigadier or above and civil servants. Membership of service complaint panels will come from outside the command chain of the complainant and could be drawn from another Service than that of the complainant or from the civil service. The Secretary of State may make regulations requiring that in the case of a service complaint of a particular description an independent member to sit on a service complaint panel. Examples of where an independent member appointed by the Secretary of State will sit is likely to be appropriate are complaints involving bullying, harassment or other misconduct.
667. Where the Defence Council has not delegated a case (either by delegating the particular case or a relevant category of cases to a complaints panel) they will still be able to decide the matter (as at present acting through a Service Board). In such cases, a Service Board could require a service complaint panel to assist the Board in carrying out its functions, e.g. a service complaint panel could be asked to investigate a particular matter and report to the Board with their recommendations.
668. In those cases where a Service Board deals with a complaint made by an officer, the officer if dissatisfied with the decision of the Service Board, may request reference of his individual grievance to Her Majesty.
669. The Act also provides for the appointment of a Service Complaints Commissioner. He will have two main functions (explained further below). One of these will be to receive from any person allegations that a member of the Armed Forces has been the victim of certain types of wrong in relation to his service. The Commissioner will have power

to refer those allegations to an officer, who will have to check whether the alleged victim wishes to bring a complaint. The Commissioner's second main function will be to provide the Secretary of State with an annual report on the efficiency, effectiveness and fairness of the redress system.

***Section 334: Redress of individual grievances: service complaints***

670. This section allows a person who is, or who has previously been, subject to service law to make a complaint if he thinks himself wronged in any matter relating to his service.
671. Subsection (2) enables the Secretary of State to make regulations about the kind of matter that cannot be the subject of a complaint. It is envisaged that regulations will be made to exclude complaints about Service disciplinary proceedings (where other appeal procedures exist) and about matters involving pensions and reserve forces (where alternative dispute resolution and appeals procedures also exist).
672. Subsection (3) requires the procedure for making and dealing with complaints to be laid down in Defence Council regulations. Under subsection (4) the regulations must make provision for the kind of officer to whom a complaint is to be submitted. They must also provide so that:
- the officer is able to refer the matter to a prescribed superior officer or to the Defence Council
  - the complainant is able to require the matter to be referred to a prescribed superior officer, and
  - both the superior officer and the complainant are able to require the matter to be referred on to the Defence Council.
673. Defence Council regulations may also provide for the manner in which a complaint is to be handled and timescales for making a complaint and for a complainant to apply for his complaint to be referred to a superior officer or to the Defence Council (subsections (5) and (6)).
674. Any person considering a complaint must decide if the complaint is well-founded and if it is he must grant such redress which is within his authority to give and which he considers would be appropriate (subsections (7) and (8)).

***Section 335: Service complaints: role of Defence Council and service complaint panels***

675. This section permits the Defence Council to delegate all or some of its responsibilities under section 334 to a panel, referred to in the Act as a "service complaint panel". Members of a service complaint panel are appointed by the Defence Council (except independent members appointed by the Secretary of State where required by regulations under section 336(7)).
676. Subsection (4) permits the Defence Council (in relation to all or any complaints) to delegate to a civil servant or officer
- the decision on which of its functions are to be delegated to a service complaint panel, and
  - the Council's function of appointing the panel members.
677. Subsections (6) and (7) enable the Defence Council to obtain assistance in other ways. Under subsection (6) the Defence Council may require a panel to assist them and (under subsection (7)) may appoint a person (including a panel or panel member) to investigate a complaint.

***Section 336: Composition and procedure of service complaint panels***

678. This section sets out the eligibility criteria for membership of a service complaint panel. Generally a member must be a serving officer of at least the rank of brigadier (or equivalent in the other services) or a civil servant. Panels must have at least two members, and at least one member must be a serving officer of such a rank. The section also empowers the Secretary of State to make further provision in regulations about its composition and procedure, including:

- provision for additional or stricter eligibility requirements, and
- provision requiring a panel to include one member who is neither a member of the armed forces nor a civil servant.

***Section 337: Reference of individual grievance to Her Majesty***

679. Officers have traditionally had the right to have their complaint referred to the Sovereign for Her Majesty to decide whether to give the Defence Council any directions about the complaint. This section lays down certain conditions that must be satisfied for an officer to have his complaint referred to Her Majesty. One condition is that the complaint must have previously been decided by the Defence Council, i.e. by a Service Board, and that its function has not been delegated to a service complaints panel to any extent. So the matters about which an officer will be entitled to complain to Her Majesty will be limited to those matters that the Defence Council decides not to delegate decisions on to service complaint panels.

***Section 338: Referral by Service Complaints Commissioner of certain allegations***

680. Under this section the Service Complaints Commissioner (who is to be appointed under section 366) will be able to receive from any person allegations that a member of the Armed Forces has been the victim of certain types of wrong in relation to his service, or that a former member was the victim of such a wrong while in the Armed Forces. The wrongs in question will be prescribed in regulations made by the Secretary of State. It is intended that they will include bullying, harassment and other misconduct. The Commissioner will have power to refer those allegations to an officer, who will have to check whether the alleged victim wishes to bring a complaint about the alleged wrong.

***Section 339: Reports by Commissioner on system for dealing with service complaints etc***

681. Under this section the Commissioner must provide the Secretary of State with an annual report on the efficiency, effectiveness and fairness of the redress system, the exercise by him of his own function under section 338 of referring allegations and any related matters that he consider appropriate or the Secretary of State directs. The reports must be laid before Parliament by the Secretary of State. The Secretary of State is also empowered to require the Commissioner to provide him with other reports on aspects of the redress system or on matters relating to the Commissioner's function of referring allegations.

**Restriction on aliens**

***Section 340: Restriction on aliens in regular forces etc***

682. This section prevents aliens from being members of the regular forces or of HM Forces raised under the law of a British overseas territory. Section 3 of the Act of Settlement 1700 (which would otherwise prevent certain non-UK nationals from holding any "office or place of trust" in HM Forces) is disapplied so that it is clear that the position regarding aliens in the armed forces is governed by this section alone. An alien is a person who is neither a citizen of the UK, the Commonwealth or the Republic of Ireland nor a British protected person.

*These notes refer to the Armed Forces Act 2006 (c.52)  
which received Royal Assent on 8 November 2006*

683. However, despite this general prohibition, the section allows the Defence Council to make regulations excluding certain aliens from its operation. This would allow Gurkhas (who are aliens) to be members of these forces.