

ARMED FORCES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

42. *Subsection (1)* of section 11 adds new sections 93A to 93I to AFA 2006. New section 93A(1) empowers a commanding officer to require a member of the armed forces to take a preliminary test for exceeding a prescribed limit for alcohol or for impairment of ability due to alcohol or drugs (or more than one of these). The commanding officer must have reasonable cause to believe that the person is committing one of two “relevant offences”, or has committed such an offence and is still affected by alcohol or drugs. The offences are an offence under the new section 20A, created by section 10 (breach of a prescribed alcohol limit for a safety-critical duty), and an offence under section 20(1)(a) (unfitness for duty).
43. However, under the new section 93A(2)(b) a commanding officer may only require the taking of a preliminary test for the offence under section 20(1)(a) (unfitness for duty) if the commanding officer reasonably believes that performance of the duty with the ability to do so impaired by alcohol or drugs would carry a risk of causing death, serious injury, serious damage to property or serious environmental harm.
44. Accordingly, the combined effect of the new section 20A and the new section 93A is that there is a power (based on reasonable belief of commission of a relevant offence) to test: for alcohol in respect of the breach of prescribed limits for prescribed, safety-critical duties, and for alcohol or drugs in respect of an impaired ability to carry out any duty which the commanding officer reasonably believes is safety-critical.
45. The new section 93A also applies to a “civilian subject to service discipline” (see the note on section 22), when the commanding officer has reasonable cause to believe that the person is committing an offence under AFA 2006 which corresponds to maritime or aviation offences under the Railways and Transport Safety Act 2003. It also applies where the commanding officer has reasonable cause to believe that such a person has committed such an offence and is still affected by alcohol or drugs.
46. The sections of AFA 2006 added by section 11 make further provision for preliminary testing and for the provision of specimens for analysis. New sections 93B to 93D of AFA 2006 closely reflect the provisions for preliminary tests by Home Office police forces in section 6 of the Road Traffic Act 1988 (“RTA 1988”). The preliminary breath test in new section 93B is for the presence of alcohol. It is intended that the device used to measure this will be the same as that approved for Home Office police forces. The preliminary impairment test under section 93C will enable a service policeman to observe a suspect’s performance of simple tasks. The tasks will be very similar to those used by Home Office police forces under RTA 1988 (for example, walking in a straight line). Like those under RTA 1988 the tasks will be set out in a code of practice (under new section 93C(3)), issued jointly by the Provost Marshals (the heads of the three service police forces). New section 93D provides for a preliminary test for drugs, also to be administered by a service policeman and based on a specimen of sweat or

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

saliva. Under new section 93A(6) a person who, without reasonable excuse, fails to co-operate with these tests commits an offence.

47. Under new section 93E, where an offence referred to in new section 93A is being investigated, a service policeman may require samples of breath, or of blood or urine, for analysis. A person who, without reasonable excuse, fails to provide a sample commits an offence (new section 93E(10)). The provisions on samples mirror certain provisions of RTA 1988 applicable to motorists.
48. The new regime provided by sections 10 and 11(1) would overlap with the power in section 306 of AFA 2006 to test after a dangerous incident, as the new power to test could arise before or after an incident. This would mean that different regimes could apply in the same circumstances. To avoid this, *subsection (2)* of section 11 provides for the repeal of section 306 (and of related provisions in section 307).