

ARMED FORCES BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the Armed Forces Bill as brought from the House of Lords on 5 May 2016.
- 2 These Explanatory Notes have been prepared by the Ministry of Defence in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords amendments themselves, refer to HL Bill 85, the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords amendments.
- 5 Lords Amendments 1 and 2 were tabled in the name of the Minister.

Commentary on Lords amendments

Lords Amendment to Clause 10: Review of sentence following offer of assistance

Lords Amendment 1

- 1 Lords Amendment 1 would amend clause 10 of the Bill. Clause 10 inserts new section 304D (review of sentence following offer of assistance) into the Armed Forces Act 2006 (“AFA 2006”).
- 2 New section 304D provides that a person who has been sentenced by the Court Martial may have their sentence reviewed to take account of assistance that they have given, or offered to give, to an investigator or prosecutor pursuant to an agreement with the Director of Service Prosecutions (“the Director”). The reviewing court may reduce the sentence in return for the assistance offered or given.
- 3 Subsection (8) allows a person whose sentence is reviewed under new section 304D to appeal against the Court Martial’s decision to reduce, or not to reduce, the sentence. The Director may also appeal against the decision (see subsection (9)).
- 4 Subsection (10) allows regulations to be made in relation to the conduct of proceedings on appeals against decisions under new section 304D. It provides that, in relation to any proceedings under new section 304D, the Secretary of State may make regulations containing provision corresponding to any provision in Parts 2 to 4 of the Court Martial Appeals Act 1968 (“the 1968 Act”), with or without modifications. Part 2 of the 1968 Act makes provision with respect to appeals from the Court Martial to the Court Martial Appeal Court. Part 3 of that Act makes provision with respect to appeals to the Supreme Court. Part 4 of that Act makes miscellaneous and general provision with respect to appeals.

- 5 Regulations under new section 304D(10) must be made by statutory instrument, subject to the negative procedure (this is the effect of subsections (1) and (4) of section 373 of AFA 2006 (orders, regulations and rules)).
- 6 The 1968 Act includes some provisions (about the recovery of costs and expenses in appeal proceedings), the effect of which may be modified by the Lord Chancellor by regulations subject to the affirmative procedure. For example, under section 31A (legal costs) of the 1968 Act, an Appeal Court is prevented from directing the Secretary of State to pay legal costs to a successful applicant, except where affirmative procedure regulations made by the Lord Chancellor provide otherwise.
- 7 Lords Amendment 1 would insert a new subsection (10A) into new section 304D. New subsection (10A) would limit the regulation-making power conferred by new section 304D(10) so that it:
 - a. could not be used to make provision corresponding to provision which may be included in regulations made by the Lord Chancellor under section 31A (legal costs), 33 (witnesses' expenses), 33A (appellant's expenses), 46A (costs: application to Appeal Court by Director of Service Prosecutions) or 47 (costs: application to Supreme Court) of the 1968 Act;
 - b. could be used to confer regulation-making powers corresponding to the powers in those sections only if the powers were (like the powers in the 1968 Act) subject to the affirmative procedure.
- 8 This would prevent regulations under new section 304D(10), which are subject to the negative procedure, being used to make provision corresponding to the costs provisions of the 1968 Act but with modifications which, if made to the 1968 Act by regulations under that Act, would be subject to the affirmative procedure.
- 9 For example, the effect of Lords Amendment 1 would be that regulations under new section 304D(10):
 - a. could not make provision corresponding to provision in section 31A (legal costs) of the 1968 Act, with modifications, allowing an Appeal Court to direct the Secretary of State to pay legal costs to a successful applicant;
 - b. could confer a power on the Lord Chancellor to make regulations providing that an Appeal Court may direct the Secretary of State to pay legal costs to a successful appellant – but only if the Lord Chancellor's regulations are subject to the affirmative procedure.

Lords Amendment to Clause 11: Review of sentence following failure to assist

Lords Amendment 2

- 10 Lords Amendment 2 would amend clause 11 of the Bill. Clause 11 inserts new section 304E (review of sentence following failure to assist) into AFA 2006.
- 11 New section 304E allows a sentence to be reviewed to take account of a failure by the person sentenced to give assistance that they offered to an investigator or prosecutor and in return for which they received a sentence that was discounted under new section 304C (reduction in sentence) or 304D. If the reviewing court is satisfied that the person knowingly failed to give the assistance, it may increase the sentence to take account of that failure.

- 12 Subsection (7) allows a person whose sentence is reviewed under new section 304E to appeal against the decision of the reviewing court. The Director may also appeal against the decision (see subsection (8)).
- 13 Subsection (9) allows regulations to be made in relation to the conduct of proceedings on appeals against decisions under new section 304E. It provides that, in relation to any proceedings under new section 304E, the Secretary of State may make regulations containing provision corresponding to any provision in Parts 2 to 4 of the 1968 Act, with or without modifications. As with regulations under new section 304D(10), the regulations must be made by statutory instrument, subject to the negative procedure.
- 14 Lords Amendment 2 would insert a new subsection (9A) into new section 304E. New subsection (9A) would limit the regulation-making power conferred by new section 304E(9). The effect of new subsection (9A) on the exercise of the power in new section 304E(9) would be the same as the effect of new section 304D(10A) (see Lords Amendment 1) on the exercise of the power in new section 304D(10).

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These Explanatory Notes refer to Lords amendments to the Armed forces Bill as brought from the House of Lords on 5 May 2016 (Bill 175).

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