These notes refer to the Armed Forces Bill
as brought from the House of Commons on 16th June 2011 [HL Bill 76]

ARMED FORCES BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Armed Forces Bill as brought from the House of Commons on 16th June 2011. They have been prepared by the Ministry of Defence in order to assist the reader of the Bill and to help informed debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. For constitutional reasons an Armed Forces Bill is required every five years. The primary purpose of Armed Forces Bills is accordingly to provide for the continuation for a further period of up to five years of the provisions enabling the armed forces to be recruited and maintained as disciplined bodies. The most recent of them, the Armed Forces Act 2006, introduced a single system of law that applies to all service personnel. It applies wherever in the world they are operating. In the Bill and in these Notes the Armed Forces Act 2006 is referred to as "AFA 2006". AFA 2006 includes a comprehensive system of discipline, covering such matters as offences, the powers of the service police, and the jurisdiction and powers of commanding officers and of service courts, in particular the Court Martial.

4. This Bill is much smaller in scale. It contains a number of items relating to the armed forces' disciplinary system. In common with previous five-yearly Bills, it contains some proposals that fall outside the traditional area of service discipline. Paragraphs 5 to 12 of the Notes summarise both the Bill's structure and the individual provisions.

OVERVIEW OF THE BILL'S STRUCTURE AND SUMMARY

5. The Bill contains nine groups of clauses. The first (composed of a single clause) renews AFA 2006 for a further period ending not later than the end of 2016.

6. The second (composed of a single clause) provides for the Secretary of State to make an annual report to Parliament on the effect of membership of the armed forces on, in particular, the welfare of members and former members of the forces.

7. The third group of clauses contains provisions that relate to the independence and inspection of the service police forces; and to new arrangements for the management of members of the Ministry of Defence Police.

8. The fourth group of clauses confers new powers on judge advocates to authorise entry and search of certain premises and on the Secretary of State to make provision by order as to access for the service police to special categories of material (for example bank records).

9. The fifth group makes provision about the testing of service personnel for alcohol and drugs in specified circumstances.

10. The sixth group of clauses relates to punishments and other court orders.

11. The seventh group of clauses makes a number of changes to AFA 2006. They include changes relating to: where the Service Civilian Court may sit; reduction in rank of service personnel; the process for redress of complaints brought by service personnel; and civilians subject to service jurisdiction.

12. The eighth group of clauses make amendments and repeals of other legislation, including the legislation governing military byelaws, the Naval Medical Compassionate Fund Act 1915 and the Reserve Forces Act 1996. It also provides for minor amendments to service legislation, consequential amendments and repeals. The ninth group contains supplementary provision.

TERRITORIAL EXTENT AND APPLICATION

13. The Bill is part of the law of every part of the United Kingdom. It may also be extended by Order in Council to the Channel Islands, the Isle of Man and British overseas territories. The provisions applicable to members of the armed forces will apply to them wherever they are in the world.

14. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish

Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

COMMENTARY ON CLAUSES

Clause 1: Duration of AFA 2006

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

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

Clause 2: Armed forces covenant report

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

18. The clause inserts into AFA 2006 new section 359A. The new section requires the Secretary of State to lay before Parliament an annual report on effects of membership (or

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

former membership) of the armed forces on members and former members of the armed forces, and on such persons connected with them as the Secretary of State may decide. The former members covered by new section 359A include both those who have left the armed forces before the section comes into force and those who leave subsequently. But former members are covered by new section 359A only if they are ordinarily resident in the United Kingdom. This reflects the purpose referred to in paragraph 17 of responding to the effects of service on the ability to benefit from provision made in the United Kingdom. The members, former members and connected persons covered are referred to in the new section as "service people". Each annual report must address effects of membership or former membership in the fields of healthcare, education and housing; but new section 359A does not require each report to cover all the effects of membership in these fields, and the effects the Secretary of State chooses to report on may relate to particular descriptions of service people. If the Secretary of State considers that any of the fields of healthcare, education and housing is not relevant to a particular description of people covered in a report, the requirement to report on each of those fields is relaxed to that extent. The Secretary of State may also decide to cover in a report effects in fields additional to healthcare, education and housing.

19. A report under section 359A is referred to as an "armed forces covenant report". With reference to this, new section 359A(3) requires the Secretary of State, in preparing the reports, to have regard in particular to the unique obligations and sacrifices of the armed forces, to the principle of the desirability of removing disadvantages arising from membership of the armed forces and to the principle that special provision for service people may be justified by the effects of membership, or former membership, of the armed forces. Under new section 359A(4) each report must state whether, in the Secretary of State's opinion, any effects in a particular field covered by the report put service people, or a category of them, at a disadvantage compared with other people. In that case the report must, under new section 359A(5), set out the Secretary of State's response. Under new section 359A(6) the Secretary of State must also consider whether effects covered by the report would justify making special provision for service people, or a category of them. If the Secretary of State does consider that to be the case, the report must say so.

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

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

Clause 4: Inspection of service police investigations

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

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

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

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

Clause 5: Provost Marshals: appointment

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

Clause 6: Ministry of Defence Police: performance regulations

26. The Ministry of Defence Police ("the MDP") is a civilian force established under the Ministry of Defence Police Act 1987 ("the 1987 Act"). Each member of the MDP is both a constable and a civil servant. Section 3A of the 1987 Act allows the Secretary of State to make regulations for dealing with misconduct of members of the MDP. The Ministry of

Defence Police (Conduct) Regulations 2009, which were made under this power, are similar to regulations made under section 50 of the Police Act 1996 in respect of misconduct of members of Home Office police forces. However, unlike members of Home Office police forces, underperformance (in the sense of lack of efficiency and effectiveness) on the part of members of the MDP is dealt with under civil service procedures rather than regulations.

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

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

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

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

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

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

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

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

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

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

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

section 86 as amended would not permit provision enabling a judge advocate to issue a search warrant.

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

Clause 9: Unfitness through alcohol or drugs

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

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

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

Clause 10: Exceeding alcohol limit for safety-critical duties

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

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

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

42. S*ubsection (1)* of clause 11 adds new sections 93A to 93I to AFA 2006. Subsection (1) of new section 93A 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 clause 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 clause 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 RTSA. It also applies where the commanding officer has reasonable clause 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 clause 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 ("the 1998 Act"). 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 the 1988 Act (for example, walking in a straight line). Like those under the 1988 Act the tasks will be set out in a code of practice (under new section 93C(3)), issued jointly by the Provost Marshals (the heads of the three service police forces). New section 93D provides for a preliminary test for drugs, also to be administered by a service policeman and based on a

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

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

48. The new regime provided by clauses 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 clause 11 provides for the repeal of section 306 (and of related provisions in section 307).

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

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

Clause 13: Reduction in rank or rate

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

Clause 14: Sentencing powers of Court Martial where election for trial by that court instead of CO

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

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

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

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

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

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

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

Clause 16: Enforcement of financial penalties

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

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

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

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

Clause 17: Service sexual offences prevention orders
Service sexual offences prevention orders

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

but are for the protection of members of the service community outside the United Kingdom. *Subsection (1)* inserts new sections 232A to 232G into AFA 2006.

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

62. New section 232A(3) provides that a service SOPO (like a SOPO) may prohibit the defendant from doing anything described in it and lasts for a fixed period of at least 5 years. The order can only be made for the purpose of protecting members of the service community outside the United Kingdom from serious sexual harm from the defendant. This is defined in section 232A(6)(a) as protecting the service community outside the United Kingdom, or particular members of that community, from serious physical or psychological harm caused by the person committing a serious sexual offence. The new power sits alongside the existing provisions in Part 2 of SOA 2003, so that a service court can impose a SOPO and a service SOPO at the same time.

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

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

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

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

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

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

68. Clause 17(2) (by amending section 108 of SOA 2003) removes the power of the Crown Court to vary or revoke a SOPO where section 232C(3)(a) applies. This prevents applications being made in both the civilian and service jurisdictions, where one court may be unaware of the other court's decision.

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

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

Extended prohibitions orders

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

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

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

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

75. Under section 232G a breach of a service SOPO or of an EPO without reasonable excuse is a service offence punishable with five years' imprisonment. This is the same

maximum penalty as applies for conviction on indictment for breach of a SOPO (section 113 of SOA 2003).

Clause 18: Place of sitting of Service Civilian Court

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

Clause 19: Administrative reduction in rank or rate

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

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

Clause 20: Service complaint panels

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

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

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

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

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

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

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

Clause 21: Persons eligible to be prosecuting officers

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

Clause 22: Civilians subject to service discipline

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

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

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

90. Paragraph 5 of Schedule 15 currently applies to a person whenever they are outside the British Islands, if he or she is employed in a specified naval, military or air-force organisation by reason of the United Kingdom's membership of the organisation. The only organisation currently specified (by the Armed Forces (Civilians Subject to Service Discipline) Order 2009) is NATO. The effect of paragraph 5 is considered too wide, because it purports to apply service jurisdiction wherever the employee is (outside the British Islands) and regardless of the purpose for which he is there. *Subsection (3)* of clause 22 amends paragraph 5 in a way which parallels the amendment to paragraph 4. It limits paragraph 5, so that the employee is only a CSSD in two circumstances. One is if he is in the foreign country or territory where he usually works. The other is if he is in another foreign country or territory wholly or partly for the purposes of that work.

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

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

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

Clause 23: Protected prisoners of war

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

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

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

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

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

Clause 24: Byelaws for service purposes

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

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

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

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

102. Clause 24 also amends section 17 of 1892 Act. That section also governs the procedure for publishing byelaws, whether made by virtue of the 1892 Act, the 1900 Act or

the 1958 Act. The clause removes the requirement that the Secretary of State for Defence shall publish the byelaws in such manner as appears to him necessary to make them known to all persons in the locality, and replaces it with a requirement that he publish the byelaws in such manner as appears to him appropriate.

Clause 25: Claims against visiting forces: transfer of liability

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

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

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

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

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

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

109. To remedy this, the clause provides for the insertion of a new section 9A into the Visiting Forces Act 1952. This enables the Secretary of State, if a sending state requests it, to

transfer any liability in tort in respect of a relevant claim to the Ministry of Defence. He does this by a written declaration specifying the claim and the time from which any liability in tort is transferred. This will enable him to be substituted as a party in the proceedings in place of the sending state. It does not prevent the Secretary of State defending the claim. He will have only the same liability, and accordingly any defence, that the sending state would have had in the proceedings.

Clause 26: Judge advocates sitting in civilian courts

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

Clause 27: Repeal of Naval Medical Compassionate Fund Act 1915

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

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

Clause 28: Call out of reserve forces

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

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

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

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

Clause 29: Minor amendments of service legislation

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

Clause 30: Consequential amendments and repeals

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

Clause 31: Meaning of "AFA 2006"

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

Clause 32: Commencement

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

- clause 1, which provides for the duration of AFA 2006;
- clause 31, which provides for the interpretation in the Act of "AFA 2006" as the Armed Forces Act 2006;
- clause 33, which provides for extent to the Channel Islands, Isle of Man and British overseas territories; and

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

- clause 34, which provides for the short title of the Act to be the Armed Forces Act 2011.

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

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

121. The clause also provides for the commencement orders to contain transitional, transitory and saving provision. *Subsection (5)* of clause 32 makes particular provision for transitional provisions related to the coming into force of the new Schedule 3A to AFA 2006. That Schedule is provided for by clause 14 of, and Schedule 1 to, the Bill. The new Schedule affects the powers of punishment of the Court Martial, where an accused elects trial by that court instead of by his commanding officer. Those powers are to be decided by reference to the punishments that the commanding officer could have awarded. But, where the election is before commencement and the trial afterwards, transitional provision will be needed as to what powers of punishment it is assumed the commanding officer would have had. This is because the Bill itself (for example in clause 12) affects what a commanding officer can do.

Clause 33: Extent

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

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

COMMENTARY ON THE SCHEDULES

Schedule 1 – Court Martial sentencing powers where election for trial by that court instead of CO

124. Section 165 of AFA 2006 limits the Court Martial's powers of punishment in the case of an offender who elected under section 129 of that Act to be tried by that court rather than being dealt with by his or her commanding officer (referred to in the note on this Schedule as

"CO"). The objective is to ensure that summary hearing of a charge by a CO does not infringe the accused's Convention right under the Human Rights Act 1998 to a fair trial by an independent tribunal. The accused has a right to be tried by a compliant court, and there is no incentive to refrain from exercising that right because by doing so the accused does not risk incurring a more severe punishment.

125. However, section 165 itself deals only with relatively straightforward cases: the more complex situations are the subject of Court Martial rules made under section 163. Part 20 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041) supplements section 165 in a number of ways. For example, it requires the court to pass a single sentence, like a CO, where the accused is convicted of two or more offences which, but for the election, the CO would have heard together.

126. Clause 14 replaces both section 165 of AFA 2006 and Part 20 of the Court Martial Rules with a new Schedule 3A to AFA 2006 (set out in Schedule 1 to the Bill), so that the relevant provisions will be all in one place. The overall effect is unchanged, with two exceptions (as to which, see paragraphs 129, as to paragraph 3 of new Schedule 3A, and 162, as to paragraph 9 of Schedule 3, below).

127. The substantive provisions of the new Schedule 3A apply where the Court Martial convicts a person of a "relevant offence" (or, in the case of paragraph 13 only, where the court acquits a person of, or makes certain other findings in relation to, an offence which would be a relevant offence if the person were convicted of it). *Paragraph 1* defines a relevant offence as one that falls within any of cases A to D.

128. Under *paragraph 2*, an accused is convicted of a case A offence if he or she elects Court Martial trial of a charge and is convicted on that charge.

129. Under *paragraph 3*, an accused is convicted of a case B offence if he or she elects Court Martial trial of one charge, the Director of Service Prosecutions substitutes another, and the accused is convicted on the substituted charge. But this is so only if the substitution is one which, under the new section 130A inserted by paragraph 9 of Schedule 3 to the Bill (see paragraph 162 below), does not require the accused's consent. Under the current rules an offence is relevant if the charge in respect of it was brought in addition to the charge on which the accused elected (which would always require the accused's consent) or substituted for that charge (which might or might not require the accused's consent, depending on the charge substituted). The new rule is based on the assumption that an accused will not be deterred from electing by the risk of the Director's taking a step which cannot be taken without the accused's consent.

130. *Paragraph 4* provides for the case where an accused elects on one charge, and the CO then refers a second charge (which would otherwise have been heard separately from the first) to the Director without offering the opportunity to elect on the second charge. For example, the accused elects Court Martial trial on a charge of common assault. There is also an outstanding charge of fighting. The CO decides not to offer the accused the right to elect Court Martial trial in respect of the fighting charge, but instead refers it to the Director together with the assault charge. The accused is convicted on the fighting charge, but not on the assault charge. The conviction on the fighting charge is a conviction of a relevant offence (a case C offence). If this were not so, the accused might be deterred from electing on the assault charge by the possibility that this might prompt the CO to refer the fighting charge, and that the Court Martial might then award a more severe punishment on the fighting charge than the CO could have awarded.

131. Case D is to case C as case B is to case A. Under *paragraph 5*, an offence is a case D offence if the charge of the offence is substituted (without the accused's consent) for a charge of an offence which, if the accused were convicted of it, would be a case C offence. In the example at paragraph 130 above, if the Director substituted for the fighting charge a charge of conduct prejudicial to discipline, and the accused were convicted of that offence, it would be a case D offence.

132. *Paragraph 6* restricts the Court Martial's sentencing powers in respect of a single case A or B offence. The court may not award any punishment which the CO could not have awarded if the charge on which the accused elected had been heard summarily. *Paragraph 16* makes it clear that for this purpose it is irrelevant that the CO may have been promoted since the time of the election - even if, had the accused not elected, the higher rank would have meant that the CO had extended powers of punishment - and that, had the accused not elected, the CO might have *applied* for such powers. In other words it is to be assumed that the CO would not have had extended powers, unless such powers had already been granted when the accused elected (or the CO had them automatically, by virtue of holding at least 2-star rank).

133. Similarly, *paragraph 7* prohibits the court from punishing a case C or D offence more severely than the CO could have punished the offence alleged in the charge that was referred to the Director without the accused's being offered the opportunity to elect on it. In the examples at paragraphs 130 and 131 above, this would be the fighting charge.

134. *Paragraphs 8 to 10* provide for the case where the Court Martial convicts an accused of two or more relevant offences which, had the accused not elected (or, in relation to offences within case C or D or both, had the CO not referred the charge without offering the right to elect), would have been heard summarily together. Paragraphs 6 and 7 do not apply in this case. Because the CO would have awarded a single punishment (or combination of punishments) in respect of both or all the offences proved, paragraph 9 requires the Court Martial similarly to pass a single sentence for both or all of the relevant offences. This is an

exception to section 255 of AFA 2006, which would otherwise the court to pass a separate sentence for each offence. Under paragraph 9(3) and (4), the punishments awarded by the single sentence must be punishments which the CO could have awarded had the accused not elected (or, in relation to offences within case C or D or both, had the CO not referred the charge without offering the right to elect).

135. *Paragraph 10* modifies several sections of AFA 2006 which differentiate between the principles applicable to the passing of individual sentences by the Court Martial and those applicable to the award of "global" punishments by a CO, so that, where paragraph 9 requires the Court Martial to pass a global sentence, it is the principles relevant to global punishments awarded by a CO that apply. *Paragraph 15* similarly modifies certain sections of the Court Martial Appeals Act 1968 so that, where the Court Martial Appeal Court substitutes a different sentence for that passed by the Court Martial, the substituted sentence is also a global sentence.

136. *Paragraphs 11, 13 and 14* disapply some provisions of AFA 2006 which would otherwise apply in relation to an offender convicted of a relevant offence (or, in the case of paragraph 13, where the court makes certain other findings instead of convicting the accused of a relevant offence), which are potentially disadvantageous to such a person, and which would not apply if the charge had been heard summarily.

137. *Paragraph 12* makes provision in relation to the Court Martial's power to activate a suspended sentence of service detention passed by a CO or the Summary Appeal Court. Section 194(1) prohibits a CO from activating such a sentence for more than 28 days, unless the CO has extended powers. Where the Court Martial activates such a sentence by virtue of having convicted the offender of a relevant offence, paragraph 12(2) accordingly prohibits the activation of the sentence for more than 28 days unless the CO would have had extended powers for the purpose of section 194. Paragraph 12(3) similarly prevents the Court Martial from making the activated sentence consecutive to another sentence in such a way that the aggregate of the terms is longer than that which would have been permitted by section 194(2) if the CO had heard the charge.

138. *Paragraph 17* ensures that, where the Director replaces one charge with another and then substitutes a third charge for the second, for the purposes of references in the Schedule to substituted charges the third charge is treated as having been substituted for the first; and so on.

Schedule 2 – Judge advocates sitting in civilian courts

139. *Paragraph 1* of Schedule 2 amends section 8 of the Senior Courts Act 1981 to provide for a "qualifying judge advocate" to be able to exercise the jurisdiction of the Crown Court in relation to any criminal cause or matter other than an appeal from a youth court, including

when sitting with not more than four justices of the peace. The definition of a "qualifying judge advocate" is provided for by *paragraph 5* (see note on that paragraph below).

140. *Paragraph 2* amends section 73(2) of the Senior Courts Act 1981 to provide for a power for rules of court to authorise or require a qualifying judge advocate to continue with any proceedings with a court where one or more of the justices initially constituting the court has withdrawn, or is absent for any reason. Paragraph 2 also amends section 73(3) of the Senior Courts Act 1981 to provide that a qualifying judge advocate sitting as a judge of the Crown Court with justices of the peace shall preside and so that, if the members of the court are equally divided on a decision, the qualifying judge advocate shall have a second and casting vote.

141. *Paragraph 3* amends section 74(1) of the Senior Courts Act 1981 by adding a qualifying judge advocate to the list of judges who, subject to the other provisions of section 74, shall sit with not less than two nor more than four justices of the peace where the Crown Court is to hear any appeal. Section 74(3) provides so that rules of court may authorise or require specified judges in certain circumstances, to enter on, or continue with, any proceedings, although the court does not comprise the justices required by subsections (1) and (2). Paragraph 3 also amends section 74(3) so that the rules of court can apply to qualifying judge advocates.

142. Section 75(1) of the Senior Courts Act 1981 provides for the allocation of cases to judges and other matters relating to the distribution of Crown Court business to be determined in accordance with directions given by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor. Section 75(1) is amended by *paragraph 4* of the Schedule to include qualifying judge advocates in the list of judges referred to in the subsection.

143. *Paragraph 5* defines "qualifying judge advocate" to mean the Judge Advocate General, or a person appointed under section 30(1)(a) or (b) of the Courts-Martial (Appeals) Act 1951 as the Vice Judge Advocate General or as an Assistant Judge Advocate General. This is inserted by *paragraph* 5 into section 151(1) of the Senior Courts Act 1981.

144. *Paragraph 6* adds new subsection (2A) to section 66 of Courts Act 2003. The new subsection provides that a qualifying judge advocate has the powers of a justice of the peace who is a District Judge (Magistrates' Courts) in relation to criminal causes and matters. Paragraph 6 also inserts into section 66 a definition of "qualifying judge advocate" in the same terms as the definition inserted into section 151(1) of the Senior Courts Act 1981 (see the note on paragraph 5 above).

145. *Paragraphs 7 and 8* amend section 9(5) of the Criminal Justice Act 1967 to include a qualifying judge advocate in the list of judges who may sit alone to hear an application under section 9(4)(b) of that Act. An application under section 9(4)(b) is for a person to be required to attend court to give evidence (notwithstanding that the person has provided a written statement which may be admissible in evidence under section 9). However, qualifying judge advocates will only be able to hear such an application where it has been made to the Crown Court. The amendments made to section 9(5) by paragraphs 7 and 8 are alternatives; which of them has effect depends on whether amendments made to section 9(5) by the Courts Act 2003 have come into force before paragraph 1 of this Schedule is commenced. Paragraph 7 applies if the amendments to section 9(5) have come into force before the commencement of paragraph 1.

146. *Paragraphs 9 and 10* amend section 9B(3) of the Juries Act 1974 to include a qualifying judge advocate in the list of judges who may determine whether a juror is to be discharged on account of physical disability. However, qualifying judge advocates will only be able to make such a determination where the juror has been summoned to attend jury service at the Crown Court. Again, paragraphs 9 and 10 contain alternative sets of amendments; which set has effect depends on the commencement of amendments made to section 9B(3) by the Courts Act 2003.

147. *Paragraph 11* amends Schedule 1 to the Police and Criminal Evidence Act 1984 to include a qualifying judge advocate in the list of judges who may hear an application by a police constable to obtain access to excluded or special procedure material.

Schedule 3 – Minor amendments of service legislation

148. Section 22A of the Armed Forces Act 1991 permits a service policeman to remove to suitable accommodation a child who appears to be at risk. For this purpose "service policeman" is defined as having the same meaning as in the Armed Forces Act 1996. *Paragraph 1* of Schedule 3 redefines the expression as having the same meaning as in AFA 2006.

149. Section 67 of AFA 2006 confers powers of arrest for service offences. Subsection (2)(c) allows an officer to be arrested on the order of another officer, by a person who is lawfully exercising authority on behalf of a provost officer. *Paragraph 2* of the Schedule amends this provision so as to make it clear that an officer may be arrested *by* an officer exercising authority on behalf of a provost officer: there is no need for such an officer to order a third officer to carry out the arrest.

150. *Paragraph 3* extends section 90 of AFA 2006, which permits a service policeman to enter and search certain premises for the purpose of arresting a person, so as to apply where the person is unlawfully at large and is to be arrested under section 303 of the Act.

151. Part 3 of AFA 2006 deals with powers of arrest, search and entry. It replaced Part 2 of the Armed Forces Act 2001, in which "service living accommodation" was defined as including accommodation occupied either by service personnel or by civilians to whom service law applied. In AFA 2006, however, the expression was erroneously defined so as to include only the former. *Paragraph 4* of the Schedule corrects the error by including accommodation occupied by a civilian subject to service discipline, thus reverting to the position as it was before AFA 2006 came into force.

152. *Paragraph 5* is explained in paragraphs 160 and 161. Section 115 of AFA 2006 (duty of commanding officer with respect to investigation of service offences) establishes a general duty on commanding officers as to the investigation of possible offences by those under their command. In particular, if a commanding officer becomes aware of an allegation or circumstances which would indicate to a reasonable person that a service offence may have been committed by someone under his command, the commanding officer must ensure that the matter is investigated appropriately or ensure that a service police force is aware of the matter.

153. Additionally, under sections 113 (commanding officer to ensure service police aware of possibility serious offence committed) and 114 (commanding officer to ensure service police aware of certain circumstances) of AFA 2006, if a commanding officer becomes aware of an allegation or circumstances which would indicate to a reasonable person that an offence listed in Schedule 2 to AFA 2006 may have been committed by someone in his command or if he becomes aware of any circumstances prescribed by regulations made under section 128 of AFA 2006 (Regulations for purposes of Part 5), he must ensure that a service police force is aware of the matter.

154. The Director of Service Prosecution is tasked under AFA 2006 with the conduct of prosecutions before service courts.

155. Section 116 (referral of case following investigation by service or civilian police) of AFA 2006 applies where the service police have investigated a possible service offence or where a civilian police force has investigated a matter and referred it to the service police.

156. Section 116(2) provides that a service policeman must refer the case to the Director of Service Prosecutions (for a decision on whether to charge etc) if he considers that there is sufficient evidence to charge:

(a) an offence listed in Schedule 2;

(b) if he is aware of any prescribed circumstances, any service offence.

157. The duty to refer relates to the most serious cases (Schedule 2 offences) and to a number of other cases in which it is considered especially important to ensure that the key decisions on prosecution are decided by the Director (the "prescribed circumstances cases").

158. Under section 116(3), if the service policeman considers that there is sufficient evidence to charge a service offence but the case is not within section 116(2), he must refer the case to the suspect's commanding officer.

159. While it is for the service policeman to decide whether there is sufficient evidence to bring a case within section 116(2) or (3), section 116(4) provides for a duty on the service policeman to consult the Director.

160. *Paragraph 5* provides for the substitution of a new subsection (4) and the insertion of a new subsection (4A) into section 116 to clarify that the duty to consult the Director is not limited to when a duty has fallen on the commanding officer under section 113 or 114 (i.e. he has actually become aware of allegations or circumstances which gave rise to such a duty), but arises by reference to the type of allegation or circumstance investigated. Under the new subsection (4), the duty to consult arises if:

a) the allegation or circumstance would indicate to a reasonable person that a Schedule 2 offence has or might have been committed, or

b) any circumstances investigated are circumstances of a description prescribed by regulations under section 128 for the purposes of section 114,

and a service policeman proposes not to refer the case to the Director under subsection (2).

161. The new subsection (4A) provides that where subsection (4) requires a service policeman to consult, the service policeman must do so as soon as reasonably practicable and before any referral of the case under subsection (3).

162. *Paragraphs 6 and 9* make related amendments in respect of the powers of the Director of Service Prosecutions to change the charges against an accused who has elected Court Martial trial. At present these powers are restricted by rule 157 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041). Rule 157 requires the accused's consent before the Director can add any charge, or substitute a charge which could not be heard summarily or which the accused's commanding officer could not have heard summarily because section 54 of the Act would have required the permission of higher authority. Rule 157 is in Part 20 of the rules, the remainder of which is concerned with the powers of the Court Martial and is replaced by the new Schedule 3A (see the note on Schedule 1 above). Consistently with the policy of incorporating the whole of Part 20 into the Act, paragraph 6 of Schedule 3 repeals

the provisions of section 125 which permit the restrictions to be imposed by court rules, and paragraph 9 inserts a new section 130A which replaces rule 157. However, the new restrictions are slightly different from those currently imposed by rule 157. The accused's consent is still required before a charge can be added, or a charge which could not be heard summarily is substituted; but the substitution of a charge within section 54(2) of the Act (namely a charge of an offence listed in Part 2 of Schedule 1 to the Act, or of an attempt to commit such an offence) will require the accused's consent unless the original charge was also such a charge. It is irrelevant whether section 54 would in fact have precluded the commanding officer from hearing the new charge.

163. Section 129 of AFA 2006 requires a commanding officer, before hearing a charge summarily, to give the accused the opportunity of electing Court Martial trial. If the accused chooses not to elect, the summary hearing will normally begin immediately. The commanding officer may, in the course of the hearing, amend the charge, substitute another charge or bring an additional charge. In these circumstances, section 129(4) provides that the right to elect Court Martial trial must be re-offered. However, section 129(4) applies only if the charge is changed *after* the start of the hearing. If there is a delay between the offer of the right to elect and the start of the hearing, it appears that the commanding officer may change the charge *before* starting the hearing; and the legislation does not expressly require that the right to elect be re-offered before the hearing begins. *Paragraph 7* of the Schedule amends section 129 so as to make it clear that the right to elect must be re-offered if the charge is changed at any time after the first offer, whether before or after the start of the hearing.

164. The commanding officer's powers of punishment will depend on whether the commanding officer has extended powers. If the accused is subject to a suspended sentence of detention, the commanding officer's power to activate that sentence may similarly depend on whether the commanding officer has extended powers for that purpose. AFA 2006 provides that the commanding officer has extended powers if, before the summary hearing, an application for such powers has been made to higher authority and granted. If there is a delay between the offer of the right to elect and the start of the hearing, on a literal reading it would seem that the commanding officer can obtain extended powers during that interval without re-offering the right to elect. The amendment of section 129 made by paragraph 7 of the Schedule makes it clear that, if extended powers are obtained after the right to elect has been offered, that right must be re-offered.

165. Section 130(3) of AFA 2006 ensures that the right to elect is not re-offered where the accused first elects but then consents to the charge being referred back to the commanding officer. This does not apply if the charge is amended by the commanding officer after being referred back. But, read literally, it does apply if the commanding officer adds another charge, or substitutes a new charge for the one referred back. Similarly, a literal reading would suggest that the commanding officer can obtain extended powers after the charge is referred back, even though section 130(3) does not allow the re-offer of the right to elect. *Paragraph 8* of the Schedule amends section 130(3) so as to make it clear that the right to elect must also

be re-offered if, after the charge is referred back, the commanding officer adds or substitutes another charge or obtains extended powers.

166. AFA 2006 provides that the commanding officer has extended powers only if such powers have been granted *before* the summary hearing. It follows that extended powers cannot be obtained where the charge is changed in the course of the hearing (even though section 129(4) already requires that the right to elect be re-offered if the charge is changed). *Paragraphs 10, 11, 15 and 16* of the Schedule amend the relevant provisions so that, where the charge is changed in the course of the hearing, extended powers can then be obtained before re-offering the right to elect under section 129(4) and proceeding with the hearing.

167. *Paragraph 12* removes the requirement for a commanding officer to have extended powers of punishment in order to award a fine of more than 14 days' pay to an officer or warrant officer. The possession of extended powers is a procedural requirement that must be satisfied before certain punishments can be awarded summarily. The maximum fine that a commanding officer can award to a person of any rank remains 28 days' pay.

168. *Paragraph 13* amends section 153 of AFA 2006 so as to enable the summary hearing rules made under that section to make provision as to grants of extended powers and of permission to hear a charge which under section 54 may not be heard summarily without permission. For example, the rules could provide that in specified circumstances a grant of extended powers, or of permission to hear a charge, ceases to have effect.

169. *Paragraphs 14, 17 and 19* amend provisions of AFA 2006 which refer to an offence "in the British Islands" so as to make it clear that they include conduct which is an offence *under the law of* any part of the British Islands even if it occurs outside that part.

170. Section 213 of AFA 2006 provides that certain provisions of the Powers of Criminal Courts (Sentencing) Act 2000 apply to a detention and training order made by a service court as well as one made by a civil court. The provisions thus applied do not include section 106 of the 2000 Act. Subsections (4) and (5) of that section provide for the case where an offender is subject both to a detention and training order and to a sentence of detention in a young offender institution; subsection (6) provides for the effect of a detention and training order made in the case of a person aged 18 or over (by virtue of a provision enabling a court to deal with the person in a way in which a court could have dealt with the person on a previous occasion). *Paragraph 18* of the Schedule amends section 213 of AFA 2006 so that these provisions of the 2000 Act apply equally to a detention and training order made under section 211 of AFA 2006.

171. Section 270 of AFA 2006 prohibits a service court from awarding a "community punishment" (a service community order or an overseas community order) unless the offence

is serious enough to warrant it. This corresponds broadly to section 148 of the Criminal Justice Act 2003, which imposes a similar restriction on "community sentences" passed by civil courts in England and Wales. Section 151 of the 2003 Act makes an exception to this principle for an offender who has been fined on three or more previous occasions: in this case a civil court may pass a community sentence even if the latest offence is not itself serious enough to warrant such a sentence. Section 270(7) of AFA 2006, as enacted, applies section 151 of the 2003 Act (with modifications) to a court dealing with an offender for a service offence. However, the Criminal Justice and Immigration Act 2008 amends section 151 of the 2003 Act so as to provide separately for community orders and youth rehabilitation orders (the new form of community sentence for offenders aged under 18). A new section 150A is inserted into the 2003 Act, prohibiting a court from making a community order (but not a youth rehabilitation order) unless the offence is punishable with imprisonment or section 151 so permits. In order to keep the powers of service courts in relation to community punishments aligned with those of civil courts in relation to community sentences, the 2008 Act inserted new sections 270A and 270B into AFA 2006 (corresponding respectively to the new section 150A of the 2003 Act and section 151 of that Act as amended), and repealed section 270(7). This overlooked the fact that community punishments under AFA 2006, unlike community orders under the 2003 Act as amended, include orders made against persons aged under 18 (which, under AFA 2006, would necessarily be overseas community orders). A service court would thus be prohibited from making an overseas community order against a young offender in circumstances in which a civil court would be able to make a youth rehabilitation order. The provisions of the 2008 Act inserting the new sections 270A and 270B into AFA 2006 were therefore not brought into force. But section 270(7) cannot be left as it stands because it no longer works in conjunction with section 151 of the 2003 Act as amended. *Paragraph 20* of the Schedule therefore amends section 270 of AFA 2006 so that, instead of being subject to section 151 of the 2003 Act as modified, it is subject to a new section 270A. The new section will enable a service court to award a community punishment, even if the latest offence is not serious enough to warrant it, where the offender has been fined on three or more previous occasions for offences committed since the offender reached the age of 16. The uncommenced amendments made by the 2008 Act are repealed.

172. Section 301 of AFA 2006 provides, in effect, that any period during which a person sentenced to service detention is unlawfully at large does not count towards the period of detention. The definition of a period when such a person is unlawfully at large assumes that that period will necessarily begin at a time after the sentence is passed - which is not the case if the sentence is passed in the offender's absence. *Paragraph 21* of the Schedule amends section 301 so as to make it clear that in these circumstances the person is unlawfully at large until taken into custody.

173. In the past the Provost Marshal of the Royal Air Force Police and some of the senior officers appointed to carry out police functions within that force were not members of the force. Section 375(5) of AFA 2006 provides for Provost Marshal and such officers to be treated for the purpose of the Act as members of the service police force within which they

worked. Such appointments are no longer made. *Paragraph 22* accordingly provides for the repeal of section 375(5).

174. Section 380 of AFA 2006 made provision for the Secretary of State to make transitional provision by order in connection with the coming into force of that Act. It may be necessary to make changes to provisions of the order made under section 380 by way of transitional provisions for the Bill. *Paragraph 23* amends section 380 so that the power to amend the order under section 380 includes amendments in connection with the coming into force of the Bill as well as amendments in connection with the coming into force of AFA 2006.

175. Schedule 12 to the Criminal Justice Act 2003 permits a civil court to activate a suspended sentence of imprisonment where the offender is convicted of another offence committed during the operational period of the suspended sentence. Schedule 7 to AFA 2006 applies that Schedule with modifications so that, in similar circumstances, a suspended sentence of imprisonment passed by a service court can be activated by the Court Martial. But this applies only if the offender is *convicted* of another offence. AFA 2006 does not refer to a person as being "convicted" where a charge is found proved at a summary hearing. Section 376 provides that references to conviction in that Act include such a finding, but does not expressly apply to references in the 2003 Act as applied by AFA 2006. It may therefore be arguable that the Court Martial cannot activate a suspended sentence of imprisonment on the basis of a further offence if that offence was found proved at a summary hearing. *Paragraph 24* of the Schedule amends Schedule 7 to AFA 2006 so as to make it clear that the Court Martial can do so.

Schedule 4 – Consequential amendments

176. This Schedule is given effect by clause 30. See the note on that clause.

Schedule 5 – Repeals and revocations

177. This Schedule is given effect by clause 30. See the note on that clause.

FINANCIAL EFFECTS OF THE BILL

178. Two significant new costs arise from the provisions contained in the Bill. One is in relation to the cost of independent inspections of the service police forces carried out by Her Majesty's Inspectorate of Constabulary. The other is the costs incurred in defending claims, where the liability for certain claims arising from the conduct of members of visiting forces is transferred to the Ministry of Defence from the state sending those forces. Where this happens, the Secretary of State for Defence will become a party to the litigation, but will have any defences to the claim that the sending state would have had. The total additional cost arising from these provisions is expected to be in the region of £270K per annum. The

Ministry of Defence has confirmed to HM Treasury that this additional expenditure will be met from within the Department's existing resources.

EFFECTS OF THE BILL ON PUBLIC MANPOWER

179. The Bill will have no impact on manpower levels in Government departments and their agencies.

SUMMARY OF THE IMPACT ASSESSMENT

180. It has been confirmed that an impact assessment is not required because the Bill will not have an impact on small firms or on the charitable and voluntary sectors. A full equality impact assessment has been prepared to assess the Bill's impact on specific groups. The equality impact assessment has confirmed that the Bill will apply equally to all those who are subject to it and that no group is placed at a disadvantage compared with others.

EUROPEAN CONVENTION ON HUMAN RIGHTS

181. A statement has been made by the Under-Secretary of State for Defence pursuant to section 19 of the Human Rights Act 1988 that in his view the provisions of the Bill are compatible with the Convention rights.

182. The most significant human rights issues that arise from the Bill are summarised in the following paragraphs.

183. Power of judge advocate to authorise entry and search (clause 7). Under section 83 of AFA 2006 a judge advocate may in specified circumstances issue a warrant authorising a service policeman to enter and search certain premises. Clause 7 of the Bill provides for a new section 83. As amended, that section will allow the issue of a warrant for more than one premises and entry to premises on more than one occasion. The new section 83, like the current one, will permit the issue of warrants only for accommodation provided for those subject to service jurisdiction and for premises occupied as residence by such persons (these types of accommodation and premises are referred to below and in the Bill as "relevant residential premises"). The clause required consideration of Article 8 and of Article 1, Protocol 1. However the clause mirrors section 8 of the Police and Criminal Evidence Act 1984 and is subject to the further restriction mentioned above to premises of persons within service jurisdiction. On this basis it is considered to be both necessary for the purposes of the detection and prevention of crime and proportionate to that aim.

184. Power to make provision about access to excluded material etc (clause 8). Section 86 of AFA 2006 empowers the Secretary of State to make provision enabling service police to obtain access to excluded material or special procedure material on certain premises. Excluded material and special procedure material have broadly the same meaning as in the Police and Criminal Evidence Act 1984 and the Secretary of State's power is to make equivalent provision to that in the 1984 Act relating to such material.

185. However, the provision that may be made under section 86 is limited to relevant residential premises. This makes the existing provision for access largely ineffective because material which qualifies as excluded material or special procedure material (such as bank records or social workers' files) is unlikely to be held on such premises. Clause 8 amends section 86 so that the Secretary of State may make provision enabling the service police to obtain access to material (other than legally privileged material) on premises which cannot be searched under section 83. Section 86 as amended would permit provision enabling a judge advocate to grant access to the material by making a "production order", which requires the person apparently in possession of the material to produce it to be taken away by a service policeman, or to give a service policeman access to it.

186. The clause required consideration of Article 8 and Article 1, Protocol 1. However the provision allowed by the clause mirrors that in Schedule 1 to the 1984 Act and is subject to the further restriction that in the case of material not on relevant residential premises, section 86 as amended would not permit provision enabling a judge advocate to issue a search warrant. Instead section 86 would only permit provision enabling a failure to comply with a production order to be treated as contempt of court. Direct access by means of a warrant is therefore excluded if the premises are not relevant residential premises. On this basis it is considered that the clause is both necessary for the purposes of the detection and prevention of crime and proportionate to that aim.

187. Access to service living accommodation (paragraph 4 of Schedule 3). The provision for AFA 2006 which deals with the powers of search and entry replaced provisions of the Armed Forces Act 2001 in which such powers could be exercised by reference to "service living accommodation", defined in the 2001 Act as including accommodation occupied either by service personnel or by "civilians subject to service discipline". The latter are persons within the limited categories of civilians, who, outside the United Kingdom, are subject to service jurisdiction (as to whom further reference is made to the note on clause 22). In AFA 2006 the expression "service living accommodation" was erroneously defined to include only accommodation occupied by service personnel. Paragraph 4 of Schedule 3 corrects the error by including accommodation occupied by civilians subject to service discipline.

188. Again the provision required consideration of Article 8 and Article 1, Protocol 1. However, the power in question goes no further than those applied to service personnel or, under the 1984 Act, to the civilian population generally. The provision is necessary for the

prevention and detection of crime and is considered proportionate, as being completely consistent with those under the 1984 Act.

189. Testing for alcohol and drugs (clause 11). AFA 2006 preserves the offence of unfitness for duty through alcohol or drugs. Clause 10 of the Bill provides for service personnel to be guilty of an offence if they exceed a prescribed limit on alcohol when performing, or when they might reasonably be expected to perform, a safety-critical duty. Clause 11 empowers a commanding officer to require a member of the armed forces to take a preliminary test for drugs or alcohol where the commanding officer has reasonable grounds to believe that the person has committed one of two "relevant offences". One relevant offence is that of unfitness for a duty which, if carried out with impaired ability, would result in a risk of death, serious injury, serious damage to property or serious environmental harm. The second relevant offence is that of exceeding a prescribed limit on alcohol imposed in respect of prescribed safety-critical duties. Under clause 11, the service police investigating such an offence fully may require the provision of breath, blood or urine samples. The same testing regime applies to the limited categories of civilians who are subject to service jurisdiction ("civilians subject to service discipline" - see the note on clause 22) but only in respect of offences under AFA 2006 by reference to specified sections of the Railways and Transport Safety Act 2003 (maritime and aviation offences) or an offence under AFA 2006 of conduct outside the United Kingdom which would be one of those offences under the 2003 Act if committed in England or Wales.

190. The provisions required consideration of Articles 6, in particular the right against self-incrimination, and 8. In relation to both Articles it is considered that the provisions are in response to a serious social problem and are proportionate because the powers are restricted to safety-critical duties.

191. Service sexual offences prevention orders (clause 17). Part 2 of the Sexual Offences Act 2003 ("SOA 2003") gives both civilian and service courts the power to make sexual offences prevention orders when dealing with an offender for certain sexual offences or offences of violence. A sexual offences prevention order made under these provisions protects members of the public or any particular members of the public in the United Kingdom from serious sexual harm from the defendant. Clause 17 extends the powers of the Court Martial and the Service Civilian Court so that they can make service sexual offences prevention orders for the protection of members of the service community outside the United Kingdom. Consideration was given in particular to Articles 5, 6, 7 and 8 of the Convention.

192. The orders are only available against members of the armed forces, the limited categories of civilians who are subject to service jurisdiction when outside the United Kingdom and a person who a service court is satisfied is intending to become, or likely to become, such a civilian. It is considered necessary to cover the last group mainly because members of service families cease to be within service jurisdiction whenever they return to

the United Kingdom. In such a case the court will have to be satisfied that the defendant intends or is likely, to rejoin his family outside the United Kingdom and become a civilian subject to service discipline again. It may make a service sexual offences prevention order if this is necessary for the protection of the service community outside the United Kingdom.

193. Prohibitions within the order must be necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the defendant. The power to make the orders is otherwise subject to the same restrictions as those under the 2003 Act and a right of appeal is provided.

194. The clause also empowers the Court Martial to make new extended prohibitions orders in respect of a person subject to service law or a "civilian subject to service discipline" (as to whom, see the note on clause 22). These orders can be made where the person is subject to a sexual offences prevention order (the principal sexual offences prevention order), and there are members of the service community outside the United Kingdom who would be protected by the sexual offences prevention order if they were in the United Kingdom. An extended prohibitions order will extend the prohibitions in the principal sexual offences prevention order for the protection of members of the service community outside the United Kingdom. The orders will be made on the application of a Provost Marshal (the head of a service police force). The Court Martial must make an extended prohibitions order if is satisfied that there is in existence a sexual offences prevention order made under Part 2 of SOA 2003 in respect of a person, and that there are members of the service community outside the United Kingdom who would be protected by the sexual offences prevention order if they were in the United Kingdom.

195. An extended prohibitions order is a mirror order which will stand or fall with the principal sexual offences prevention order. However, the clause also provides for an appeal to the Judge Advocate General against the making of an extended prohibitions order.

196. In view of the limitations under the clause, closely reflecting those under SOA 2003, it is considered that the provision is proportionate to the need to make for members of the armed forces community outside the United Kingdom provision equivalent to that provided within the United Kingdom. The option of relying on local jurisdictions was considered, but it is decided that they would be ineffective to deal with situations arising within United Kingdom families living within United Kingdom military bases abroad.

197. It is not considered that any other provision of the Bill raises issues in relation to the Convention or other human rights instruments.

TRANSPOSITION NOTES

198. The Bill does not implement a European Directive.

COMMENCEMENT

199. Reference is made to the note on clause 32.

ARMED FORCES BILL

EXPLANATORY NOTES

These notes refer to the Armed Forces Bill
as brought from the House of Commons on 16th June 2011
[HL Bill 76]

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