

Armed Forces Bill

Memorandum by the Ministry of Defence for the House of Lords Delegated Powers and Regulatory Reform Committee

1. In this memorandum:
 - a. provisions referred to in bold are provisions relating to powers to make delegated legislation;
 - b. “AFA 2006” means the Armed Forces Act 2006 (c.52);
 - c. “AFA 2011” means the Armed Forces Act 2011 (c.18).
2. This memorandum describes the purpose and content of the Armed Forces Bill; identifies the provisions of the Bill which confer powers to make delegated legislation; explains the purpose of the delegated powers proposed; explains why matters are to be dealt with in delegated legislation; and explains the nature and justification of any parliamentary procedures which apply.

BACKGROUND

3. Since the 1950s, an Armed Forces Act has been required every five years. The primary purpose of these Acts is to continue in force the legislation enabling the armed forces to be recruited and maintained as disciplined bodies (currently AFA 2006), although they have also contained provisions that fall outside the traditional area of service discipline.
4. AFA 2006 introduced a single system of service law that applies to all service personnel wherever in the world they are operating. The Act provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice. It also provides a more limited system for dealing with offences by some

civilians when they are living or working with the armed forces outside the United Kingdom. It covers matters such as offences, the powers of the service police, and the jurisdiction and powers of commanding officers and of the service courts (in particular, the Court Martial). It also contains a large number of other important provisions as to the armed forces, such as provision for enlistment, pay and redress of complaints.

5. The most recent five-yearly Bill prior to this Bill – now AFA 2011 - was much smaller in scale than AFA 2006. Most of the provisions of AFA 2011 amended AFA 2006 but, in common with previous five-yearly Acts, it also contained some provisions that fell outside the traditional area of service discipline.

OVERVIEW OF THE BILL

6. The Bill:

- provides for the continuation, for a further period up to the end of 2021, of AFA 2006, which would otherwise expire at the end of 2016;
- extends the circumstances in which commanding officers may require members of the armed forces and civilians subject to service discipline to be tested for drugs and alcohol after accidents;
- simplifies the current provisions in Part 5 of AFA 2006 affecting the bringing of charges for offences under the Act by reducing the number of stages required to decide and bring charges;
- makes provision to increase, from 12 to 24 months, the maximum period for which a sentence of service detention may be suspended by the Court Martial;
- creates a statutory framework for immunity, undertakings restricting the use of evidence, and sentence reductions for offenders who co-operate in investigations and prosecutions;

- brings AFA 2006 into force in the Isle of Man and the British overseas territories (except Gibraltar);
- amends sections 146 and 147 of the Criminal Justice and Public Order Act 1994 by removing wording which provides that those sections do not prevent a homosexual act from being a ground for discharging a member of the armed forces;
- amends section 25 of the Social Security Act 1989 so that the Secretary of State may provide, in regulations under that section, for war pensions committees to be given new functions (relating to benefits payable under an armed and reserve forces compensation scheme established under the Armed Forces (Pensions and Compensation) Act 2004), and for the naming of such committees;
- gives Ministry of Defence fire-fighters statutory powers to act in an emergency to protect life or property.

PROVISION FOR DELEGATED LEGISLATION

7. It is envisaged that the powers conferred upon the Secretary of State detailed below will be exercised by the Secretary of State for Defence. All of the powers conferred upon the Secretary of State to make regulations are exercisable by statutory instrument and, with the exception of the power in clause 19 (commencement and transitional provision), are subject to negative procedure.

8. **New section 93AA** of AFA 2006, which is inserted by **clause 2(3)**, confers powers on the Defence Council to make regulations. These powers are exercisable by statutory instrument. The Defence Council is a body, established by Letters Patent, to exercise certain prerogative powers of command and administration in relation to the armed forces. The Defence Council also has certain statutory functions.

9. Section 373(2) of AFA 2006 makes provision with respect to specified powers conferred on the Defence Council by provisions in the Act to make regulations. It provides so that regulations made under the specified powers are exercisable by statutory instrument. **Clause 2(8)(a)** amends section 373(2) to provide that the power to make regulations under **new section 93AA** of AFA 2006 will be exercisable by statutory instrument. By virtue of section 373(3)(d) of AFA 2006, as amended by **clause 2(8)(b)**, those regulations will be subject to the affirmative resolution procedure.

10. There is also provision related to commencement and extent which is included in this memorandum for the sake of completeness.

DURATION OF THE ARMED FORCES ACT 2006

Clause 1: Duration of the Armed Forces Act 2006

New section 382 Duration of this Act

Power conferred on: Her Majesty the Queen

Power exercisable by: Order in Council

Parliamentary procedure: Affirmative resolution

11. **Clause 1** provides for the substitution of a **new section 382** (Duration of AFA 2006) in AFA 2006. As originally drafted, section 382 provided that AFA 2006 would expire one year after it was passed, unless renewed by Order in Council approved by each House of Parliament. It provided so that AFA 2006 could be renewed by such an Order for up to one year at a time, but not beyond the end of 2011. Section 1 of AFA 2011 substituted a new section 382, which provides that AFA 2006 will expire one year after AFA 2011 was passed, unless renewed by Order in Council approved by each House of Parliament. It provides so that AFA 2006 could be renewed by such an Order for up to one year at a time, but not beyond the end of 2016.

12. **Clause 1** substitutes a **new section 382**, which provides for the continuation of AFA 2006 so that it expires a year after the Armed Forces Act 2015 (this Act) 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 one year at a time, but not beyond the end of 2021.

13. A requirement for renewal of the legislation enabling the armed forces to be recruited and maintained as disciplined bodies has been a feature of service legislation primarily because of the provision in the Bill of Rights 1688 that a standing Army in time of peace is only lawful with the consent of Parliament. Since the 1950s, successive Armed Forces Acts have applied similar time limits to the legislation governing all of the services. As previously, this matter is to be dealt with in delegated legislation to avoid the need for a new Act every year. The power, as before, is subject to the affirmative resolution procedure.

ALCOHOL AND DRUGS

Clause 2: Commanding officer's power to require preliminary alcohol and drugs tests

14. **Clause 2** gives new powers to commanding officers under which members of the armed forces and civilians subject to service discipline may be required to co-operate with preliminary tests for alcohol and drugs after accidents. The new powers are derived from, but not identical to, powers in the Railways and Transport Safety Act 2003 under which civilians may be required to co-operate with tests for alcohol and drugs.

15. The new powers provide for the testing, after an accident involving an aircraft or a ship of:

- (a) a person who was carrying out an “aviation function” in relation to the aircraft or a “marine function” in relation to the ship at the time of the accident; or
- (b) a person who carried out such a function before the accident occurred, where the carrying out of the function by that person may have caused or contributed to the occurrence of the accident or its consequences.

The new powers also provide for the testing, after a serious accident, of a person who carried out a “safety-critical function” before or at the time of the accident, where the carrying out of that function by that person may have caused or contributed to the occurrence of the accident or its consequences.

New section 93AA Section 93A: interpretation

Power conferred on: *The Defence Council*

Power exercisable by: *Regulations by Statutory Instrument*

Parliamentary procedure: *Affirmative resolution*

16. **Clause 2** inserts **new section 93AA** (Section 93A: interpretation) in AFA 2006. **New section 93AA(2), (3) and (4)** make the following provision with respect to the meaning of “aviation function” and “marine function” for the purposes of the new powers to require co-operation with tests:

“Aviation function” means:

- (a) a role or activity in connection with aviation that is specified, or of a description specified, by regulations made by the Defence Council. Such a role or activity (or description of role or activity) may only be specified if carrying it out with ability impaired by alcohol or drugs would result in a risk of death, serious injury, serious damage to property or serious environmental harm; or
- (b) a role or activity undertaken in preparation for, or in connection with, the carrying out of a role or activity (or description of role or activity), that is specified, or of a description specified, by regulations made by the Defence Council.

“Marine function” means:

- (a) a role or activity in connection with a ship or ships that is specified, or of a description specified, by regulations made by the Defence Council. Such a role or activity (or description of role or activity) may only be specified if carrying it out with ability impaired by alcohol or drugs would result in a risk

of death, serious injury, serious damage to property or serious environmental harm; or

(b) a role or activity undertaken in preparation for, or in connection with, the carrying out of a role or activity (or description of role or activity), that is specified, or of a description specified, by regulations made by the Defence Council.

17. It is considered appropriate that “aviation function” and “marine function” roles and activities are specified in delegated legislation rather than in AFA 2006 itself. This is because the range of roles and activities carried on by the armed forces in relation to aircraft and ships which may need to be specified is (1) significant (much greater than the range of activities specified in the equivalent civilian legislation (the Railways and Transport Safety Act 2003)), and is (2) likely to change over time in the light of changing circumstances (such as the development of new technology, including new weapons systems).

18. The use of delegated legislation will also better enable consistency to be maintained between the definitions of “aviation function” and “marine function” and the related definition of “prescribed duty”. “Prescribed duty” is defined in regulations made by the Defence Council (the Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013 (SI 2013/2787)). The duties specified in the 2013 Regulations include a number of duties which relate to aircraft and ships. A member of the armed forces commits an offence (under section 20A of AFA 2006) if the proportion of alcohol in their breath, blood or urine exceeds the relevant limit at a time when they are performing, or purporting to perform, a prescribed duty; or might reasonably expect to be called on to perform such a duty. It is desirable to ensure that aviation or marine roles or activities which involve the performance of “prescribed duties” are specified as “aviation functions” or “marine functions” under the new regulations. This will ensure that those whose roles render them liable to be prosecuted (under section 20A of AFA 2006) in the event that they exceed prescribed alcohol limits may be required to co-operate with preliminary tests after an accident. Under both the 2013 Regulations and regulations made under the powers in new **section 93AA(2), (3) and (4)**, a role or activity may only be specified if carrying it

out with ability impaired by alcohol or drugs would result in a risk of death, serious injury, serious damage to property or serious environmental harm.

19. The 2013 Regulations are made by the Defence Council by statutory instrument subject to the affirmative procedure. As with the 2013 Regulations, the range of roles and activities to be covered in regulations under **new section 93AA** is regarded as an issue requiring the specific input of the chain of command. It is for this reason that the regulations are to be made by the Defence Council.

20. As the functions specified in the regulations will define the scope of the new powers to require co-operation with preliminary tests (and failure, without reasonable excuse, to co-operate with such tests is a service offence), it is considered appropriate that the regulations should be made by statutory instrument subject to the affirmative resolution procedure. This is consistent with the provision made in AFA 2006 with respect to regulations made under the power in section 20A of AFA 2006 to specify safety-critical duties as “prescribed duties”.

OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS

Clause 10: Review of sentence following offer of assistance

21. The provisions in clauses 7 to 12 create a statutory framework for immunity from prosecution, restrictions on the use of evidence, and sentence reductions for offenders who co-operate in investigations and prosecutions. This is to give the Director of Service Prosecutions and service courts powers which may be of considerable assistance to investigators and prosecutors in cases where it may otherwise be difficult to persuade service personnel to co-operate with the service police and to give evidence. The provisions closely follow those in sections 71 to 75 of the Serious Organised Crime and Police Act 2005 which apply to the civilian criminal justice system.

New section 304D Review of sentence following offer of assistance

Power conferred on: The Secretary of State

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Negative resolution

22. **Clause 10** inserts **new section 304D** into AFA 2006. This new section enables a person who has been sentenced by the Court Martial to have their sentence reviewed to take account of assistance that they have given, or offered to give, to an investigator or prosecutor pursuant to an agreement with the Director of Service Prosecutions. The reviewing court may reduce the sentence in return for the assistance offered or given.

23. **New section 304D(10)** allows regulations to be made by the Secretary of State in relation to appeals from decisions on review. The power conferred is a power to make provision corresponding to provision in Parts 2 to 4 of the Court Martial Appeals Act 1968, with or without modifications.

24. The power to make regulations under **new section 304D(10)** is exercisable by statutory instrument subject to the negative procedure. This is the effect of section 373 of AFA 2006. Section 373(1) provides that any power to make regulations conferred by AFA 2006 on the Secretary of State is exercisable by statutory instrument. Section 373(4) provides that statutory instruments under AFA 2006, other than those made under the powers specified in subsection (3) or (4) of that section, are subject to the negative procedure. The power in **new section 304D(10)** is not specified in those subsections.

25. The effect of subsection (5) of section 373 is that the power to make regulations under **new section 304D(10)** includes power to make incidental, supplemental, consequential, transitional, transitory and saving provision and to make different provision for different cases. That is consistent with the equivalent power in section 172 of the Serious Organised Crime and Police Act 2005.

26. It is considered that it would be suitable for an instrument regulating the conduct of appeals from decisions on review under **new section 304D** to be subject to

the negative resolution procedure, to allow flexible updating of provisions which are administrative and procedural in nature. This would be in line with the procedure that applies to the power (conferred on the Secretary of State by section 74(12)(a) of the Serious Organised Crime and Police Act 2005) to make an order, in relation to any proceedings under that section, containing provision corresponding to any provision in the Criminal Appeal Act 1968 (subject to any specified modifications). **New section 304D** of AFA 2006 makes equivalent provision with respect to the service justice system to that made by section 74 of the 2005 Act (section 74(2)(b) and (c) and (6) cases) with respect to the civilian justice system. Negative resolution procedure would also be in line with the procedure that applies to the similar power under section 163 of AFA 2006 to make rules with respect to the Court Martial, including the practice and procedure of the court and appeals from the Service Civilian Court.

Clause 11: Review of sentence following failure to assist

New section 304E Review of sentence following failure to assist

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

27. **Clause 11** inserts **new section 304E** into AFA 2006. This new section allows a sentence to be reviewed to take account of a failure by the person sentenced to give assistance that they offered to an investigator or prosecutor (pursuant to an agreement with the Director of Service Prosecutions) and in return for which assistance they received a sentence that was discounted under new section 304C or 304D. If the reviewing court is satisfied that the person knowingly failed to give the assistance, it may increase the sentence to take account of that failure.

28. **New section 304E(9)** allows regulations to be made by the Secretary of State in relation to appeals from decisions on review. The power conferred is a power to make provision corresponding to provision in Parts 2 to 4 of the Court Martial Appeals Act 1968, with or without modifications.

29. The power to make regulations under **new section 304E(9)** is exercisable by statutory instrument subject to the negative procedure. This is the effect of section 373 of AFA 2006. Section 373(1) provides that any power to make regulations conferred by AFA 2006 on the Secretary of State is exercisable by statutory instrument. Section 373(4) provides that statutory instruments under AFA 2006, other than those made under the powers specified in subsection (3) or (4) of that section, are subject to the negative procedure. The power in **new section 304E(9)** is not specified in those subsections.

30. The effect of subsection (5) of section 373 is that the power to make regulations under **new section 304E(9)** includes power to make incidental, supplemental, consequential, transitional, transitory and saving provision and to make different provision for different cases. That is consistent with the equivalent power in section 172 of the Serious Organised Crime and Police Act 2005.

31. It is considered that it would be suitable for an instrument regulating the conduct of appeals from decisions on review under **new section 304E** to be subject to the negative resolution procedure, to allow flexible updating of provisions which are administrative and procedural in nature. This would be in line with the procedure that applies to the power (conferred on the Secretary of State by section 74(12)(a) of the Serious Organised Crime and Police Act 2005) to make an order, in relation to any proceedings under that section, containing provision corresponding to any provision in the Criminal Appeal Act 1968 (subject to any specified modifications). **New section 304E** of AFA 2006 makes equivalent provision with respect to the service justice system to that made by section 74 of the 2005 Act (section 74(2)(a) and (5) cases) with respect to the civilian justice system. Negative resolution procedure would also be in line with the procedure that applies to the similar power under section 163 of AFA 2006 to make rules with respect to the Court Martial, including the practice and procedure of the court and appeals from the Service Civilian Court.

WAR PENSIONS COMMITTEES

Clause 15: War pensions committees and armed and reserve forces compensation schemes

New section 25(1A) and (3A) Social Security Act 1989

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

32. War pensions committees are established by regulations made by the Secretary of State under section 25(1) of the Social Security Act 1989. The Secretary of State may, by regulations under section 25, give war pensions committees functions relating to war pensions and war pensioners. “War pension” and “war pensioner” are defined in section 25(4) of the 1989 Act. The committees’ existing functions relate primarily to the war pensions scheme provided for in the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (S.I. 2006/606). This scheme provides compensation for injury or death caused by service in the armed forces before 6 April 2005. **Clause 15** amends section 25 of the 1989 Act so that, by regulations under that section, war pensions committees may be given additional functions and may be given names (as well as being known as war pensions committees).

33. **Clause 15(2)** inserts **new section 25(1A)** into the 1989 Act. The changes made by **clause 15(2), (3) and (5)** allow the Secretary of State, by regulations under section 25, to give war pensions committees functions not only in relation to “war pensions” and “war pensioners” but also “AFCS benefits” (defined in **clause 15(5)**, which amends section 25(4) of the 1989 Act, as benefits payable under an armed and reserve forces compensation scheme established by order under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004) and “AFCS benefit recipients” (defined in **clause 15(5)** as persons in receipt of an AFCS benefit).

34. The purpose of this extension of the existing regulation-making powers in section 25 is to enable provision to be made to extend the functions of war pensions

committees to include, for example, the provision of advice and assistance in relation to complaints made to them by persons receiving or claiming benefits under the scheme provided for in the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (S.I. 2011/517). This scheme was established under the 2004 Act and provides compensation for injury or death caused by service in the armed forces on or after 6 April 2005.

35. **Clause 15(4)** inserts **new section 25(3A)** into the 1989 Act. The purpose of **new section 25(3A)** is to allow the Secretary of State to provide, in regulations under section 25, for committees to have names specified in the regulations (as well as being known as war pensions committees). The intention is to provide for committees to have names which reflect not only functions relating to war pensions and war pensioners but also functions conferred on the committees (under **new section 25(1A)**) relating to AFCS benefits and AFCS benefit recipients (though they will also continue to be known as war pensions committees).

36. The existing power to make regulations under section 25 is exercisable by statutory instrument subject to the negative resolution procedure: this is the effect of section 29(3) of the 1989 Act, which provides that a statutory instrument which contains regulations under the 1989 Act (and which is not subject to any requirement that a draft of the instrument be laid before, and approved by a resolution of, each House of Parliament) is subject to the negative procedure.

37. It is considered that it remains suitable for regulations made under section 25 to be subject to the negative resolution procedure. **New section 25(1A)** extends the existing regulation-making powers in section 25 of the 1989 Act so that war pensions committees may be required to carry out additional functions but those functions are substantively similar to the functions which they may currently be given under that section. Their existing functions relate primarily to the war pensions scheme provided for in the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 (S.I. 2006/606), which provides compensation for injury or death caused by service in the armed forces before 6 April 2005. The additional functions relate to the Armed Forces Compensation Scheme, which provides compensation for injury or death caused by service in the armed forces on or after 6

April 2005, and to future compensation schemes established under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004.

38. The extension of the existing regulation-making powers in section 25 by **new section 25(3A)** is a limited one, allowing regulations under section 25 to provide for committees to have names specified in the regulations. Any such provision would be of an administrative nature and the negative resolution procedure would allow flexible updating of that provision.

SUPPLEMENTARY

Clause 19: Commencement and transitional provision

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations by Statutory Instrument*

Parliamentary procedure: *None*

39. As is the practice in primary legislation, the Secretary of State has power (under **clause 19(1)**) to make regulations providing for provisions of this Bill to be brought into force on a day or days appointed. Clauses 1, 13 and the Schedule and clauses 18 to 22 come into force on Royal Assent. Clauses 14, 16 and 17 come into force two months after Royal Assent. The power under **clause 19(1)** is the normal commencement procedure, being exercisable by statutory instrument but without being subject to parliamentary procedure.

40. Provision is made in **clause 19(4)** to allow transitional, transitory or saving provision to be made by regulations in connection with the coming into force of provisions of the Bill. This power is exercisable separately from the power to bring provisions of the Bill into force. It is exercisable by statutory instrument but without being subject to parliamentary procedure.

Clause 21: Extent in the Channel Islands, Isle of Man and British overseas territories

Power conferred on: *Her Majesty*

Power exercisable by: *Order in Council*

Parliamentary procedure: *None*

41. **Clause 21** provides so that the changes that the Bill makes to AFA 2006:

- may be extended to the Channel Islands by Order in Council under section 384(1) of AFA 2006. If such an order is made, it can modify those changes (so that the law of the Channel Islands is not the same as that of the United Kingdom);
- extend directly (ie without the need for an Order in Council) to the Isle of Man and the British overseas territories (except Gibraltar), but an Order in Council may be made under section 384(2) of AFA 2006 to modify the Act in its application to any of those territories.

42. The power to make such Orders in Council is exercisable by statutory instrument (see section 373(1) of AFA 2006) but such Orders are not subject to Parliamentary procedure (see section 373(4) of AFA 2006). Providing that the making of such Orders is not subject to Parliamentary procedure reflects the particular constitutional status of the Channel Islands, the Isle of Man and the British overseas territories. These Orders are mentioned only for completeness.

Ministry of Defence

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