



# EXPLANATORY NOTES

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## Armed Forces Act 2021

### Chapter 35

£11.50



# ARMED FORCES ACT 2021

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35).

- These Explanatory Notes have been prepared by the Ministry of Defence in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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## Overview of the Act

- 1 The primary purpose of this Act is to renew the Armed Forces Act 2006 (“AFA 2006”) and, in so doing, continue in force the primary legislation governing the armed forces. This Act, the Armed Forces Act 2021 (“AFA 2021”) also provides for measures to maintain the effectiveness of the service justice system so that it continues to meet the needs of the armed forces and is to further incorporate the Armed Forces Covenant into law.
- 2 The Act deals with the following matters:
  - Duration of the AFA 2006
  - Service courts, summary hearings and jurisdiction
  - Service in the armed forces
  - Service police: complaints, misconduct etc
  - Sentencing and rehabilitation
  - Posthumous pardons

## Policy background

- 3 Since the 1950s, an Armed Forces Act has been required every five years to continue in force the legislation enabling the armed forces to be recruited and maintained as disciplined bodies. Since 2009 the relevant legislation has been the AFA 2006, most of which came into force in 2009: this has been kept in force by further Armed Forces Acts in 2011 and 2016.
- 4 The AFA 2006 replaced separate disciplinary regimes for, respectively, the Royal Navy, Army and Royal Air Force. In so doing it introduced a single system of service law that 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 committed by certain civilians in circumstances closely connected with the armed forces. The AFA 2006 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. Further, it contains a substantial number of other important provisions for the armed forces, such as provision for enlistment, pay and service complaints.

- 5 In 2017, in preparation for this Act, the Ministry of Defence commissioned an independent review of the service justice system with the aim of ensuring its effectiveness. The review was carried out by HH Shaun Lyons, a retired senior Crown Court judge. Shaun Lyons was supported by Sir Jon Murphy, a former Chief Constable for Merseyside. The Review, which was published in February 2020, made 79 recommendations<sup>1</sup>. The Government response to the Review is outlined in two written ministerial statements: dated 27 February 2020<sup>2</sup> and 12 November 2020<sup>3</sup>.
- 6 Most of the recommendations of the Service Justice System Review do not require primary legislation in order to implement them. This Act contains provisions relating to those recommendations of the Service Justice System Review which do. Those recommendations concern: the handling of cases committed in the United Kingdom which could be tried in either the service justice system or the civilian criminal justice system (particularly murder, manslaughter and rape) (recommendations 1 to 3 of Part 1; recommendation 23 of Part 2); the constitution of the Court Martial (recommendation 4 of Part 1; recommendations 24 to 26 of Part 2); Circuit judges sitting in the Court Martial (recommendation 7 of Part 1); provision to permit the correction of mistakes in sentencing at summary hearing (recommendation 43 of Part 2) and independent oversight of the service police (recommendation 44 of Part 2).
- 7 Also relevant is the Report of the Henriques Review<sup>4</sup> into the Framework, Processes and Skills that the Service Justice System Requires for Overseas Operations. The review was carried out by Sir Richard Henriques, a retired High Court judge. The review was published on 21 October 2021. It made 64 recommendations. The Government response to this review was contained in a written ministerial statement<sup>5</sup> on the same date. In particular, the review contained recommendations about the establishment of a new service policing unit, to be known as the Defence Serious Crime Unit.
- 8 In common with other five-yearly Armed Forces Acts, this Act contains measures which fall outside the ambit of the service justice system. Notably, the Act makes provision for the Armed Forces Covenant in fulfilment of the Government manifesto commitment at the general election in December 2019 that the Government would “further incorporate the Armed Forces Covenant into law”. The new provision is part of the Government’s programme to ensure that members of the armed forces, veterans and their families are treated fairly. The Act also makes changes to the basis on which reservists can enter voluntary commitments to serve with the armed forces. It also makes provision about service complaints, the statutory complaints system by which service personnel can complain where they think themselves wronged in any matter relating to their service in the armed forces.

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<sup>1</sup> <https://www.gov.uk/government/publications/service-justice-system-review>

<sup>2</sup> <https://questions-statements.parliament.uk/written-statements/detail/2020-02-27/hlws125>

<sup>3</sup> <https://questions-statements.parliament.uk/written-statements/detail/2020-11-12/HCWS577>

<sup>4</sup> <https://www.gov.uk/government/publications/sir-richard-henriques-report-on-strengthening-the-service-justice-system>

<sup>5</sup> <https://questions-statements.parliament.uk/written-statements/detail/2021-10-21/hcws349>

# Legal background

## Service justice system

- 9 The AFA 2006 contains most of the primary legislation for the service justice system. The service justice system is the current disciplinary regime for the armed forces. It applies to service personnel (referred to in the Act as “persons subject to service law”) wherever they are in the world. The regime also applies to some civilians, for example, when they are living or working with the armed forces on certain bases overseas. They are referred to in the AFA 2006 as “civilians subject to service discipline”.
- 10 The service justice system in the AFA 2006 creates a system for dealing with “service offences”; defined in section 50 of the AFA 2006. These are mainly set out in Part 1 of the AFA 2006. There are specific service offences relating to discipline in the armed forces. They include, for example, insubordination or disobedience to lawful commands. These are referred to as “service disciplinary offences”. It is also a service offence for a service person (or civilian subject to service discipline) to commit an act which is an offence under the criminal law of England and Wales; or would be an offence if it were done in England and Wales; see section 42 of the AFA 2006. Such offences are known as “criminal conduct offences”.
- 11 The AFA 2006 sets out the circumstances in which service offences can be dealt with by a commanding officer or service courts. In summary:
  - a. Summary hearings: There is summary jurisdiction by which low level offending can be dealt with by a service person’s commanding officer. The service offences which can be dealt with in this way are set out in sections 52 to 54 of, and Schedule 1 to, the AFA 2006. A service person has the right to elect trial by Court Martial instead of being tried summarily (section 129 of the AFA 2006) and has a right to appeal to the Summary Appeal Court (see below).
  - b. The Court Martial: All service offences may also be investigated by the service police and prosecuted by the independent Service Prosecuting Authority before the Court Martial. The jurisdiction of the Court Martial is set out in section 50 of the AFA 2006. Commanding officers are obliged to ensure service police are aware of serious offending (see sections 113 and 114 of the AFA 2006). While capable of dealing with all service offences (even those that would be summary-only offences in England and Wales) the Court Martial has – in broad terms – similar powers and practices to the Crown Court in England and Wales. In trials, the Court Martial consists of a judge advocate (a civilian judge) and three to seven lay members (see section 155 of the AFA 2006). The lay members are normally officers and senior non-commissioned officers who perform a similar function to the jury in Crown Court proceedings. The Court Martial has similar sentencing powers to the Crown Court.
  - c. The Service Civilian Court: The Service Civilian Court consists of a judge advocate who tries civilians subject to service discipline for low level offences (Part 11 of the AFA 2006). Its purpose is to deal with service disciplinary offences (insofar as they are relevant to civilians) which would typically be handled by commanding officers if the person being tried was a service person and criminal conduct offences that would be dealt with by a magistrates’ court in England and Wales.
  - d. The Summary Appeal Court: This court hears appeals by service personnel against sentence or conviction in summary proceedings before their commanding officer (section 141 of the AFA 2006). It consists of a judge advocate and two lay members who will be serving officers or warrant officers (section 142 of the AFA 2006). Appeals are by way of a rehearing (see section 146 of the AFA 2006).



- e. The Court Martial Appeal Court: There is a right to appeal convictions or sentence in the Court Martial to the Court Martial Appeal Court, established by the Court Martial Appeals Act 1968. The Court Martial Appeal Court has similar functions and powers to the Criminal Division of the Court of Appeal in England and Wales, is staffed by the same judges and follows the same procedure. Appeals from the Court Martial Appeal Court are made to the Supreme Court.

### **Armed Forces Covenant**

- 12 The AFA 2006 requires the Secretary of State to make an armed forces covenant report annually to Parliament (see section 343A of the AFA 2006). The report covers the effects of membership, or former membership, of the armed forces on service people in the fields of healthcare, education, housing, inquests and in such other fields as the Secretary of State decides. In preparing the report, the Secretary of State must have regard in particular to: (a) the unique obligations of, and sacrifices made by, the armed forces; (b) the principle that it is desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces; and (c) the principle that special provision for service people may be justified by the effects on such people of membership, or former membership, of the armed forces (see section 343A(3)). Section 343B defines various terms in section 343A, including what is meant by “service people” and “relevant family member”.

### **Reserve forces**

- 13 The main provisions in primary legislation concerning the reserve forces are contained in the Reserve Forces Act 1996 (“RFA 1996”) which covers matters such as the organisation and membership of those forces, service in the reserve forces, and the powers to call out reservists and reserve associations. The RFA 1996 is supplemented by secondary legislation made under the Act. In particular, orders and regulations made under section 4 set out much of the detail on service in the reserve forces. The reserve forces are made up of:
  - a. The ex-regular reserve forces: the Royal Fleet Reserve, the Regular Reserve and the Air Force Reserve. These consist of former members of the regular forces who, on leaving those forces, are transferred to the reserve forces for a period of time.
  - b. The volunteer reserve forces: the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve and the Royal Auxiliary Air Force. These consist of civilians who enlist or engage in the reserve forces.
- 14 Reservists must undergo periodic training and are also liable to be called out for mandatory periods of permanent service. They can also volunteer to perform additional duties or undertake periods of full-time service. Under section 367 of the AFA 2006 reservists called out for permanent service or in full-time service are subject to service law at all times, otherwise they are only subject to service law when training or performing their duties. The main types of service in the reserve forces are set out below:
  - a. mandatory training for a set period each year (see sections 22 and 23 of the RFA 1996);
  - b. full-time service commitments, that is, a voluntary commitment to serve full-time for a set period on similar terms to members of the regular forces (see section 24 of the RFA 1996);
  - c. additional duties commitments, that is, a voluntary commitment to perform extra duties at set times (see section 25 of the RFA 1996);
  - d. voluntary training and other duties (see section 27 of the RFA 1996);
  - e. mandatory permanent service when called out under a call-out order or other powers in the RFA 1996 (see Parts 4 to 6 of the RFA 1996).

## **Service Complaints**

- 15 In addition to the service justice system, Part 14A of the AFA 2006 sets out the service complaints system for the armed forces. The current service complaints system has been in place since 2008 and was subject to amendment by the Armed Forces (Service Complaints and Financial Assistance) Act 2015. The system provides a means for persons subject to service law to obtain redress where they think themselves wronged in any matter relating to their service (see section 340A of the AFA 2006). The system is overseen by an independent officeholder, the Service Complaints Ombudsman, established under section 365B of the AFA 2006.
- 16 Part 14A mandates the Defence Council to make procedures for the operation of the service complaints system by way of regulations. In outline, the key features of the complaints procedure are as follows:
  - a. A service complaint is made by a service person submitting a statement of complaint to an officer of a description specified in regulations, who will decide whether all or part of a service complaint is admissible. The complainant has the right to apply to the Service Complaints Ombudsman to seek a review of the commanding officer's admissibility decision.
  - b. Once there has been a decision by either the commanding officer or the Service Complaints Ombudsman that a service complaint is admissible, the commanding officer will refer the complaint to a nominated Defence Council delegate to appoint a Decision Body. The Decision Body consists of one or more individuals, appointed to investigate and make a decision on a service complaint.
  - c. If a complainant is dissatisfied with the decision of the Decision Body, they can submit an appeal to the nominated Defence Council delegate. Prior to the AFA 2021 the time limit for bringing an appeal could not be less than six weeks beginning with the day on which the complainant received notification of that decision, unless the nominated Defence Council delegate considered it just and equitable to allow it after this period. Once the nominated Defence Council delegate (or, following a review, the Service Complaints Ombudsman) decides that an appeal can proceed, they must appoint an Appeal Body. The Appeal Body will determine whether the service complaint is well-founded.
  - d. The complainant may apply to the Service Complaints Ombudsman against the final decision of the Appeal Body on substantive grounds or grounds of maladministration. Again, before the AFA 2021, an application to the Service Complaints Ombudsman on either ground had to be made in writing within six weeks of the day on which the complainant received notification of the decision, unless the Service Complaints Ombudsman considered it is just and equitable to allow it after this period. A complainant may also apply to the Service Complaints Ombudsman in relation to an ongoing service complaint where undue delay is alleged.

## **Service Police: complaints, misconduct etc**

- 17 There is a service police force for each of the services: the Royal Navy Police; the Royal Military Police and the Royal Air Force Police. Each is headed by a Provost Marshal. Members of the service police are not constables but have law enforcement powers that enable them to carry out criminal investigations. By section 115A of the AFA 2006, Provost Marshals are under a duty to ensure that all investigations carried out by the force are free from improper interference.

- 18 Her Majesty's Inspectors of Constabulary inspect and report to the Secretary of State on the independence and effectiveness of investigations carried out by each service police force under section 321A of the AFA 2006, and provide independent oversight of the forces, in a similar way to that provided to territorial and other civilian police forces across the United Kingdom (save in Scotland where Her Majesty's Inspectorate of Constabulary in Scotland is the responsible body).
- 19 The Provost Marshals have put in place complaints procedures to deal with complaints about members of their forces. These procedures allow complaints to be passed to another force to investigate in appropriate cases. However, there is no independent body that has oversight of these arrangements, or that can carry out investigations into serious matters.
- 20 The Act creates a new office holder – the Service Police Complaints Commissioner – and creates a power to establish a complaints regime similar to the one applicable to those serving with civilian police forces in England and Wales, and to give the Commissioner functions similar to those conferred on the Director General of the Independent Office for Police Conduct. It also takes powers so that similar provision can also be made regarding matters of concern raised by whistle blowers as well as super complaints, which will allow designated organisations to raise issues about harmful patterns or trends in policing.
- 21 The Act creates the framework for the establishment of a tri-service serious crime unit for the service police. The Act provides that the Provost Marshal for serious crime (who will head the new unit) is subject to the same rules about appointment as the existing provost marshals of the service police forces and provides that the Provost Marshal for serious crime owes the duty of investigative independence for investigations by the tri-service serious crime unit on the same terms as existing provost marshals owe a duty of investigative independence for investigations by their service police force. The new tri-service serious crime unit is included within the new regime for complaints against the service police.

### **Posthumous pardons**

- 22 Section 164 of the Policing and Crime Act 2017 (“PCA 2017”) provides for posthumous pardons for those convicted of certain abolished sexual offences, for example, buggery. Specifically, anyone who was convicted of, or cautioned for, such an abolished offence and has now died, is pardoned for that offence if two conditions are met. The conditions are that: (a) the other person involved in the conduct that constituted the offence consented to it and was aged 16 or over; and (b) the offence would not still be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory) (see section 164(2) of the PCA 2017).
- 23 Pardons apply to those convicted under the civilian criminal justice system under legislation dating back to 1533 (see section 164(3) of the PCA 2017). The equivalent service offences are listed in section 164(4) and (5) ensuring that those convicted under service law would be pardoned, just as if they had been convicted in the civilian system. Prior to the AFA 2021, PCA 2017 captured all equivalent service offences in relation the Royal Navy from 1661 and all equivalent service offences for the Royal Air Force. It did not capture some older equivalent service offences for the Army or the Royal Marines, hence the amendments to section 164 included in the Act.

## **Territorial extent and application**

- 24 Sections 25 and 26 of the Act set out the territorial extent of the Act, that is the jurisdictions in which the Act forms part of the law. The extent of an Act can be different from its application. Application is about where an Act produces a practical effect.

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*

## Territorial application of the Act in the UK

- 25 This Act extends to the whole of the United Kingdom subject to the following:
- a. Section 17(5) (removal of requirement to take into account offences in member States) only extends to England and Wales;
  - b. Section 18 (rehabilitation periods: England and Wales) only extends to England and Wales;
  - c. Section 19 (posthumous pardons in relation to certain abolished service offences) only extends to England and Wales;
  - d. Paragraphs 1 to 3, 6, 7 and 9 of Schedule 3 only extend to Northern Ireland and paragraphs 4, 5 and 8 only extend to England and Wales and Scotland;
  - e. Paragraph 1 of Schedule 4, so far as it inserts paragraph 1 of Schedule 14A to the AFA 2006 (status of Service Police Complaints Commissioner as a corporation sole), extends to England and Wales and Northern Ireland only. This reflects the fact that Scots law does not recognise the concept of a corporation sole. Paragraph 7 of Schedule 4 only extends to England and Wales and paragraph 8 only extends to England and Wales and Scotland;
  - f. Paragraphs 1 and 37 to 41 of Schedule 5 only extend to England and Wales, paragraph 2 of that Schedule only extends to Northern Ireland and paragraphs 3 to 5 of that Schedule only extends to England and Wales and Northern Ireland.
- 26 In general, a provision of the Act applies (i.e. has effect) in the jurisdictions where it forms part of the law. However, sections 2 to 7 and 11 to 17 apply worldwide as they relate to the service justice system which applies to service personnel wherever they are in the world. Section 9 of the Act also applies worldwide as it concerns service by members of the reserve forces, which can be undertaken anywhere in the world.
- 27 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

## Territorial application of the Act outside the UK

- 28 The changes that this Act makes to the AFA 2006 may be extended by Order in Council to the Channel Islands. 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).
- 29 The changes that this Act makes to the AFA 2006 extend directly (i.e. 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 to modify the Act in its application to any of those territories.
- 30 The changes that this Act makes to the RFA 1996 may be extended by Order in Council to the Channel Islands or the Isle of Man. If such an Order is made, it can modify those changes (so that the law of the Channel Islands and the Isle of Man is not the same as that of the United Kingdom).

# Commentary on provisions of Act

## Section 1: Duration of AFA 2006

- 31 Since the Bill of Rights 1688, 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.
- 32 As originally enacted, section 382 of the AFA 2006 provided that the Act would expire one year after it received Royal Assent (which it did on 8 November 2006), unless renewed by Order in Council approved by each House of Parliament. It provided that the AFA 2006 could be continued by such an Order for up to a year at a time, but not beyond the end of 2011. Section 1 of the Armed Forces Act 2011 substituted a new section 382 maintaining the pattern of renewal by annual Orders in Council, up until the end of 2016. Section 1 of the Armed Forces Act 2016 took the same approach to renew the AFA 2006 up until the end of 2021.
- 33 Section 1 again substitutes a new section 382, which provides for the continuation of the AFA 2006. It also repeals section 1 of the Armed Forces Act 2016, which inserted the current section 382 into the AFA 2006.

### **New section 382 Duration of this Act**

- 34 This new section provides that the AFA 2006 expires a year after the Armed Forces Act 2021 was passed, unless renewed by Order in Council approved by each House of Parliament. The AFA 2006 may be renewed by such an Order for up to a year at a time, but not beyond the end of 2026.

## Section 2: Constitution of the Court Martial

- 35 This Section introduces Schedule 1.

### Schedule 1: Constitution of the Court Martial

- 36 This Schedule amends the AFA 2006 making changes to the constitution of the Court Martial. The Court Martial consists of a judge advocate and, in proceedings which require it, lay members. Lay members are normally service personnel, although in some circumstances they can be civilians, and prior to the AFA 2021 service personnel could only act as lay members if they were officers or warrant officers. Lay members perform a similar function to a jury in a Crown Court trial in England and Wales. They make findings on a charge by majority verdict; the judge advocate does not vote. The judge advocate and lay members together decide on sentence. The Schedule makes changes to the numbers of lay members in Court Martial proceedings, voting and qualification to be a lay member.
- 37 The Schedule makes a number of substantive changes to the AFA 2006 along with a number of linked minor and consequential amendments, the substantive changes are:
  - a. Paragraph 1(2) amends section 155(1)(b) of the AFA 2006 to provide that, where the Court Martial sits with lay members, there will be three or six lay members. Currently, the Court Martial can sit with anywhere between three and seven lay members. Court Martial rules will set out the circumstances in which six lay members will be required for Court Martial proceedings.
  - b. Paragraph 1(4) inserts a new subsection (2A) in section 155 of the AFA 2006 by providing that a judge advocate may direct that there be a fourth lay member of the Court Martial in circumstances where there would otherwise be three lay members. These amendments would address, for example, the possibility that the Court Martial may lose a lay member due to illness or enforced isolation.

- c. Paragraph 1(5) and (8) amends subsection (3) of section 155 of the AFA 2006 and substitutes a new subsection (9) to expand the range of service personnel qualified to be a lay member to include those of OR-7 rank. OR-7 rank means anyone of the rank of chief petty officer, staff corporal, staff sergeant, Royal Marine colour sergeant, flight sergeant or chief technician.
- d. Paragraph 1(6) inserts a new subsection (6A) in section 155 of the AFA 2006 so that if the Court Martial is constituted with six or four lay members, Court Martial rules may provide for the proceedings to continue with only five or three lay members respectively on a direction from a judge advocate.
- e. Paragraph 2(4) inserts a new subsection (3A) in section 156 of the AFA 2006 which bars a person who is an acting chief petty officer, staff corporal, staff sergeant, Royal Marine colour sergeant, flight sergeant or chief technician from being a lay member of the Court Martial.
- f. Paragraph 2(5) amends subsection (4) of section 156 of the AFA 2006 to bar those of OR-7 rank from being lay members of the Court Martial, if they are members of the Military Court Service, Service Prosecuting Authority or a service police force, chaplains in the armed forces or lawyers. This extends the prohibition which already applies to officers and warrant officers.
- g. Paragraph 3(3) to (5) amends section 157 of the AFA 2006 to bar those of OR-7 rank from being lay members of the Court Martial if they have been involved in an investigation or inquiry relating to the charge. This extends the prohibition which already applies to officers and warrant officers.
- h. Paragraph 4(2) inserts a new subsection (A1) in section 160 of the AFA 2006 to introduce qualified majority verdicts for findings on a charge where the Court Martial consists of six or five lay members. Specifically, where there are six lay members, five must agree on the verdict. Where there are five lay members, four must agree. Where there are four lay members, three of them must agree. Where, as now, there are three, two of them must agree.

### Section 3: Nomination of Circuit judge to sit as a judge advocate

- 38 This section amends section 362(c) of the AFA 2006 to provide the Lord Chief Justice of England and Wales with a power to nominate a Circuit judge to sit as a judge advocate following a request by the Judge Advocate General. Formerly, section 362 only empowered the Lord Chief Justice to nominate a puisne judge of the High Court of England and Wales. This implements a recommendation of the Service Justice System Review (recommendation 7 of Part 1).

### Section 4: Summary hearings: power to rectify mistakes etc

- 39 Section 4 enables rules made under section 153 of the AFA 2006 in respect of summary hearings or the activation of suspended sentences of service detention (“summary hearing rules”) to include a power for a commanding officer to vary or rescind punishments or activation orders that the commanding officer has awarded or made in error (this type of power is sometimes referred to as a “slip rule”). An activation order is an order under section 193 of AFA 2006 that makes a suspended sentence of service detention passed by a commanding officer or the Summary Appeal Court (“SAC”) take effect. Prior to the AFA 2021, such errors could only be corrected by the SAC on appeal or when a case was referred to the court following a review under section 152 of the AFA 2006 (this gives the Defence Council or an officer appointed by the council the power to review commanding officers’ punishments and activation orders and refer them to the SAC). There are similar powers for the Court

Martial to rectify errors under Part 15 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041). In the civilian criminal justice system in England and Wales, the Crown Court and a magistrates' court have comparable powers (see section 385 of the Sentencing Act 2020 and section 142 of the Magistrates' Courts Act 1980). This section implements a recommendation of the Service Justice System Review (recommendation 43 of Part 2).

- 40 Subsection (2) inserts a new subsection (1A) in section 153 of the AFA 2006 to enable summary hearing rules to give a commanding officer the power to vary or rescind a punishment awarded by the commanding officer in cases where it appears to them that there was no power to award the punishment or make the order.
- 41 Subsection (3) inserts a new subsection (2A) in section 153 of the AFA 2006 to allow summary hearing rules to include rules on the commencement of punishments or activation orders varied by a commanding officer.
- 42 Subsection (4) amends section 153(3) of the AFA 2006 to allow the powers in the new subsection (1A) of that section to be used in relation to proceedings in respect of activation orders made by a commanding officer.
- 43 Subsection (5) inserts new subsections (2A) to (2C) in section 152 of the AFA 2006. Section 152 puts in place arrangements for punishments awarded by commanding officers to be reviewed by the Defence Council or an officer appointed by the council; if an error is identified the case can then be referred to the SAC. The new subsections (2A) and (2B) provides the option of referring the case back to the commanding officer instead for them to consider exercising their power to vary or rescind the punishment.

### Section 5: The Summary Appeal Court: power to rectify mistakes

- 44 This section introduces a similar power to section 4, allowing rules under section 151 of the AFA 2006 in respect of the Summary Appeal Court ("SAC rules") to give that court powers to vary or rescind punishments or activation orders in cases where it appears to the court that it had no power to award the punishment or make the order or confirm the commanding officer's decision to do so.
- 45 Subsection (2) inserts a new paragraph (ga) in section 151(3) of the AFA 2006 to enable the SAC rules to include these powers.
- 46 Subsection (3) inserts a new subsection (5A) in section 151 of the AFA 2006 to allow the SAC rules to include provisions on the commencement of punishments or orders varied by the court (this provision is to be read with section 195 of the AFA 2006 which deems activation orders to be a "punishment" for the purposes of section 195 and the rest of Chapters 2 and 3 of Part 6 of the AFA 2006).

### Section 6: The Service Civilian Court: power to rectify mistakes

- 47 This section introduces a similar power to sections 4 and 5, allowing rules under section 288 of the AFA 2006 in respect of the Service Civilian Court ("SCC rules") to give the court powers to vary or rescind punishments or activation orders in cases where it appears to the court that it has no power to award the punishment or make the order.
- 48 Paragraph (a) inserts a new paragraph (ea) in section 288(3) of the AFA 2006 to enable the SCC rules to include these powers.
- 49 Paragraph (b) inserts a new subsection (6A) in section 288 of the AFA 2006 to allow the SCC rules to include provisions on the commencement of sentences or orders varied by the court.

## Section 7: Concurrent jurisdiction

- 50 This section amends the AFA 2006 to place a duty on the Director of Service Prosecutions and each of the heads of the civilian prosecution services across the United Kingdom to agree protocols on the handling of cases where there is concurrent jurisdiction. Concurrent jurisdiction arises where either the service justice system or the civilian criminal justice system has jurisdiction to try criminal offences committed by service personnel in the United Kingdom.

### **New section: 320A Guidance on exercise of criminal jurisdiction: England and Wales**

- 51 New section 320A places a duty on the Director of Service Prosecutions and the Director of Public Prosecutions to agree a protocol where there is concurrent jurisdiction. Concurrent jurisdiction arises where alleged criminal conduct by a service person in England and Wales could be tried as a criminal conduct offence under section 42 of the AFA 2006 in the service justice system or as a criminal offence in the civilian criminal justice system.
- 52 Subsection (3) provides that the protocol must give guidance to relevant prosecutors to assist in the decision as to where a case should be prosecuted. The protocol may also give guidance as to the process to be followed in making such decisions. In particular, the guidance may provide for the circumstances in which consultation may be needed between prosecutors in the service justice system and civilian criminal justice system. The guidance may provide, for example, that consultation between prosecutors in separate systems is only required in certain types of circumstances.
- 53 Subsection (5) provides that where the protocol applies, and prosecutors are unable to resolve a disagreement as to the appropriate jurisdiction for a case, the Director of Public Prosecutions will make the final decision.
- 54 Subsections (6) to (8) contain further provisions in respect of the protocol. To maintain currency of the protocol, subsection (6) provides that the Director of Service Prosecutions and the Director of Public Prosecutions may revise the protocol from time to time. Subsection (7) requires the Directors to consult the people listed there before agreeing the protocol or any revision. Subsection (8) requires the current version of the protocol to be published.

### **New section 320B Guidance on exercise of criminal jurisdiction: Scotland**

- 55 New section 320B contains provision for Scotland which corresponds to that in new section 320A for England and Wales.
- 56 Subsection (1) provides that the Director of Service Prosecutions and Lord Advocate must agree a protocol for the handling of cases of concurrent jurisdiction in Scotland.
- 57 Subsections (2) and (3) identify when concurrent jurisdiction arises in Scotland, taking into account the fact that there are significant differences between the criminal law in Scotland and the criminal law in England and Wales on which section 42 of the AFA 2006 is based. In particular, concurrent jurisdiction arises where the alleged criminal conduct in Scotland also directly constitutes a criminal conduct offence under section 42 of the AFA 2006 or where it constitutes a criminal conduct offence which is broadly equivalent to an offence under the law of Scotland (for example, the criminal conduct offence which corresponds to the offence in England and Wales of manslaughter and, in Scotland, culpable homicide).
- 58 The remaining provisions correspond to the equivalent provisions in new section 320A. In particular, where the protocol applies, subsection (6) provides for the Lord Advocate to make the final decision where there is disagreement as to the appropriate jurisdiction for a case.



### **New section 320C Guidance on exercise of criminal jurisdiction: Northern Ireland**

- 59 New section 320C contains provision for Northern Ireland which corresponds to that in new section 320A for England and Wales and new section 320B for Scotland.
- 60 Subsection (1) provides that the Director of Service Prosecutions and Director of Public Prosecutions for Northern Ireland must agree a protocol for the handling of cases of concurrent jurisdiction in Northern Ireland.
- 61 The remaining provisions correspond to the provisions in new section 320B. In particular, where the protocol applies, subsection (6) provides for the Director of Public Prosecutions for Northern Ireland to make the final decision where there is disagreement as to the appropriate jurisdiction for a case.

### **Section 8: Armed Forces Covenant**

- 62 Section 8 amends Part 16A of the AFA 2006 to impose a duty to have due regard to the principles of the Armed Forces Covenant, as follows: (a) the unique obligations of, and sacrifices made by, the armed forces; (b) the principle that it is desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces; and (c) the principle that special provision for service people may be justified by the effects on such people of membership, or former membership, of the armed forces. These principles are already set out in the existing duty on the Secretary of State to prepare an annual Armed Forces Covenant report (section 343A of the AFA 2006). The new duty applies to specified persons or bodies when exercising certain housing, education or healthcare functions.

### **New sections 343AA, 343AB, 343AC, 343AD Duty to have due regard to principles: England, Wales, Scotland and Northern Ireland**

- 63 New sections 343AA, 343AB, 343AC and 343AD set out the duty for England, Wales, Scotland and Northern Ireland respectively. Subsection (1) of each section defines the three principles of the Armed Forces Covenant. It places a duty on those persons or bodies specified in subsection (3) to have due regard to these principles. These bodies are subject to the duty to have due regard to the principles only when exercising the functions listed in subsections (4), (5) and (6) in relevant areas of housing, education and healthcare.

### **New section 343AE Sections 343AA to 343AD: guidance**

- 64 New section 343AE provides that the Secretary of State may issue guidance in relation to the duties imposed by new sections 343AA(1), 343AB(1), 343AC(1) and 343AD(1). Subsection (2) provides that where such guidance is issued, the persons or bodies subject to the duty must have regard to it when exercising any of the listed functions. Subsection (4) requires the guidance to be laid before Parliament in draft before it can be issued and provides that the guidance comes into force on a day appointed by the Secretary of State by regulations. Subsection (6) provides for the requirements in subsection (4) to apply to any revised guidance. Under subsection (5), the Secretary of State must consult with relevant devolved administrations where the guidance relates to devolved functions, and with others considered appropriate, before issuing the guidance or making significant amendments to it. Subsection (8) provides that the current version of the guidance must be published.

### **New section 343AF Sections 343AA to 343AD: power to add bodies and functions**

- 65 New section 343AF provides that the Secretary of State may by way of regulations widen the scope of the duty in sections 343AA(1), 343AB(1), 343AC(1) and 343AD(1) by specifying additional persons or bodies who are subject to the duty, and by specifying additional functions in relation to which the duty applies. Subsections (2) to (11) contain further

provision in respect of the power. Subsection (5) provides that any additional functions may be in areas other than housing, education or healthcare. Under subsection (7), the Secretary of State is required to consult relevant devolved administrations when exercising this power in devolved contexts and other appropriate stakeholders before exercising this power.

- 66 Section 8(4) amends section 343B of the AFA 2006, in particular to provide for “relevant family members” for the purpose of the Armed Forces Covenant duties to be defined in regulations. Subsection (4)(c) inserts new subsections (4A) to (4C) into section 343B which include a requirement on the Secretary of State before making such regulations to consult relevant devolved administrations where the devolved context is affected and other appropriate stakeholders.
- 67 Section 8(5) amends section 373 of the AFA 2006 to provide for regulations made under new sections 343AE(4), 343AF and 343B(4A) to be subject to the affirmative resolution procedure.

### Section 9: Reserve forces: flexibility of commitments

- 68 Section 9 amends sections 24 and 25 of the RFA 1996 to replace the full-time service commitment, which enables members of a reserve force to volunteer to undertake a period of full-time service, with a new service commitment (“a section 24 commitment”). A section 24 commitment enables members of a reserve force to volunteer to undertake a period of full-time or part-time service.
- 69 Subsection (4) inserts a new subsection (1A) and (1B) in section 24 of the RFA 1996. This allows a section 24 commitment to be a commitment to full-time or part-time service and include periods of both types of service. Orders or regulations to be made under section 4 of the RFA 1996 are to govern the type and period of service permitted under a section 24 commitment and enable periods of special or extended leave to be included in the commitment.
- 70 Subsection (14) inserts a new subsection (2A) into section 25 of the RFA 1996, which enables members of a reserve force to enter into a commitment to perform additional duties for a specified period or periods. The new subsection clarifies that a commitment under section 25 (“an additional duties commitment”) can enable a member of a reserve force to perform duties under a commitment on any basis, including on a full-time or part-time basis.

### Schedule 2: Reserve forces: flexibility of commitments

- 71 Schedule 2 makes consequential amendments to the RFA 1996 and the AFA 2006 in consequence of the new section 24 commitment. It also deals with transitional issues.
- 72 Paragraphs 1 to 9 make the consequential amendments. One significant amendment made by paragraph 9 is to section 367 of the AFA 2006. Section 367 of the AFA 2006 sets out the circumstances in which a person is a person subject to service law. Being subject to service law means in particular that a service person is subject to the service justice system. The effect of paragraph 9 is that where a member of the reserve forces is in service under a section 24 commitment, they will be subject to service law for the entire time that they are in service under this commitment.
- 73 Paragraph 10 provides that regulations under section 24 of the Act (transitional provision) may have an effect in relation to commitments under section 24 or 25 of the RFA 1996 made before section 9 of the Act comes into force. These will permit transitional arrangements under section 24 to include arrangements (if needed) that affect those undertaking a period of service or performing duties under existing commitments under section 24 or 25 of the RFA 1996.

## Section 10: Service complaints appeals

- 74 This section amends section 340D of the AFA 2006 as part of wider reforms to increase efficiency and speed up the process within the statutory service complaints system. Section 340D deals with appeals to the Defence Council where a first instance decision was taken by a person or panel of persons appointed by the Defence Council. The amendments reduce the minimum time which can be set out in regulations for complainants to lodge appeals and permits the possibility of restricting the grounds upon which an appeal can be brought.
- 75 Subsection (3) enables regulations on service complaints procedure to restrict the grounds on which an appeal against a first instance decision of the Decision Body can be brought and require the Defence Council to decide any question relating to whether an appeal has been brought on valid grounds. This does not affect access to the Service Complaints Ombudsman, as a case with no right of appeal will be considered finally determined under section 340H(5) of the AFA 2006. This is expected to reduce the number of speculative appeals where currently complainants do not have to provide substantive reasons for asking for their case to be re-examined.
- 76 Subsection (4) changes the minimum period for an appeal that can be set out in regulations on service complaints procedure from six weeks to two weeks, commencing on the day the complainant receives notification of the decision which they wish to appeal. Subsection (8) similarly reduces the minimum time which can be set out in regulations for an application to the Service Complaints Ombudsman in respect of a complaint that has been finally determined. It is expected that the regulations will continue to set out exceptions to this time limit, such as that a person may bring an appeal outside this time limit where the Defence Council (or, upon review, the Service Complaints Ombudsman) considers that it is just and equitable to allow it, for example, where the requirements of the service person's service has reasonably prevented them from meeting the two-week deadline.
- 77 Subsection (5) provides that regulations must make provision to enable a complainant to apply to the Service Complaints Ombudsman for a review of a decision by the Defence Council that an appeal was not brought on a valid ground.
- 78 Subsections (6) to (9) amend the date from which the period to apply to the Service Complaints Ombudsman for an investigation will run. Where a complainant has received a decision that their appeal is inadmissible on the basis that it does not meet the prescribed grounds of appeal, the time-limit to apply to the Service Complaints Ombudsman for an investigation will now run from the "relevant date". The "relevant date" is the latest admissibility decision on the appeal. This will be either the decision of the Defence Council that the appeal is inadmissible, or the decision of the Service Complaints Ombudsman where the complainant has sought a review of the Defence Council's decision.

## Schedule 3: Service complaints appeals

- 79 This Schedule makes amendments to legislation in consequence of section 10, which enables the Defence Council to restrict the grounds upon which an appeal can be brought. The provisions which have been amended relate to when a service complaint is deemed to be withdrawn for the purposes of accessing the employment tribunal under the parent legislation. The consequential amendments made in this Schedule set out how these deemed withdrawal provisions operate for service complaints with no grounds for appeal under regulations made under amended section 340D. Where the person bringing the complaint is aware of grounds to bring an appeal and fails to do so, either within the prescribed time limit or out of time, the service complaint is considered to have been withdrawn. A case is not deemed to have been withdrawn where there are no grounds of appeal, or where the person bringing the complaint could not reasonably have been aware of facts which might have constituted a ground of appeal.

## Section 11: Service police: complaints, misconduct etc

- 80 This section amends the AFA 2006 to create a new regime for complaints against the service police, including the new tri-service serious crime unit, and related matters. It does so by establishing the Service Police Complaints Commissioner (“the SPCC”) and enables the creation of a regime for complaints, conduct matters and death or serious injury matters which is modelled on the regime for the civilian police in England and Wales. The civilian regime is overseen by the Director General of the Independent Office for Police Conduct (“DG IOPC”). This issue was considered in the Service Justice System Review (recommendation 44 of Part 2).
- 81 Subsection (2) inserts a new section 365BA and 365BB in Part 18 of the AFA 2006.

### **New section 365BA Service Police Complaints Commissioner**

- 82 This new section of the AFA 2006 establishes the SPCC. It also introduces new Schedule 14A to the AFA 2006 which makes further provision in respect of the new SPCC.

### **New section 365BB Investigating officers**

- 83 This new section enables the SPCC to appoint investigating officers to carry out functions of the SPCC. In particular, the SPCC is able to appoint an officer to carry out an investigation where the SPCC has decided that one is required under regulations made under new Part 14B of the AFA 2006.
- 84 Subsection (3) inserts a new Part 14B in the AFA 2006.

### **New Part 14B of AFA 2006**

- 85 New Part 14B contains new sections 340P, 340Q and 340R. Section 340P contains a power to make provision corresponding to any that is made in or under Part 2 of the Police Reform Act 2002 (complaints and misconduct) in relation to the SPCC, service police forces and the tri-service serious crime unit. This enables the Secretary of State to confer functions on the new SPCC that are similar to those conferred on the DG IOPC and to set up procedures to deal with complaints, misconduct and death and serious injury matters. Section 340Q contains a power that will enable the Secretary of State to make similar provision to that made in or under Part 2B of the Police Reform Act 2002 in relation to whistle-blowers. Section 340R contains a power that enables the Secretary of State to make similar provision to that made in or under Part 2A of the Police Reform Act 2002 in relation to super-complaints.
- 86 The overall effect of new Part 14B enables the Secretary of State to create a statutory system for dealing with complaints and other concerns about the service police which is similar to the statutory system that covers those serving in civilian police forces in England and Wales.

## Schedule 4: Service police: complaints, misconduct etc

- 87 This Schedule makes further provision about the new SPCC and consequential amendments relating to the new service police complaints regime.

### **New Schedule 14A to AFA 2006**

- 88 Paragraph 1 of Schedule 4 inserts new Schedule 14A into the AFA 2006.
- 89 Paragraph 1 of new Schedule 14A sets out the status of the SPCC as a “corporation sole”. This means that it is a single incorporated office occupied by a single natural person. By paragraph 2, the SPCC is neither a servant or agent of the Crown nor enjoys any Crown status, immunity or privileges.
- 90 Under paragraph 3, the SPCC is appointed by Her Majesty on the recommendation of the Secretary of the State.

- 91 Under paragraph 4, certain persons are disqualified from being appointed as the SPCC: if they are a member of the regular or reserve forces (this includes serving members of the service police forces who are all members of one of the regular or reserve forces), are a former service police officer or are employed in the civil service.
- 92 Paragraph 5 deals with vacancy or incapacity and enables the Secretary of State to appoint a person to act as the SPCC during a period in which the office is vacant or the SPCC is seriously ill.
- 93 Paragraph 6 covers terms of office and paragraph 7 allows the new SPCC to delegate functions to persons working for the SPCC, who will all be seconded to work for the SPCC. Paragraph 8 deals with liability of the SPCC in respect of any unlawful conduct of seconded staff in carrying out their functions as a member of the SPCC's staff.

#### **Other provision in Schedule 4**

- 94 Paragraph 2 of Schedule 4 amends sections 58, 106, 107, 133 of, and Schedules 4 and 6 to, the Investigatory Powers Act 2016. These sections and Schedule cover the meaning of "excepted disclosure", the power and restriction on issuing warrants for the SPCC, providing the officeholder with powers that closely mirror the DG IOPC.
- 95 Paragraph 3 amends the Public Records Act 1958 to provide for records of the SPCC to be public records for the purpose of the Public Records Act 1958. Paragraph 4 amends the House of Commons Disqualification Act 1975 to disqualify the SPCC from being a member of the House of Commons. Paragraph 5 similarly amends the Northern Ireland Assembly Disqualification Act 1975 to disqualify the SPCC from being a member of the Northern Ireland Assembly.
- 96 Paragraphs 6 and 8 amend the Freedom of Information Act 2000 and the Equality Act 2010 to make the SPCC a public authority for the purposes of those Acts. Paragraph 7 amends the Coroners and Justice Act 2009 to make the SPCC an interested person for the purposes of that Act and paragraph 9 amends the Data Protection Act 2018 to make the SPCC a competent authority for the purposes of that Act.

#### **Section 12 and Schedule 5: Framework for establishment of tri-service serious crime unit**

- 97 This section and Schedule 5 set out the framework for the establishment of a tri-service serious crime unit for the service police. The section provides that the Provost Marshal for serious crime (who heads the new unit) is subject to the same rules about appointment as the existing provost marshals of the service police forces by amending section 365A(1) of AFA 2006. It provides in particular that the Provost Marshal for serious crime is appointed by Her Majesty. This section also amends 115A of AFA 2006 and provides that the Provost Marshal for serious crime owes the duty of investigative independence for investigations by the tri-service serious crime unit on the same terms as existing provost marshals owe a duty of investigative independence for investigations by their service police force. Schedule 5 provides in particular for the tri-service serious crime unit and Provost Marshal for serious crime to have the same statutory powers as, respectively, the existing service police forces and provost marshals.

#### **Section 13: Power of commanding officer to award service detention: Royal Marines**

- 98 Section 13 gives a commanding officer the power to award a punishment of service detention to a corporal in the Royal Marines; prior to the AFA 2021 only a person of a rank beneath that of corporal in the Royal Marines could be awarded this punishment by a commanding officer. This ensures commanding officers have the same powers to punish corporals in the Royal Marines as they do in respect of Leading Hands in the Royal Navy who hold an equivalent

rank. Subsection (2) amends the table of punishments available to commanding officers in section 132 of the AFA 2006 and inserts a new subsection (1A) to make this change. Subsections (3) to (6) make consequential amendments to section 133 of the AFA 2006 which sets out the limits on commanding officers' powers to award service detention.

## **Section 14: Deprivation orders**

99 Section 14 inserts new sections 94A and 177B to 177F into the AFA 2006 to introduce the punishment of a deprivation order. Such orders will be available for commanding officers, the Court Martial and the Service Civilian Court. Deprivation orders deprive offenders of any rights they had in the property. The provisions are modelled on the provision for deprivation orders which are available in the civilian context in England and Wales under section 152 of the Sentencing Act 2020.

100 Subsection (4) inserts the new sections 177B to 177F in the AFA 2006 and subsection (5) inserts the new section 94A in the AFA 2006. The rest of section 14 makes consequential amendments in respect of these new sections. The new sections are as follows.

### **New section 177B Deprivation orders: interpretation**

101 This new section provides that a deprivation order is an order which deprives an offender of any rights in the property to which the order relates. A deprivation order can be made by the Court Martial, the Service Civilian Court or a commanding officer at summary hearing when the charge has been proved.

### **New section 177C Deprivation order: availability**

102 This new section sets out the circumstances in which a deprivation order will be available.

103 Subsections (2) to (5) set out the property that may be subject to such an order. Under subsection (2) the property must have either been lawfully seized from the offender or in the offender's possession when apprehended. In addition, the property must have been connected to the offence(s). It must have either been used (or intended to be used) for the purpose of committing or facilitating the offence or the offence is of unlawful possession of that property.

104 Subsections (6) to (8) provide that the property which is the subject of the deprivation order must be handed over to the "appropriate authority" which means either the service police or the offender's commanding officer.

### **New section 177D Vehicle to be treated as used for purposes of certain offences**

105 This new section provides that where a vehicle is used in the commission of certain service offences, the vehicle is to be regarded for the purpose of new section 177C(3) as being used for the purpose of committing the offence.

### **New section 177E Exercise of power to make deprivation order**

106 This new section requires the Court Martial, the Service Civilian Court or commanding officer to have regard to the property's value and the likely financial impact on the offender when making a deprivation order.

### **New section 177F Application of proceeds of property subject to deprivation order**

107 This new section applies where either the Court Martial or the Service Civilian Court makes a deprivation order and a victim suffered personal injury, loss or damage.

108 Subsection (2) allows the court, in addition to making the deprivation order, to make an order that any proceeds arising out of the disposal of the property are to be paid to the victim.

109 Subsection (3) provides that, in order to make such an additional order, the court must be satisfied that it would have made a service compensation order but for the inadequacy of the offender's means.

#### **New section 94A property subject to deprivation order: modification of section 94**

110 This new section modifies the existing regulation-making power contained in section 94 of the AFA 2006. Section 94 enables the Secretary of State to make provision with respect to disposal of property which has come into the possession of the service police or a commanding officer. This new section enables regulations to be made to deal with property held by the service police or a commanding officer in consequence of a deprivation order.

111 Subsections (2) and (3) require the regulations to give the legitimate owner of the property 6 months from the date of the deprivation order to make a claim for the property.

112 Subsections (4) to (6) allow the regulations to provide that, after the 6-month period, the property may be otherwise disposed of, including by transferring it to the Secretary of State.

#### **Section 15: Driving disqualification**

113 This section amends the AFA 2006 to introduce the punishment of a driving disqualification order. Driving offences under the law of England and Wales are also service offences under section 42 of the AFA 2006. An offender convicted by the Court Martial of a service offence under the AFA 2006 which is connected to driving is liable to any punishment listed in section 164 of the AFA 2006, though prior to the AFA 2021 this did not include disqualification from driving. This section extends the punishments available to the Court Martial to enable the court to disqualify a person from driving. The provisions are modelled on the provision for driving disqualification orders which are available in the civilian context in England and Wales under section 162 of the Sentencing Act 2020.

#### **New section 177G Driving disqualification orders**

114 This new section defines a driving disqualification order as an order which disqualifies an offender from holding or obtaining a driving licence anywhere in the United Kingdom. The period for disqualification is the period specified in the order.

#### **New section 177I Disqualification period**

115 This new section provides that the disqualification period is such period as the Court Martial considers appropriate, but this is subject to new sections 177J and 177K.

#### **New section 177J Extension of disqualification where custodial sentence or service detention also imposed**

116 This new section extends the disqualification period where a custodial sentence or a sentence of service detention is imposed on the offender. This new section is designed to extend the period of disqualification by a period relating to the period that the offender is expected to spend in custody or detention; known as the appropriate extension period. The appropriate extension period is set out in subsection (5). This provision is designed to ensure that offenders still feel the impact of the disqualification order punishment once they leave custody or detention.

#### **New section 177M Driving disqualification: power to make equivalent provision to Road Traffic Offenders Act 1988**

117 This new section enables the Secretary of State by regulations to make provision in relation to driving disqualification orders which is equivalent to that made by the relevant provision in the Road Traffic Offenders Act 1988.

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*

## Section 16 and Schedule 6: Deprivation and driving disqualification orders: minor and consequential amendments

118 Section 16 introduces Schedule 6 which contains minor and consequential amendments relating to sections 14 and 15.

## Section 17: Removal of requirement to take into account offences in member states

119 Subsections (2) to (4) remove the requirements in sections 238, 263 and 270A of the AFA 2006 for service courts to take account of EU Member State convictions in the same way as UK convictions when deciding, respectively, how serious an offence is, whether to give an unrepresented defendant a custodial sentence and whether to impose a community punishment. These requirements were introduced by the Coroners and Justice Act 2009 in order to implement European Union Framework Decision 2008/675/JHA (on taking into account convictions in other EU member States). The decision to remove these requirements reflects the approach being taken in relation to civilian sentencing law in England and Wales. The result is that EU Member State convictions are treated the same as those with previous convictions imposed in any other country outside of the United Kingdom.

120 Subsection (5) addresses a related issue to do with the instrument which implements this policy in the civilian sentencing context in England and Wales: the Taking Account of Convictions (EU Exit) (Amendment) Regulations 2020 (S.I. 2020/1520). That instrument made consequential changes to the AFA 2006 in light of changes to civilian sentencing law (regulation 6). The powers to make that instrument did not permit those consequential changes to extend beyond the United Kingdom because of the extent of the European Union (Withdrawal) Act 2018. This section therefore ensures that these consequential changes have the usual extent for armed forces provisions (see the description of the extent described below).

## Section 18: Rehabilitation periods: England and Wales

121 Section 18 inserts a new entry in the table in paragraph (b) of subsection (2) of section 5 of the Rehabilitation of Offenders Act 1974. The new entry restores rehabilitation periods to the service punishments of reprimand and severe reprimand by amending the Rehabilitation of Offenders Act 1974. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended that Act for England and Wales and, in doing so, gave those punishments a rehabilitation period of “nil”. The result of this was that these punishments were immediately “spent”, and it meant that they could not be taken into account, for example by promotion boards. The result of this amendment is these punishments will receive a rehabilitation period of 12 months for adults and 6 months for young offenders.

## Section 19: Posthumous pardons in relation to certain abolished service offences

122 Section 19 amends section 164 of the Policing and Crime Act 2017 (“PCA 2017”) to extend posthumous pardons for very old, abolished service offences. Section 164 provides for posthumous pardons for those convicted of, or cautioned for, certain specified abolished sexual offences with the effect that if anyone was convicted of or cautioned for such an abolished offence (and has since died) they may be pardoned for that offence if specified conditions are met. The conditions are that: (a) the other person involved in the conduct that constituted the offence consented to it and was aged 16 or over; and (b) the offence would not still be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory): see section 164(2) of the PCA 2017.

123 Prior to the AFA 2021 section 164 (insofar as it relates to the armed forces) referred only to historical (here meaning pre-1881) service offences of men who served in the Navy but not in respect of those who served in the Army or the Royal Marines (when ashore).



124 Section 19(2), (3) and (4) amends subsections (5) and (8) of section 164 of PCA 2017 and adds a new subsection (10). These changes mean section 164 of that Act also refers to historical service offences under:

- Section 41 of the Army Discipline and Regulation Act 1879;
- Article 2 of Section 20 of the Articles of War of 1749 (offences triable by courts martial outside Great Britain);
- Article 93 of Section 2 of the Articles of War of 1876 (offences not specified in Marine Mutiny Act or Articles of War);
- any provision corresponding to those specified articles, contained in other Articles of War made under the Mutiny Act 1878, the Marine Mutiny Act 1878 or any Act previously in force corresponding to either of those Acts.

### Section 20: Power of British overseas territories to apply AFA 2006 etc

125 This section amends section 357 of the AFA 2006. Section 357 allows a British overseas territory to apply all or any of the provisions of the AFA 2006 (with or without modification) to a locally raised force. In doing so, it enables a British overseas territory force to make use of the United Kingdom's service justice system contained in the AFA 2006. This section clarifies that section 357 of the AFA 2006 may be applied by a British overseas territory even when the section does not extend to that overseas territory. As a result of amendments made by the Armed Forces Acts in 2011 and 2016, the AFA 2006 no longer extends to Gibraltar. This section confirms that Gibraltar legislation can apply the AFA 2006 (with or without modification) to bring the Royal Gibraltar Regiment into the United Kingdom's service justice system despite the extent provisions of the AFA 2006.

### Section 21: Time limit for appeals in respect of war pensions: Scotland and Northern Ireland

126 This section substitutes new subsections (5) and (6) for subsection (5) of section 8 (time limit for appeals) of the Pensions Appeal Tribunals Act 1943. This enables an amendment to align the late appeal rules in Scotland and Northern Ireland, made under the 1943 Act, with those for England and Wales, which are contained in the separate Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (S.I. 2008/2686). At present, subsection (5) provides that a late appeal may only be brought in Scotland and Northern Ireland in certain prescribed circumstances, set out in regulations made under the Act.

127 The new subsection (5) enables the Minister to make provision for cases where an appeal is made within twelve months of the time limit specified in section 8(1) or 8(3), which is currently twelve months.

128 New subsection (6)(a) in section 8 provides that regulations may stipulate that a notice submitted in this extended 12-month period will be treated as if it was in time providing the conditions in the regulations are met. New subsection (6)(b) in section 8 also provides that regulations may confer a power on a Pensions Appeal Tribunal for Scotland or Northern Ireland to allow an appeal to be brought if a notice of appeal is submitted in this extended 12-month period, but the conditions are not met.

### Section 22: Minor amendments

129 This section contains two minor amendments to the AFA 2006.

130 Subsection (2) amends section 61(1) of the AFA 2006 to provide that the time limits contained in sections 55 to 60 of the AFA 2006 (time limits on charging service offences) apply to the Director of Service Prosecutions in relation to a charge under section 121 of the AFA 2006 (power of Director of Service Prosecutions to charge or direct the bringing of charge etc).

131 Subsection (3) amends section 373(3) of the AFA 2006 which deals with the circumstances in which orders, regulations and rules under the AFA 2006 are approved by the affirmative procedure. It provides that a statutory instrument made under the powers listed in that subsection (which are approved by the affirmative procedure) may also be combined with instruments made under other provision. This clarifies that such instruments may also deal with matters that would otherwise be subject to the negative procedure.

### Section 23: Meaning of “AFA 2006”

132 This section provides that the Armed Forces Act 2006 can be abbreviated to the AFA 2006 wherever it is used in the Act.

### Section 24: Commencement and transitional provision

133 There are provisions which have come into force on the passing of the Act, but these are technical provisions relating to the duration of the AFA 2006, combining procedures for statutory instruments made under the AFA 2006, definitions, commencement, extent (including the provision about extent in section 17(5)) and the short title. In addition, the provision on the power of the British overseas territories to apply the AFA 2006 has come into force on Royal Assent. The other provisions come into force either two months after Royal Assent or are brought into force by commencement regulations.

134 Under subsection (4), the Secretary of State may make transitional, transitory or saving provision by regulations in connection with the coming into force of provisions of the Act.

### Section 25: Extent in the United Kingdom

135 This Act extends to the whole of the United Kingdom subject to the following:

136 Paragraph 1 of Schedule 4, so far as it inserts paragraph 1 of Schedule 14A to the AFA 2006 (status of SPCC as a corporation sole), extends to England and Wales and Northern Ireland only.

137 Amendments made by the following have the same extent in the United Kingdom as the provisions to which they relate:

- a. sections 9(1) to (14);
- b. section 10(10) and Schedule 3;
- c. section 17(5);
- d. section 19;
- e. section 21;
- f. paragraphs 1 to 6 of Schedule 2;
- g. paragraphs 2 to 9 of Schedule 4;
- h. paragraphs 1 to 23 and 33 to 52 of Schedule 5;
- i. paragraphs 4 to 6 of Schedule 6.

138 Section 18 extends to England and Wales only.

## Section 26: Extent in the Channel Islands, Isle of Man and British overseas territories

- 139 The changes that this Act makes to the AFA 2006 may be extended to the Channel Islands by Order in Council under section 384(1) of the 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).
- 140 The changes that this Act makes to the AFA 2006 extend directly (i.e. without the need for an Order in Council) to the Isle of Man, and the British overseas territories (excluding Gibraltar), but an Order in Council may be made under section 384(2) of the AFA 2006 to modify the Act in its application to any of those territories.
- 141 The changes that this Act makes to the RFA 1996 may be extended by Order in Council to the Channel Islands or the Isle of Man. If such an Order is made, it can modify those changes (so that the law of the Channel Islands and the Isle of Man is not the same as that of the United Kingdom).

## Section 27: Short title

- 142 This section provides that the Act may be cited as the Armed Forces Act 2021.

## Commencement

143 Sections 1, 17(5), 20, 22(3) and 23 to 27 have come into force on Royal Assent. Sections 19 and 22(2) will come into force two months after Royal Assent. The remaining provisions of the Act will come into force on a day (or days) to be appointed by the Secretary of State in regulations.

## Related documents

144 The following documents are relevant to the Act and can be read at the stated locations:

- Armed Forces Act 2006 <https://www.legislation.gov.uk/ukpga/2006/52>
- Armed Forces Act 2011 <https://www.legislation.gov.uk/ukpga/2011/18>
- Armed Forces Act 2016 <https://www.legislation.gov.uk/ukpga/2016/21>
- The Delegated Powers and Regulatory Reform Committee Memorandum is available at <https://bills.parliament.uk/Publications/42240/Documents/553>

## Annex A - Territorial extent and application in the United Kingdom

Section of the Act	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?
Section 1	Yes	Yes	Yes	Yes
Section 2	Yes	Yes	Yes	Yes
Section 3	Yes	Yes	Yes	Yes
Section 4	Yes	Yes	Yes	Yes
Section 5	Yes	Yes	Yes	Yes
Section 6	Yes	Yes	Yes	Yes
Section 7	Yes	Yes	Yes	Yes
Section 8	Yes	Yes	Yes	Yes
Section 9	Yes	Yes	Yes	Yes
Section 10	Yes	Yes	Yes	Yes
Section 11	Yes	Yes	Yes	Yes
Section 12	Yes	Yes	Yes	Yes
Section 13	Yes	Yes	Yes	Yes
Section 14	Yes	Yes	Yes	Yes
Section 15	Yes	Yes	Yes	Yes
Section 16	Yes	Yes	Yes	Yes
Section 17	Yes	Yes	In part	In part
Section 18	Yes	Yes	No	No
Section 19	Yes	Yes	No	No
Section 20	Yes	Yes	Yes	Yes
Section 21	No	No	Yes	Yes
Section 22	Yes	Yes	Yes	Yes
Section 23	Yes	Yes	Yes	Yes
Section 24	Yes	Yes	Yes	Yes
Section 25	Yes	Yes	Yes	Yes
Section 26	Yes	Yes	Yes	Yes
Section 27	Yes	Yes	Yes	Yes
Schedule 1	Yes	Yes	Yes	Yes
Schedule 2	Yes	Yes	Yes	Yes
Schedule 3	In part	In part	In part	In part
Schedule 4	Yes	Yes	In part	In part
Schedule 5	In part	In part	In part	In part

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*

<b>Section of the Act</b>	<b>Extends to E &amp; W and applies to England?</b>	<b>Extends to E &amp; W and applies to Wales?</b>	<b>Extends and applies to Scotland?</b>	<b>Extends and applies to Northern Ireland?</b>
Schedule 6	Yes	Yes	Yes	Yes

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*

## Annex B - Hansard References

145 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Commons</i>		
Introduction	26 January 2021	<a href="#">Vol. 688 Col. 206</a>
Second Reading	8 February 2021	<a href="#">Vol. 689 Col. 49</a>
Select Committee on the Armed Forces Bill	25 March 2021	<a href="#">Select Committee on the Armed Forces Bill</a> <a href="#">Debate 25 March 2021</a>
	31 March 2021	<a href="#">Debate 31 March 2021</a>
Committee of the whole House	23 June 2021	<a href="#">Vol. 697 Col. 880</a>
Report and Third Reading	13 July 2021	<a href="#">Vol. 699 Col. 231</a>
<i>House of Lords</i>		
Introduction	14 July 2021	<a href="#">Vol. 813 Col. 1942</a>
Second Reading	7 September 2021	<a href="#">Vol. 814 Col. 724</a>
Grand Committee	27 October 2021	<a href="#">Vol. 815 Col. 145GC</a>
	2 November 2021	<a href="#">Vol. 815 Col. 283GC</a>
	8 November 2021	<a href="#">Vol. 815 Col. 405GC</a>
Report	23 November 2021	<a href="#">Vol. 816 Col. 742</a>
Third Reading	29 November 2021	<a href="#">Vol. 816 Col. 1135</a>
Commons Consideration of Lords Amendments	6 December 2021	<a href="#">Vol. 705 Col. 96</a>
Lords Consideration of Commons Reasons	8 December 2021	<a href="#">Vol. 816 Col. 1908</a>
Commons Consideration of Lords message	13 December 2021	<a href="#">Vol. 705 Col. 814</a>
Lords Consideration of Commons Reasons	14 December 2021	<a href="#">Vol. 817 Col. 143</a>
Royal Assent	15 December 2021	<a href="#">House of Commons Vol. 705 Col. 1039</a>
		<a href="#">House of Lords Vol. 817 Col. 255</a>

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*

## Annex C - Progress of Act Table

146 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

<b>Section of the Act</b>	<a href="#">Bill as Introduced in the Commons</a>	<a href="#">Bill as amended in Committee in the Commons</a>	<a href="#">Bill as introduced in the Lords</a>	<a href="#">Bill as amended in Committee in the Lords</a>	<a href="#">Bill as amended on Report in the Lords</a>
Section 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1
Section 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2
Section 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3
Section 4	Clause 4	Clause 4	Clause 4	Clause 4	Clause 4
Section 5	Clause 5	Clause 5	Clause 5	Clause 5	Clause 5
Section 6	Clause 6	Clause 6	Clause 6	Clause 6	Clause 6
Section 7	Clause 7	Clause 7	Clause 7	Clause 7	Clause 7
Section 8	Clause 8	Clause 8	Clause 8	Clause 8	Clause 8
Section 9	Clause 9	Clause 9	Clause 9	Clause 9	Clause 9
Section 10	Clause 10	Clause 10	Clause 10	Clause 10	Clause 10
Section 11	Clause 11	Clause 11	Clause 11	Clause 11	Clause 11
Section 12				Clause 12	Clause 12
Section 13	Clause 12	Clause 12	Clause 12	Clause 13	Clause 13
Section 14	Clause 13	Clause 13	Clause 13	Clause 14	Clause 14
Section 15	Clause 14	Clause 14	Clause 14	Clause 15	Clause 15
Section 16	Clause 15	Clause 15	Clause 15	Clause 16	Clause 16
Section 17	Clause 16	Clause 16	Clause 16	Clause 17	Clause 17
Section 18	Clause 17	Clause 17	Clause 17	Clause 18	Clause 18
Section 19	Clause 18	Clause 18	Clause 18	Clause 19	Clause 19
Section 20	Clause 19	Clause 19	Clause 19	Clause 20	Clause 20
Section 21	Clause 20	Clause 20	Clause 20	Clause 21	Clause 21
Section 22	Clause 21	Clause 21	Clause 21	Clause 22	Clause 22
Section 23	Clause 22	Clause 22	Clause 22	Clause 23	Clause 23
Section 24	Clause 23	Clause 23	Clause 23	Clause 24	Clause 24
Section 25	Clause 24	Clause 24	Clause 24	Clause 25	Clause 25
Section 26	Clause 25	Clause 25	Clause 25	Clause 26	Clause 26
Section 27	Clause 26	Clause 26	Clause 26	Clause 27	Clause 27
Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1
Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2
Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3
Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4
Schedule 5				Schedule 5	Schedule 5

*These Explanatory Notes relate to the Armed Forces Act 2021 which received Royal Assent on 15 December 2021 (c. 35)*



<b>Section of the Act</b>	<a href="#">Bill as Introduced in the Commons</a>	<a href="#">Bill as amended in Committee in the Commons</a>	<a href="#">Bill as introduced in the Lords</a>	<a href="#">Bill as amended in Committee in the Lords</a>	<a href="#">Bill as amended on Report in the Lords</a>
Schedule 6	Schedule 5	Schedule 5	Schedule 5	Schedule 6	Schedule 6

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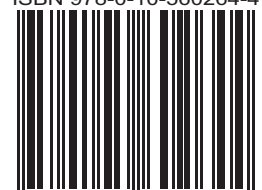
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