



## BRIEFING PAPER

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# Armed Forces Bill 2019 - 2021

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2. Main provisions of the Bill



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## Summary

The [Armed Forces Bill](#) (Bill 244) was introduced in the House of Commons on 26 January 2021. The Bill will have its Second Reading on 8 February 2021.

The primary purpose of the Bill is to renew the *Armed Forces Act 2006* (itself renewed by the Armed Forces Acts of 2011 and 2016). The *Armed Forces Act 2006* provides the legal basis for the existence of the Armed Forces as disciplined bodies. Without renewal, the 2006 Act will expire at the end of 2021.

The Bill amends the service justice system, further incorporates the Armed Forces Covenant into law and creates a new Service Police Complaints Commissioner.

### The purpose of the Bill

Parliamentary consent for the raising and keeping of a Standing Army during peacetime dates back to the 1688 Bill of Rights. In modern times that consent is given through the presentation of an Armed Forces Bill every five years.

The purpose of the *Armed Forces Act 2006* is to provide the legal basis for the armed forces and the system of military law which exists in the UK. It sets out the Service justice system that underpins the maintenance of discipline throughout the chain of command. Without the Act, commanding officers would have no powers of punishment for either disciplinary or criminal misconduct – there would be no means to enforce personnel to obey orders.

In the past the Act has also been used to introduce any new measures relating to the armed forces that fall outside the Act's traditional remit of service discipline.

### What does the Bill do?

#### **Extends the Armed Forces Act 2006**

The Bill makes provision to continue the 2006 Act for a further period of five years, ending no later than 2026.

The 2006 Act will expire on 11 May 2021. The Government has laid a draft Order in Council to extend the 2006 Act until 31 December 2021. The Motion to approve the draft [Armed Forces Act \(Continuation\) Order 2021](#) is scheduled to be taken immediately following Second Reading of the Armed Forces Bill on 8 February 2021. The 2006 Act prohibits any further extension beyond the end of December 2021.

#### **Amends the service justice system**

The Bill amends the service justice system.

The service justice system provides a legal framework that ensures Service personnel are subject to a single disciplinary code that applies wherever they are serving. An alleged offence may be investigated and dealt with summarily, by a Commanding Officer, or by one of the

Service Police forces (each force has their own) and prosecuted by the Service Prosecuting Authority (headed by the Director of Service Prosecutions) at Court Martial, which is equivalent to the Crown Court. These are presided over by Judge Advocates, led by the Judge Advocate General.

The Government commissioned an independent review of the service justice system in 2017 to inform the Bill. The Bill enacts several of the recommendations of the review (led by HH Shaun Lyons), particularly in regard to Court Martial and related service courts.

However, the Bill does not bring in one of the review's main recommendations, on jurisdiction.

Currently when an individual subject to service law commits an offence in the United Kingdom, they may be tried either in the service justice system or the civilian criminal justice system. Some organisations, such as Liberty and the Centre for Military Justice, believe jurisdiction for the most serious offences, such as rape, manslaughter and murder, should lie solely with the criminal justice system. Lyons came to the same conclusion in his review and suggested such cases should only be prosecuted at Court Martial with the consent of the Attorney General.

The Defence Secretary rejected this recommendation and the Bill reflects his intent to clarify the guidance on jurisdiction.

The Bill requires the Director of Service Prosecutions to agree new Protocols with their counterparts in Scotland, Wales and Northern Ireland to clarify matters of jurisdiction.

### **A new Service Police Complaints Commissioner**

The Bill creates a new independent body to oversee complaints about the Service Police. The Ministry of Defence says the Service Police Complaints Commissioner will mirror the role of the Independent Office of Police Conduct in providing independent oversight of the Service Police forces.

### **A legal duty to have due regard to the principles of the Armed Forces Covenant**

The *Armed Forces Act 2011* enshrined the principles of the Covenant in law. These are:

- (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.<sup>1</sup>

The Covenant does not create legally enforceable rights for service or former service personnel.

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<sup>1</sup> [Armed Forces Act 2006 section 343A\(3\)](#)

The Government pledged to further incorporate the Covenant into law in the [Queen's Speech 2019](#). The Bill requires specified public bodies to have due regard to the principles of the Covenant in the areas of housing, education and healthcare (these areas are already identified in the 2006 Act).

### **Time limit on Service complaint appeals**

The Bill reduces the amount of time available for an individual to appeal a service complaint decision from six weeks to two weeks. The Government says this is to reduce the number of speculative appeals and make the complaints system more efficient.

### **Other measures**

- The Bill allows for flexible working for Reserve personnel, allowing Reservists the opportunity to serve on a full- or part-time basis
- The Bill makes changes to sentencing and rehabilitation
- The Bill extends posthumous pardons for those convicted of abolished service offences
- The Bill aligns the time limits for war pension appeals in Scotland and Northern Ireland with those in England and Wales
- The *Armed Forces Act 2006* does not apply to Gibraltar. The Bill allows for a British overseas territory (i.e. Gibraltar) to bring the Royal Gibraltar Regiment into the UK's service justice system.

### **Parliamentary procedure: An Armed Forces Bill Select Committee**

Unlike the majority of Government Bills, the *Armed Forces Bill* has traditionally been committed to a specially convened ad hoc Select Committee after Second reading, which sits only for the duration of the Bill. The committee is able to take evidence, make visits, conduct line-by-line scrutiny, amend the Bill and submit a Special Report on their findings.

### **Reaction**

John Healey, the Shadow Defence Secretary, has described the 2021 Bill as a "missed opportunity":

It does not put the Armed Forces Covenant properly into law to ensure Forces personnel and veterans suffer no disadvantage in access to services, nor will it put right the long-term failings in the military justice system.<sup>2</sup>**How does the Bill apply to UK nations?**

The Bill extends to the whole of the United Kingdom with some exceptions. Some parts of the Bill (predominantly relating to Jurisdiction and the Armed Forces Covenant) apply in policy areas that are devolved matters. These are discussed in the paper and summarised in section 2.11.

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<sup>2</sup> ["John Healey reaction to publication of the Armed Forces Bill"](#), Labour party press release, 26 January 2021

### **Box 1: Related Library papers**

[The review of the Service Justice System](#) CBP9118, 20 January 2021

This paper explores the context for the review and discusses some of the review's main recommendations, relating to: jurisdiction, how sexual offences and domestic abuse are dealt with in the system, collection and recording of data, Court Martial composition and the support given to victims. A separate paper, [the Service Police review](#) (CBP8953, June 2020) discusses the aspects of the review that focus on the service police.

[The Armed Forces Covenant and status in law](#), CBP9072, 8 December 2020

The Government said it will use the Armed Forces Bill to further incorporate the Armed Forces Covenant into law. This paper explains what the Covenant is, its current status in law and the Government's proposals.

[Support for UK Veterans](#), CBP7693, 5 November 2020

This paper outlines the support available to Armed Forces Veterans in Great Britain and Northern Ireland. Of particular relevance to the Armed Forces Bill is the sections which discuss current access to housing and healthcare.

[Police complaints and discipline](#), SN02056, 4 September 2020. This paper explains how civilian police forces and the Independent Office of Police Conduct (IOPC) operates.

[Previous Armed Forces Bills](#): Library papers on previous Armed Forces Acts are available on the Library website.

# 1. Introduction

## 1.1 About the Bill

The [Armed Forces Bill](#) (Bill 244) was introduced in the House of Commons on 26 January 2021. The Bill will have its Second Reading on 8 February 2021. The Government published [Explanatory Notes](#) to the Bill.

## 1.2 Need for an Armed Forces Act

Under the *1688 Bill of Rights* the raising and keeping of a Standing Army during peacetime is against the law, unless it is with the consent of Parliament.<sup>3</sup>

Since the 1950s that requirement for Parliamentary consent is achieved through the presentation of an Armed Forces Bill every five years and an annual Order in Council, approved by affirmative resolution in both Houses, confirming the extension of the Act for a period of one year in each of the intervening years.<sup>4</sup> Successive Orders in Council may not provide for the continuation of the legislation beyond the five-year timeframe, when new primary legislation must then be presented. A former Defence Minister described the Bill as “the mechanism whereby parliamentary control over our armed forces is exercised”.<sup>5</sup>

The purpose of the *Armed Forces Act* is to provide the legal basis for the armed forces and the system of military law which exists in the UK. It sets out the service justice system that underpins the maintenance of discipline throughout the chain of command. Members of the armed forces have no contract of employment. Instead, they owe a duty of allegiance to Her Majesty, and that obligation is described by the Ministry of Defence as essentially a duty to obey lawful orders. Without the Act, commanding officers would have no powers of punishment for either disciplinary or criminal misconduct – there would be no means to enforce personnel to obey orders.<sup>6</sup>

The [Armed Forces Act 2006](#) completely overhauled the legislation relating to military and Service discipline. Before this Act, each Service had its own *Service Discipline Act*<sup>7</sup> dating from the 1950s which were continued by successive Armed Forces Acts. The *Armed Forces Act 2006* (AFA 2006) was a watershed because it consolidated and modernised all the previous *Service Discipline Acts* and replaced them with a single system of Service law applicable to all Service personnel wherever they

The *Armed Forces Act 2006* was a watershed because it consolidated and modernised the three previous *Service Discipline Acts*.

The *Armed Forces Bill 2021* will amend the *Armed Forces Act 2006*.

<sup>3</sup> Background on the *Bill of Rights*, and its provisions, is available in Library briefing, SN/PC/0293, [The Bill of Rights 1689](#), 5 October 2009

<sup>4</sup> The five yearly requirement dates back to the 1955 the Army and Air Force Acts (and, since 1971, the Naval Discipline Act) which were subject to renewal by primary legislation every five years and, in each of the intervening years, by an Order in Council approved in draft by both Houses of Parliament. All three Acts were replaced by the *Armed Forces Act 2006*. See the Act's [explanatory notes](#). Further background is also available in the [Special Report of the Armed Forces Bill Select Committee 2001](#). See also [HC Deb 12 November 1954 c1555](#)

<sup>5</sup> [HC Deb 10 January 2011 c47](#)

<sup>6</sup> [HL Deb 7 September 2015 cGC187](#)

<sup>7</sup> The *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*.

are serving in the world. It also brought the military disciplinary system into line, as far as practicable, with provisions made under civil legislation such as the *Criminal Justice Act 2003*.<sup>8</sup> The *Service Discipline Acts* were subsequently repealed when the 2006 Act was brought fully into force on 31 October 2009.<sup>9</sup>

Subsequent Acts have amended and extended the duration of the 2006 Act. *The Armed Forces Bill 2021* will therefore amend the 2006 Act.

The Ministry of Defence has previously used the Act to introduce measures related to the armed forces that fall outside the bill's traditional remit of command, discipline and justice. The 2016 Act, for example, gave MOD fire-fighters statutory powers to act in an emergency to protect life and property.

Following the 2006 Act's entry into force a new [manual of service law](#) (JSP 830) was produced to provide guidance and supplementary information to Armed Forces personnel on the new system of Service law.

### 1.3 Duration of the *Armed Forces Act 2006*

Section 382 of the 2006 Act provides that the Act will expire at the end of one year beginning with the day on which the *Armed Forces Act 2016* was passed, unless continued in force by Order in Council in accordance with that section.

The 2016 Act received Royal Assent on 12 May 2016. Subsequent continuation orders have provided for the continuation of the 2006 Act for a period of 12 months.<sup>10</sup> The [Armed Forces Act \(Continuation\) Order 2020](#) (SI 2010/396) provides for the 2006 Act to expire at the end of **11th May 2021**. Section 3(3) of the 2006 Act states that such an Order may not provide for the continuation of this Act beyond the end of the year 2021.

The Government has laid a draft Order in Council to extend the 2006 Act **until 31 December 2021**. The Motion to approve the draft [Armed Forces Act \(Continuation\) Order 2021](#) is scheduled to be taken immediately following Second Reading of the Armed Forces Bill on 8 February 2021. If the draft Order is approved by both Houses, the Armed Forces Bill has until the end of 2021 to receive Royal Assent.

<sup>8</sup> Further information on the provisions of that bill is available in Library briefings RP05/86, [The Armed Forces Bill](#), December 2005; SN/IA/4025, *Amendments to the Armed Forces Bill*; SN/IA/4180, *Armed Forces Bill: Lords Amendments in Committee and Report Stage* and SN/IA/4182, *Armed Forces Bill: Lords Amendments at Third Reading*.

<sup>9</sup> The Act took three years to bring fully into force due to the extensive nature of the secondary legislation associated with that Act. Further information on the secondary legislation is available in Library briefings SN/IA/4342, *Secondary Legislation of the Armed Forces Act 2006* and SN/IA/5095, *Secondary Legislation of the Armed Forces Act 2006: An Update*.

<sup>10</sup> The Armed Forces Act (Continuation) Order 2017 ([S.I. 2017/569](#)), the Armed Forces Act (Continuation) Order 2018 ([S.I. 2018/519](#)) and the Armed Forces Act (Continuation) Order 2019 ([S.I. 2019/561](#))



## 1.4 If the Bill is not passed?

Successive Defence Ministers have explained the need for the Bill and what might happen if the Bill is not renewed. Johnny Mercer, the Minister for Defence People and Veterans, provided this explanation to members of the delegated legislation committee in March 2020, regarding the draft continuation order:

If the 2006 Act expires, the legislation that governs the armed forces and the provision necessary for their maintenance as disciplined bodies would cease to exist. That would have serious repercussions, as the 2006 Act sets out nearly all the provisions for the existence of a system for the armed forces of command, justice and, above all, discipline. It creates offences and provides for the investigation of alleged offences, the arrest, holding in custody and charging of individuals accused of committing an offence, and for them to be dealt with summarily by their commanding officer or tried in the court martial. Offences under the 2006 Act include any criminal offence under the law of England and Wales, and those that are peculiar to service, such as misconduct towards a superior officer and disobedience of lawful commands.

If the 2006 Act were to expire, the duty of members of the armed forces to obey lawful commands, and the powers and procedures under which that duty is enforced, would no longer have effect. Commanding officers and the court martial would have no powers of punishment for failure to obey a lawful command or other disciplinary or criminal misconduct. Members of the armed forces would still owe allegiance to Her Majesty, but Parliament would have removed the power of enforcement. After all, service personnel do not have contracts of employment, and so have no duties as employees. Their obligation is essentially a duty to obey lawful commands. The 2006 Act also provides for other important matters for the armed forces, such as their enlistment, pay and redress of complaints.

The continuation of the 2006 Act is essential for the maintenance of discipline wherever service personnel are serving in the world.<sup>11</sup>

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<sup>11</sup> [Delegated Legislation Committee](#), 9 March 2020

### Box 2: Parliamentary procedure

Unlike the majority of Government Bills, the *Armed Forces Bill* has traditionally been committed to a specially convened ad hoc Select Committee after Second reading, which sits only for the duration of the Bill.<sup>12</sup>

The Committee is able to:

- publicly scrutinise the clauses of the Bill
- make amendments to the Bill
- take oral and written evidence
- make visits, both in the UK and abroad
- make a Special Report to the House on its findings and recommendations.

Once the Committee is finished the Bill is re-committed to a Committee of the whole House.

#### Evidence sessions and visits

In 2006 the [Armed Forces Bill Select Committee](#) held seven oral evidence sessions and six sessions on line by line scrutiny of the Bill. The Committee made several visits to meet personnel, including visits overseas to Cyprus and Iraq. In 2011, the Committee held three oral evidence sessions, followed by four sessions dedicated to formal consideration of the Bill. They also made several visits to military centres in the UK.

#### Special Report of the Select Committee

In 2011 the [Special Report of the Select Committee](#) debated the Armed Forces Covenant at length, predominantly over whether the Government's proposals went far enough in enshrining the Covenant in law. The Government later accepted the Committee's recommendation to use the term Armed Forces Covenant rather than Tri-Service or Military Covenant. Library paper [Armed Forces Bill: Consideration in Select Committee](#) (SN05899, 9 June 2011) discusses the debate over the Covenant in greater detail.

#### Government and Committee endorse current convention

In 2011 the then Government also agreed with the Committee that Select Committee scrutiny should continue to be the convention for the Armed Forces Bill "where the content of the Bill is significant enough to warrant it".<sup>13</sup> When welcoming this recommendation, Andrew Robathan, the then Parliamentary Under-Secretary of State, explained:

I believe that the appointment of a Select Committee which was able to take evidence and conduct visits allowed Committee members an opportunity to visit armed forces units, to hear from members of the armed forces and their families, and to develop a better understanding of service life. These experiences helped Committee members in their role of scrutinising the legislation.<sup>14</sup>

The Select Committee for the Armed Forces Act 2016 held two [oral evidence sessions](#) and unusually, did not produce a report.

## 1.5 Review of the service justice system

The purpose of the *Armed Forces Act* is to provide the legal basis for the armed forces and the system of military or service law which exists in the UK.

In 2017 the Ministry of Defence commissioned a review of the service justice system (SJS) in preparation for the Armed Forces Bill.

The review was carried out by His Honour Shaun Lyons, a retired senior Crown Court Judge, who submitted his review in two parts in 2018 and

<sup>12</sup> Discussion of the origins of the Select Committee can be found in the debate on the Reports of the first Committee on the Army Act and the Air Force Act, [12 November 1954 c1545-1631](#)

<sup>13</sup> Special Report of the Select Committee, 10 March 2011, HC 779 2010-11, para 3

<sup>14</sup> [HC Deb 19 May 2011 c24WS](#).

2019. The MOD published all the review documents in February 2020: [service justice system review](#).

The review consists of two parts:

- Part one examined the need for the SJS and provides an overview of the system. It also examined in a separate document whether the service police match the requirements of the SJS (led by Professor Sir John Murphy<sup>15</sup>) and conducted a process audit of domestic abuse and serious sexual offences investigated by the Service police (led by retired police officer Mark Guinness). Submitted to the MOD in March 2018.
- Part two took further some earlier aspects of the review and recommended ways in which the system can be improved. Submitted to the MOD in March 2019.

Many of the review's recommendations do not require primary legislation.

Some of Lyons's recommendations are included in the Bill. These include jurisdiction of offences committed in the UK, the constitution of the Court Martial, circuit judges sitting at Court Martial, provision to permit the correction of mistakes in sentencing at summary hearing and independent oversight of the service police.

When the review was published the Defence Secretary rejected Lyons' recommendation that the most serious offences of murder, manslaughter and rape should not be prosecuted at Court Martial (without the Attorney General's consent) when committed in the UK. Instead, the Bill reflects the Defence Secretary's preference to clarify jurisdiction between the different investigatory and prosecution authorities.

In October 2020, during the course of the Overseas Operations (Service Personnel and Veterans) Bill, the Government announced a new, judge-led review of how investigations are raised and investigated when they occur overseas on operations. The MOD explicitly said it will "build upon and not reopen" the recommendations of the Service Justice System review. This review is expected to be finished in summer 2021.

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<sup>15</sup> Professor Sir John Murphy of Liverpool John Moores University (Centre for Advanced Policing Studies).

## 2. Main provisions of the Bill

The Bill renews the Armed Forces Act 2006 (clause 1) and contains provisions about:

- Service courts, summary hearings and jurisdiction
- The Armed Forces Covenant
- Flexible working for Reserve forces
- A new Service Police Complaints Commissioner
- Service complaint appeals
- Sentencing and rehabilitation
- Posthumous pardons
- Application of AFA 2006 in British overseas territories
- Pension Appeal Tribunals for Scotland and Northern Ireland

This section discusses each clause in the order in which they appear in the Bill.

### 2.1 Renewal and duration of the *Armed Forces Act 2006*

**Clause 1** of the Bill makes provision to continue the 2006 Act for a further period of five years, ending no later than 2026. The process of obtaining Orders in Council, by affirmative resolution in both Houses of Parliament, for each of the intervening years is also retained.

### 2.2 Service justice system: courts and jurisdiction

**Clauses 2 to 7** concern the constitution of the Court Martial, the power to rectify mistakes at Summary hearings, the Summary Appeal Court and the Service Civilian Court, and concurrent jurisdiction.

#### Constitution of the Court Martial

**Clause 2** of the Bill refers to Schedule 1 which contains provisions about the constitution of the Court Martial. The schedule makes changes to the number of lay members in Court Martial proceedings, voting and eligibility to be a lay member.

#### Background

Several high-profile figures have raised concerns about Court Martial in the last few years. In 2013 Judge Jeff Blackett, then Judge Advocate General (he [retired](#) in November 2020), called for the majority system to be amended to bring it into line with the Crown Court.<sup>16</sup> In 2017 Lord Morris of Aberavon, a former Attorney General and Defence Minister,

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<sup>16</sup> "[Military judge raises court martial concerns](#)", BBC News, 25 June 2013. A [transcript of the programme](#) is available on a Navy-Net forum. The law on Crown Court majority verdicts is set out in s17 of the *Juries Act 1974*.

called for the (then recently announced) review of the service justice system to consider the majority verdict.<sup>17</sup>

Liberty, the human rights organisation, similarly called for reform of the Court Martial process in their report on military justice in 2019.<sup>18</sup> Liberty made several recommendations, including: that Boards at Court Martial are permitted to include Other Ranks; that the number of Board members be increased and unanimous verdicts be requested in the first instance; and for the role of President of the Board be abolished and replaced with a system akin to that of a jury foreman in the civilian jury system.<sup>19</sup>

Currently Courts Martial sit with Boards (juries) of between three and seven lay members, depending on the gravity of the case.<sup>20</sup> The service justice system review discussed this and found “there is widespread agreement that five-member boards should increase in size to six”, with the power to reach qualified majority verdicts in which at least five members have agreed. The review also found tri-service agreement for three-member boards for lower level work, and that the sentencing level should be the point of differentiation. The review recommends the point of differentiation be set at the level of more than two years:

This would place for trial before a six-member Board those offences listed in Schedule 2 (as before) and also those offences for which, upon conviction, a sentence of imprisonment or detention of more than two years could be passed.<sup>21</sup>

The review suggested that three-member boards would be expected to deal with the great majority of service disciplinary offences. The review also recommended eligibility to sit on boards be extended to OR7 ranks.<sup>22</sup> The review acknowledged concerns from the Royal Navy about the relative youth of their OR7 ranks but said this could be mitigated by regulations setting out eligibility to sit on a Board for these ranks.

Library paper [The review of the Service Justice System](#) (SJS) discusses this topic in more detail.

### **Clause 2 and Schedule 1**

**Schedule 1** bring these recommendations into effect by amending section 155 of the 2006 Act.

The schedule amends section 155, subsection (1)(b) to allow three or six member boards. If a Court Martial is constituted with six lay members, Court Martial rules may provide for the proceedings to continue with only five lay members on a direction from a judge advocate.

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<sup>17</sup> [HL 23 November 2017 c382385](#)

<sup>18</sup> [Military Justice: Second-rate justice](#), Liberty, 2019

<sup>19</sup> “[Military Justice – second rate justice](#)”, Liberty, January 2019

<sup>20</sup> Cases involving serving personnel are made up of serving military personnel. Trials involving civilian defendants usually require a civilian board.

<sup>21</sup> SJS review, part 2, para 164

<sup>22</sup> OR7 rank is defined in the Bill as is chief petty officer (Royal Navy), staff corporal, staff sergeant (Army), colour sergeant (Royal Marines), flight sergeant, chief

Schedule 1 allows for OR7 ranks to sit on a Board, as recommended by the SJS review.<sup>23</sup> It explicitly excludes acting OR7 ranks from membership of the court, or those of that rank who are members of the Military Court Service, the Service Prosecuting Authority or a service police force, chaplains or lawyers.

Schedule 1 also sets out the requirements for decisions of Court Martial, depending on the number of lay (Board) members: two must agree in a Board of three; four must agree in a Board of five and five must agree in a Board of six. Previously, a simple majority was accepted (so three at a Board of five).

## Nomination of Circuit judge to sit as Judge Advocate

**Clause 3** acts upon the SJS review's recommendation to allow a Circuit judge to sit as a Judge Advocate at Court Martial. Clause 3 amends [section 362\(c\)](#) of the 2006 Act.

Currently a Judge Advocate is either the Judge Advocate General or assistants to the JAG. Section 362 enables JAG to request a puisne judge (High Court Judge) be nominated to sit as a judge advocate. The SJS review suggested that the JAG be given the power to call-in help, in the form of Circuit Judges, to ensure the JAG corps can meet its commitments in the event of sickness, accident or other such incidents.<sup>24</sup>

## Power to rectify mistakes

**Clauses 4, 5 and 6** amend the 2006 Act in relation to the Summary Hearing, the Summary Appeal Court and the Service Civilian Court respectively to give them the power 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 officers decision to do so.

This acts upon a recommendation by Lyons in part 2 of his review (a "slip rule") and reflects comparable powers in the civilian criminal justice system in England and Wales at the Crown Court and magistrates' court. The Armed Forces Bill Select Committee discussed a 'slip rule' in their report on the 2005-6 Bill.<sup>25</sup>

## Concurrent jurisdiction and a new Protocol

**Clause 7** inserts into chapter 3 of the 2006 Act a new section entitled "guidance on exercise of criminal jurisdiction". This requires the Director of Service Prosecutions and each of the heads of the civilian prosecution services across the UK to agree protocols on the handling of cases where there is concurrent jurisdiction.

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<sup>23</sup> OR7 rank is defined in the Bill as is chief petty officer (Royal Navy), staff corporal, staff sergeant (Army), colour sergeant (Royal Marines), flight sergeant, chief technician in the RAF. A table of comparative ranks can be found in Annex B of the [explanatory notes](#) for the Armed Forces Act 2006.

<sup>24</sup> Recommendation seven of SJS review, part one.

<sup>25</sup> [Select Committee on the Armed Forces Bill](#), 9 May 2006, HC 828-I 2005-06, para 104-105

## Background

Concurrent jurisdiction is when either the service justice or the civilian criminal justice system has jurisdiction to try criminal offences committed by service personnel in the UK.<sup>26</sup>

In the service justice system review, Lyons recommended that the most serious offences (murder, manslaughter and rape) should not be prosecuted at Court Martial when these offences are committed in the UK, except where the consent of the Attorney General is given. This would mean jurisdiction for these offences, when committed in the UK, would lie with the civilian criminal justice system, unless the Attorney General gave consent for a case to be prosecuted in the service justice system.

The Defence Secretary rejected this recommendation when the MOD published the review in February 2020. However, after being pressed by three women who began legal action on this point<sup>27</sup>, the Defence Secretary said in June 2020 he would give “fresh consideration” to Lyons’ recommendation.

In November 2020 the Defence Secretary informed Parliament that, upon further review, he had decided to “maintain jurisdictional concurrency when dealing with cases of murder, manslaughter and rape when committed by Service personnel in the UK”. He added “my intent is to seek views on what improvements can be made to the protocols which guide those decisions and which have developed since Parliament last expressed its view on this subject”.<sup>28</sup> Commons Library paper [A review of the service justice system](#) discusses this in more depth (section 3.1).

## New Protocol

**Clause 7** inserts new chapter 3A into part 13 of the 2006 Act. New sections 320A, B and C outlines the requirement for guidance on the exercise of criminal jurisdiction in England and Wales, Scotland and Northern Ireland respectively.

New section 320A requires the Director of Service Prosecutions and the Director of Public Prosecutions to agree a protocol “regarding the exercise of concurrent jurisdiction of alleged conduct” of a person subject to service law which occurs when the person is in England or Wales and is punishable by the law of England and Wales. The Bill defines punishable in this section as having the same meaning as in section 42 (criminal conduct) of the 2006 Act.<sup>29</sup>

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<sup>26</sup> Armed Forces Bill 2021 explanatory notes para 51

<sup>27</sup> “[Judicial review brought by three rape survivors](#)”, Centre for Military Justice, accessed 26 January 2021

<sup>28</sup> HCWS577, 12 November 2020

<sup>29</sup> Section 42 (Criminal Conduct) of the Armed Forces Act provides that:

(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that- (a) is punishable by the law of England and Wales; or (b) if done in England or Wales, would be so punishable.

New section 320A(3)(a) states the protocol:

Must give guidance as to general principles which are to be taken into account by a relevant prosecutor when considering in which jurisdiction (service or civilian) proceedings should be brought.

It also says the protocol may give guidance as to the process for making decisions, for example the circumstances in which consultation may be needed between Director of Service Prosecutions (DSP), the Director of Public Prosecutions (DPP) or a Crown Prosecutor. The protocol may give guidance to as any other issue the Directors think appropriate.

Subsection 5 states if there is disagreement between the DSP and DPP over jurisdiction of a case, the DPP will make the final decision on the appropriate jurisdiction (i.e. the service or the criminal justice system).

Subsection 7 says the DSP and DPP must consult the Secretary of State<sup>30</sup>, the Attorney General, the National Police Chiefs' Council and any other person the Directors think appropriate before agreeing the protocol or revisions to it.

Subsection 11 clarifies that new section 320A applies in relation to a relevant prosecutor only where that prosecutor is aware that the Court Martial has (or may have) jurisdiction to try the person in respect of the alleged conduct.

Section 320B makes similar provision for Scotland. This requires the Director of Service Prosecutions and the Lord Advocate to agree a protocol regarding the exercise of cases in which the conduct of a person subject to service law occurs when the person is in Scotland and constitutes an offence under the law of Scotland. This section provides for the Lord Advocate to decide on the application of the guidance in the event of an issue between the DSP and the Lord Advocate. They must consult the Secretary of State and the chief constable of Police Scotland before agreeing to the protocol or revisions to it.

Section 320C makes similar provision for Northern Ireland, requiring the DSP and the Director of Public Prosecutions for Northern Ireland to agree a protocol.

## 2.3 The Armed Forces Covenant

**Clause 8** makes further provisions about the Armed Forces Covenant. Specifically, it places a duty on specified persons or bodies (e.g. local authorities) to have due regard to the principles of the Covenant.

### Background

The Armed Forces Covenant is a statement of the moral obligation which exists between the nation, the Government and the Armed Forces. It was published in May 2011 and its core principles were enshrined in law, for the first time, in the *Armed Forces Act 2011*. The Covenant does not create legally enforceable rights for service or former service personnel.

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<sup>30</sup> The Bill does not identify which Secretary of State it is referring to.



The Act places a statutory requirement on the Secretary of State for Defence to provide an annual Armed Forces Covenant report to Parliament each year. In preparing that report, the Defence Secretary must have particular regard 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.<sup>31</sup>

These are the principles of the Covenant.

The extent to which the Armed Forces Bill, as introduced in 2010, fulfilled the then Prime Minister's pledge to enshrine the Military Covenant in law was discussed at length during that Bill's progress. A summary of these discussions can be found in Commons Library paper [The Armed Forces Covenant and status in law](#).

In the Queen's Speech 2019 the Government said the Armed Forces Covenant will be "[further incorporated into law](#)". A senior MOD official later explained the Government's intention is to make it a legal duty for specified bodies to have due regard to the principles of the Covenant:

The legislation will have most effect by making it a legal duty for specified public bodies, including local authorities, to have due regard to the principles of the Covenant, and by including this commitment in the Armed Forces Bill to ensure it carries enough weight and stature as part of the Armed Forces Act. The duty will focus on healthcare, housing, and education – the Covenant policy areas encompassed in the Armed Forces Act 2006 – and the areas most likely to affect serving and former members of the Armed Forces and their families.<sup>32</sup>

### Concerns raised prior to the Bill's publication

Given the lack of detailed information about the Government's proposals, there was little commentary or reaction prior to the Bill's publication.

Charles Byrne, the Director General of the Royal British Legion, and General Sir John McColl, chairman of Cobseo, the Confederation of Service Charities, briefly discussed the Government's proposals when giving oral evidence to the committee on the *Overseas Operations (Service Personnel and Veterans) Bill 2020*. Both indicated they had been consulted by the MOD. Charles Byrne told the Committee the Legion had championed bringing the Covenant into law and is supportive of the general principle of strengthening the Covenant.<sup>33</sup> In its 2019

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<sup>31</sup> [Armed Forces Act 2006 section 343A\(3\)](#)

<sup>32</sup> Letter from Director of Armed Forces People Policy to the Chief Executives and Council Leaders, 30 September 2020, deposited in the Library of the House, [PQ110073](#), 5 November 2020

<sup>33</sup> [Overseas Operations \(Service Personnel and Veterans\) Bill \(Third sitting\)](#), 8 October 2020, c88

response to the Government's consultation on its Strategy for Veterans, the Legion said:

The option of giving statutory legal force to the Covenant principles should be on the table. We would suggest the tenth anniversary in 2021 of the Covenant's inclusion in the Armed Forces Act would be an appropriate deadline by which to consider whether firmer measures are required.<sup>34</sup>

In evidence to the committee on the *Overseas Operations (Service Personnel and Veterans) Bill 2020* General Sir John McColl discussed some of the issues Cobseo has raised during consultations with the MOD. He said he was concerned that initially there was no mention of special consideration for those who had suffered bereavement or very serious injury, but said he believed that had now been included. He also expressed concern that it was limited to three specific areas, and that the focus is on local rather than central Government.<sup>35</sup> Cobseo expanded on their concerns in their observations to the Covenant's annual report 2020, published on 7 December:

The Government's aim to consolidate the commitments set out in the Covenant is laudable; however, we are concerned that the proposed way forward, and unintended consequences, could combine to undermine their good intentions. In particular, Cobseo Members would want to ensure that the scope of the proposed legislation reflected the three principles at the heart of the Armed Forces Covenant and was sufficient to ensure that the many areas of potential disadvantage will be addressed. There is also a broader concern that if a legal standard is set that is below existing voluntary commitments, this could create the perception of a two-tier Covenant and, in practice, lead to services being reduced to what is mandated by law. A Joint MOD/Cobseo Working Group was established to address concerns, and will continue to be a means of tracking and influencing developments as the consultation process proceeds.<sup>36</sup>

The three Service Families Federations also touched on the proposals in their observations in the Covenant's annual report 2020. The Federations suggested the proposals "will have a great impact" both upon Service families and those who will be charged with delivering the changes that are implemented.<sup>37</sup>

The Labour party has indicated its support to further enshrine the armed forces covenant into law. During the progress of the Armed Forces Bill in 2011, when the extent to which the Bill enshrined the Covenant in law was discussed at length, then Shadow Defence Ministers Gemma Doyle and Kevan Jones tabled an amendment that would make it an obligation on all public bodies and Ministers, when making policy, to have regard to the same issues that the Secretary of State must also consider in preparing the Armed Forces Covenant report. The

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<sup>34</sup> Royal British Legion, "[Strategy for Our Veterans: Royal British Legion consultation response](#)", February 2019, p.13

<sup>35</sup> [Overseas Operations \(Service Personnel and Veterans\) Bill \(Third sitting\)](#), 8 October 2020, c88

<sup>36</sup> Armed Forces Covenant Annual Report 2020, Ministry of Defence, 7 December 2020, p19

<sup>37</sup> [Armed Forces Covenant Annual Report 2020, Ministry of Defence, 7 December 2020, p16](#)

Government at the time argued against such a requirement and the amendment was defeated on division.<sup>38</sup>

John Healey, the current shadow Defence Secretary, indicated Labour's support during a debate on Remembrance on 11 November 2020:

On veterans, the Office for Veterans' Affairs was a welcome step last year, but we can do more to make the UK the best place to be a veteran by enshrining the armed forces covenant in law. I say constructively and respectfully to the Minister that if the Government are willing to take those steps, they will have our full support to do so.<sup>39</sup>

However, since the Bill's publication, John Healey has described the Bill as a "missed opportunity":

It does not put the Armed Forces Covenant properly into law to ensure Forces personnel and veterans suffer no disadvantage in access to services, nor will it put right the long-term failings in the military justice system.<sup>40</sup>

The British Legion first raised concerns about the Covenant's focus on healthcare, education and housing during discussion of the 2011 Bill. The then Director General told the Select Committee on the Armed Forces Bill that a wider range of other issues "could and should be properly included".<sup>41</sup> The Legion remains concerned that the new duty to have regard to the Covenant's principles, as set out in the Bill, do not reflect other policy areas that have a significant impact on the Armed Forces community.<sup>42</sup>

During defence oral questions on 1 February, Sharon Hodgson MP asked about the funding implications of the additional legal responsibilities for local authorities. Johnny Mercer, the Minister for Defence People and Veterans, replied:

The Department is looking to issue in due course statutory guidance on how precisely these matters will be achieved. The key thing is that the legislation is very clear that it does not specify outcomes, but simply ensures that a set of principles is adhered to. That is what the armed forces covenant was always about; it was designed never for advantage, but to prevent disadvantage. That is what this Bill does. It is carefully calibrated to ensure that we raise the floor so that the experience for veterans, the serving community and their families is equal across the nation.<sup>43</sup>

The Covenant's current status, the Government's plans and the concerns raised prior to the Bill's publication are discussed in greater detail in Commons Library paper [The Armed Forces Covenant and status in law](#) (CBP 9072, December 2020). The paper also discusses how the

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<sup>38</sup> "[The Armed Forces Covenant and status in law](#)", Commons Library paper CBP09072, 8 December 2020. A detailed account of this amendment (NC17) can be found in Commons Library paper "[Armed Forces Bill: Committee Stage report](#)", SN06004, 15 June 2011 and "[Amendments to the Armed Forces Bill](#)", SN05991, 13 June 2011. The full debate is available via Hansard: [HC Deb 14 June 2011 c674-749](#).

<sup>39</sup> [HC Deb 11 November 2020 c935](#)

<sup>40</sup> "[John Healey reaction to publication of the Armed Forces Bill](#)", Labour party press release, 26 January 2021

<sup>41</sup> [Oral evidence, Select Committee of the Armed Forces Bill](#), 10 February 2011, qq134

<sup>42</sup> Communication with British Legion, 1 February 2020.

<sup>43</sup> [HC Deb 1 February 2021 c668](#)

phrase “due regard” is used in other legislation, specifically the Public Sector Equality Duty in the *Equality Act 2010*, which is often a focal point for litigation.

### **A requirement to have due regard**

**Clause 8** inserts a new section into the *2006 Act*. Clause 8 firstly replaces the heading of [Part 16A](#) from Armed Forces Covenant Report to Armed Forces Covenant. It retains the requirement for an annual report to be submitted to Parliament.

Clause 8 inserts new section 343A which requires a specified person or body exercising a relevant housing, education or healthcare function, to have due regard 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

These are the principles laid out in the Armed Forces Covenant.<sup>44</sup>

The persons or bodies who are subject to the duty in England are identified in subsection (2), namely that they are a local authority, the governing body of a maintained school or of an institution within the further education sector, the proprietor of an Academy, a post-16 institution, a relevant independent training provider, the National Health Service Commissioning Board (known as NHS England), a clinical commissioning group or an NHS foundation trust.

Subsection (3) to (5) defines the “relevant housing/education/healthcare function” with reference to the relevant legislation for each area. Other subsections further clarify definitions.

New sections 343AB, 343AC and 343AD places the same requirements as expected in England to the corresponding bodies in Wales, Scotland and Northern Ireland respectively. Subsections reflect the relevant legislation for each nation.

New sections 343AE enable the Secretary of State to amend sections 343AA to 343AD and revise any guidance issued by regulations. These sections require the Secretary of State to consult the relevant Welsh or Scottish Ministers or the Northern Ireland Executive so far as the guidance or regulations relates to devolved functions.

New section 343AF enables the Secretary of State to widen the duties in sections 343AA to 343AD by specifying additional persons or bodies who will be subject to the duties, and by specifying additional functions in relation which the duty may apply (e.g. areas other than healthcare, housing and education). The Secretary of State is required to consult the relevant devolved administrations when exercising this power. The

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<sup>44</sup> [Armed Forces Act 2006 section 343A\(3\)](#)

power is exercisable by way of regulations, subject to the affirmative procedure.

### **Devolved matters**

Clause 8 refers to matters that are within the legislative competence of the Scottish Parliament, the Senedd Cymru/Welsh Parliament and the Northern Ireland Assembly. The explanatory notes acknowledge the convention that Westminster will not normally legislate with regard to such matters without the consent of the legislature concerned. As such, a legislative consent motion is being sought from each of these legislatures.

## **2.4 Reserve forces: flexible services**

**Clause 9** provides for Reserve forces to serve a period of service on a part-time basis. Clause 9 amends section 24 of the [Reserve Forces Act 1996](#) by omitting references to “full-time service” and substituting references to “a full-time service commitment” with “a continuous service commitment”. Further amendments to the 1996 Act are contained in **Schedule 2**. Schedule 2 predominantly amends references to full-time service commitment to “continuous service commitment”. Schedule 2 makes the same changes to section 62 and section 367 of the *Armed Forces Act 2006*. The amendment to section 367 clarifies that a member of the reserve forces who is in service under a continuous service commitment will be subject to service law for the entire time that they are in service on this commitment.

This clause brings working arrangements for Reserve forces into line with those of their Regular counterparts. Regular forces were allowed to work part-time under the [Armed Forces \(flexible working\) Act 2018](#), which amended the *Armed Forces Act 2006*.

## **2.5 Service complaint appeals**

The explanatory notes states **clause 10** is “part of wider reforms to increase efficiency and speed up the process within the statutory service complaints system”.

Clause 10 amends [section 340D](#) (appeals) of part 14A of the 2006 Act.

Subsection (3) is, the explanatory notes explain, intended to reduce the number of speculative appeals by enabling 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.

Subsection (4) reduces the time in which an appeal can be brought from six weeks to two weeks. Similarly, it shortens the timeframe to appeal to the Ombudsman from six weeks to two weeks. The explanatory notes say it is expected that the regulations will continue to set out exemptions, such as that a person may bring an appeal outside this time limit where the Defence Council (or Service Complaints Ombudsman) considers that it is just and reasonable to allow it. The explanatory notes give the following example of an exemption being allowed: when

requirements of the service person's service has reasonably prevented them from meeting the two-week deadline.

A forthcoming Library paper will discuss the service complaints system.

## 2.6 Service Police Complaints Commissioner

**Clause 11** creates a new role of Service Police Complaints Commissioner and enables the creation of a regime for complaints, conduct matters and death or serious injury matters. This regime is modelled on the regime for the civilian police in England and Wales. This reflects Lyons' recommendation for oversight of the Service police.

### Background

The Lyons' review discussed the current lack of oversight of the three service police forces.<sup>45</sup> The review noted that Home Office police forces, the MDP (Ministry of Defence police),<sup>46</sup> the National Crime Agency and other law enforcement agencies are subject to independent oversight, primarily by the Independent Office for Police Conduct (IOPC).<sup>47</sup> The review states:

Independent oversight is a critical factor in bringing transparency and building confidence in policing.<sup>48</sup>

Parliament has discussed oversight of the service police before, and Baroness Jolly tabled an amendment to the *Policing and Crime Act 2017* to give the IOPC oversight of the SP. The Government said at the time they supported the need for independent oversight but said there was further work to do on such a mechanism. Baroness Jolly withdrew her amendment after the Minister, Baroness Chisholm of Owlpen, said:

The Government remain committed to implementing a single mechanism that will provide for the independent oversight of all complaints against the service police.<sup>49</sup>

Lyons explored possible options for independent oversight in part two of his review. He examined expanding the remit of two existing entities, the IOPC and the Service Complaints Ombudsman, but concluded:

Both presented factors mitigating for and against vesting responsibility in them for independent oversight of the SP.

Lyons therefore recommended the establishment of a new niche independent body which would be policy led and funded by the MOD,

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<sup>45</sup> The [Royal Military Police](#) (RMP) in the Army, the [Royal Air Force Police](#) (RAFP) and the [Royal Navy Police](#) (RNP).

<sup>46</sup> The [Ministry of Defence Police](#) (MDP) force is a national civilian force established by the *Ministry of Defence Police Act 1987*. Its primary function is to provide civil policing and armed security for the MOD's nuclear sites and other key defence assets in the UK.

<sup>47</sup> Police forces handle most complaints. Certain complaints must be referred to the IOPC, others are voluntarily referred to them. The IOPC oversees the police complaints system. It conducts independent investigations of some of the most serious and complex cases. In some other cases, it directs complaint investigations conducted by police forces. Further background is available in Commons Library paper [Police complaints and discipline](#) (SN02056, 4 September 2020) and [A short guide to police complaints](#) (CBP09053, November 2020)

<sup>48</sup> Service Justice System review (part 2), March 2019, published February 2020, para 265

<sup>49</sup> [HL Deb 30 November 2016 c248-9](#)

but at arms-length. Lyons also recommended all those subject to the Act and those directly affected by the exercise of powers contained in the Act should have access to the system. He did not identify a time limit for bringing complaints, suggesting this is for the MOD to set. Lastly, he said a clear distinction should be drawn as to which complaints fall to the newly created independent body and which to the Service Complaints Ombudsman.<sup>50</sup>

The explanatory notes explain that the Bill creates a new officer holder – the Service Police Complaints Commissioner – with similar functions to those conferred on the Director General of the Independent Office for Police Conduct.

### **A Service Police Complaints Commissioner**

**Clause 11** inserts new section 365BA into the 2006 Act. It creates a Service Police Complaints Commissioner (SPCC). The Commissioner may appoint persons to be investigating officers (section 365BB).

Further provisions regarding the Commissioner are laid out in **Schedule 3**. Schedule 3 inserts a new Schedule 14A (Service Police Complaints Commissioner).

This states the Service Commissioner is “a corporation sole”. The explanatory notes state this means that “it is a single incorporated office occupied by a single natural person”. The SPCC is neither a servant or agent of the Crown and does not enjoy any Crown status, immunity or privileges. The SPCC is appointed by Her Majesty. Certain persons are disqualified from being appointed as the SPCC – the Commissioner cannot be a member of the regular or reserve forces, have been a member of a service police force or been employed in the civil service, nor can they be a member of the House of Commons.

Clause 11 also inserts a new Part 14B into the Act. The explanatory notes state the overall effect of new Part 14B is to enable 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. This includes similar provisions regarding whistle-blowers and super-complaints.

A money resolution will be required to authorise the costs of establishment and ongoing costs of the Service Police Complaints Commissioner.<sup>51</sup>

## **2.7 Sentencing and rehabilitation**

Clauses 12 to 17 relating to sentencing and rehabilitation.

**Clause 12**, according to the explanatory notes, gives a commanding officer the power to award a punishment of service detention to a corporal in the Royal Marines; at present only a person of a rank beneath that of corporal in the Royal Marines may be awarded this

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<sup>50</sup> SJS review, part two, recommendation 44

<sup>51</sup> Armed Forces Bill 2021, explanatory notes, para 140

punishment by a commanding officer. This will give commanding officers 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.

**Clause 13** introduces the punishment of a **deprivation order**, which deprive offenders of any rights they had in the property. These are modelled on the provisions for deprivation orders which are available in the civilian context in England and Wales under section 152 of the *Sentencing Act 2020*. New sections 177B to 177F set out the definition of a deprivation order and the circumstances in which such an order will be available. They also require the Court Martial, Service Civilian Court or Commanding Officer to have regard to the property's value and the likely financial impact on the offender.

**Clause 14** introduces the punishment of a **driving disqualification** order to the Armed Forces Act. Driving offences under the law of England and Wales are also service offences under section 42 of the 2006 Act. Currently the Act does not provide for disqualification from driving as a punishment for an offence connected to driving. The provisions are modelled on those available in the civilian context under section 162 of the *Sentencing Act 2020*. New Sections 177G, 177I, 177J and 177M all relate to disqualification orders.

**Clause 15** introduces **Schedule 5** which contains minor and consequential amendments relating to clauses 13 (deprivation orders) and 14 (driving disqualification).

**Clause 16** removes the requirements for service courts to take account of **EU Member State convictions** when deciding how serious an offence is, whether to give an unrepresented defendant a custodial sentence and whether to impose a community punishment. The explanatory notes state the result will be that EU Member State convictions will be treated the same as those with previous convictions imposed in any other country outside of the UK.

**Clause 17** concerns rehabilitation periods in England and Wales. The clause amends the *Rehabilitation of Offenders Acts 1974* by inserting a new entry in the table in paragraph (b) of subsection (2) of section 5 of that Act.

The explanatory notes state:

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 is that these punishments are immediately "spent" and it means that they cannot 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.<sup>52</sup>

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<sup>52</sup> [Armed Forces Bill 2021 explanatory notes](#)



## 2.8 Posthumous pardons

**Clause 18** relates to posthumous pardons in relation to certain abolished service offences.

### Background

Lord Cashman introduced a Bill to make provision to provide posthumous pardons to armed forces personnel convicted of, or cautioned for, certain abolished offences. The [Armed Forces \(Posthumous Pardons\) Bill \(HL\) 2019](#) was introduced on 23 October 2019 but did not progress to Second Reading before the prorogation of Parliament. Lord Cashman reintroduced the Bill – the [Armed Forces \(Posthumous Pardons\) Bill \(HL 47\)](#) – as a private members' Bill on 21 January 2020.

In September 2019 Lord Lexden asked the Government what plans they have to make posthumous pardons available under the Policing and Crime Act 2017 to armed forces personnel convicted of sexual offences that have now been abolished. On 8 October 2019 Baroness Goldie replied:

Primary legislation will be required in order to add to the list of Service disciplinary offences set out in the Policing and Crime Act 2017. We will continue to consider finding Parliamentary time for this.<sup>53</sup>

Currently, section 164 of the *Policing and Crime Act 2017* provides for posthumous pardons for those convicted of certain abolished sexual offences, for example buggery, if the other person involved was aged 16 or over and the offence would not still be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).

However, while the PCA 2017 captures all equivalent service offences in relation to the Royal Navy from 1661 and all equivalent service offences for the Royal Air Force, it does not currently capture all equivalent service offences for the Army or the Royal Marines.<sup>54</sup>

**Clause 18** amends section 164 to rectify this. The amendment means PCA 2017 will now also refer to historical service offences under the *Army Discipline and Regulation Act 1879*, the Articles of War of 1749 and the Articles of War of 1878. Clause 18 will come into force two months after Royal Assent.

## 2.9 Power of British Overseas Territories to apply AFA 2006

Section 357 of the 2006 Act allows a British overseas territory to apply all or any of the provisions of the Act (with or without modification) to a locally raised force. This means a British overseas territory force can make use of the UK's service justice system. **Clause 19** clarifies that section 357 of the 2006 Act may be applied by a British overseas territory even when the section does not extend to that of the overseas territory. This relates specifically to Gibraltar, to which the 2006 Act no

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<sup>53</sup> [HL17820](#), 8 October 2019

<sup>54</sup> Armed Forces Bill 2021, explanatory notes, para 21

longer extends (following amendments made by the 2011 and 2016 Acts). The explanatory notes say:

This clause 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 AFA 2006.<sup>55</sup>

### Background

The 2006 Act (with the exception of certain provisions) extends to the Isle of Man and the British overseas territories, except Gibraltar.

During the House of Lords debate on the Armed Forces Act (Continuation) Order 2019, Lords Foulkes of Cumnock asked why the Act did not extend to Gibraltar. Earl Howe, responding for the Government, provided this explanation:

The Armed Forces (Gibraltar) Act was passed by the Gibraltar Parliament on 8 November 2018—very recently. It came into law on 10 December 2018. The Act gives effect in Gibraltar law to certain provisions of the Armed Forces Act 2006, and Gibraltar wishes to make its own provisions in relation to that Act. Of course, we continue to work with Her Majesty's Government of Gibraltar on the inclusion of the Royal Gibraltar Regiment within the Armed Forces Act 2006 service discipline regime to ensure that a discipline system is put in place that meets the needs of the regiment.<sup>56</sup>

Earl Howe mentions here efforts to include the Royal Gibraltar Regiment within the service justice system. Clause 19 puts this into effect.

## 2.10 War pensions appeals time limits

**Clause 20** aligns late appeal rules in Scotland and Northern Ireland with those in England and Wales. The Clause amends the *Pensions Appeal Tribunals Act 1943*. Currently a late appeal may only be brought in Scotland and Northern Ireland in certain proscribed circumstances (which are set out in regulations made under the Act).

## 2.11 Territorial extent in the UK

Clauses 23 and 24 deals with commencement and territorial extent.

The Bill extends to the whole of the United Kingdom with some important exceptions, as detailed in the explanatory notes:

Clauses 16(5) (the removal of requirement to take into account offences in Member States), 17 (rehabilitation periods) and 18 (posthumous pardons in relation to certain abolished service offences) only extends to England and Wales.

Paragraphs 1 to 4 of Schedule 3 only extend to Northern Ireland and paragraph 5 only extends to England and Wales and Scotland.

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

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<sup>55</sup> Armed Forces Bill 2021, explanatory notes, para 121

<sup>56</sup> [HL Deb 20 February 2019 c2289](#)

Ireland only. This reflects the fact that Scots law does not recognise the concept of a corporation sole. Paragraph 6 of Schedule 4 only extends to England and Wales and paragraph 7 only extends to England and Wales and Scotland.

Clauses 2 to 7 and 11 to 16 will apply worldwide as they relate to service personnel wherever they are in the world. Clause 9 (Reserve forces) similarly applies worldwide.

The territorial extent and application in the United Kingdom of each clause is provided in a table in annex A of the explanatory notes.

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