



# ***Armed Forces Bill***

**Bill 122 of 2010-11**

**RESEARCH PAPER 10/85** 17 December 2010

An Armed Forces bill is required every five years. The last *Armed Forces Act* received Royal Assent in November 2006 and therefore a new bill is required before the end of the 2010-2011 Parliamentary Session.

The purpose of the *Armed Forces Bill* is to provide the legal basis for the Armed Forces and the system of military law which exists in the UK. It also offers an opportunity to make necessary amendments, such as those required by changes to civilian law in the UK or as a result of cases brought before the European Court of Human Rights. The bill has also been used, on occasion, to introduce new measures relating to the Armed Forces that fall outside the bill's traditional remit.

The *Armed Forces Bill* (Bill 122 of Session 2010-11) was presented on 8 December 2010 and Second Reading is scheduled for 10 January 2011. This paper has been prepared for the Second Reading debate on the Bill in the House of Commons.

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## Research Paper 10/85

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## Summary

An Armed Forces bill is required every five years. The last *Armed Forces Bill* received Royal Assent in November 2006. Under the *Armed Forces Act (Continuation) Order 2010* that legislation will remain in force until 8 November 2011. Therefore a new bill is required in the 2010-2011 Parliamentary Session.

The purpose of the *Armed Forces Bill* is to provide the legal basis for the Armed Forces and the system of military law which exists in the UK. It offers an opportunity to make any suggested or necessary amendments, such as those required by changes to civilian law in the UK, or as a result of cases brought before the European Court of Human Rights. In the past the bill has also been used to introduce any new measures relating to the Armed Forces that fall outside the bill's traditional remit.

The *Armed Forces Act 2006 (AFA06)* was extensive and amounted to a complete overhaul of the legislation relating to military law and Service discipline. With just over a year since that Act came fully into force, this Bill provides an opportunity to make minor amendments or corrections to that legislation. It also contains number of new provisions relating to Armed Forces discipline, and in common with previous bills of this nature, some proposals that are unrelated to Service discipline. As such, the contents of the Bill are wide ranging.

The main provisions are as follows:

- In line with constitutional requirements, the Bill makes provision for the continuation of *AFA06* for a further period of five years, ending no later than the end of 2016. The process of obtaining Orders in Council, by affirmative resolution in both Houses of Parliament, for each of the intervening years is also retained.
- The Coalition Government's commitment to rebuilding the Military Covenant is reflected in this Bill. While it does not explicitly state what welfare provisions Service personnel, their dependants, or veterans would be entitled to as part of the Military Covenant, the Bill does make provision for the Secretary of State to present an Armed Forces Covenant Report to Parliament every year on the effect of membership of the Armed Forces. Healthcare, housing and education are specifically listed for inclusion in that report.
- The Bill makes several new provisions for safeguarding the independence of the Service Police by imposing a duty on a Provost Marshal to ensure that investigations are free from "improper interference", and subjecting Service police investigations to inspection by Her Majesty's Inspectors of Constabulary. In future the appointment of Provost Marshal may only be made by Her Majesty The Queen and only current Provost Officers will be eligible for appointment to that post.
- The Bill implements a number of changes to the *Police and Criminal Evidence Act 1984 (PACE)* that were made in 2005, but not subsequently included in *AFA06* relating to the types of search warrant that a Judge Advocate can issue.
- Under the Bill the Secretary of State will be able to make provision for a Service policeman to obtain access to material, other than that subject to legal privilege, such as bank records or social workers files, on premises which fall outside the definition of "relevant residential premises".
- The Bill establishes a bespoke military scheme for the testing of Service personnel for alcohol and drugs, in line with the provisions of the *Railways and Transport Safety Act 2003*. It would not, however, remove the military's current exemption from that Act.

Nor does it replace any of the provisions in *AFA06* which provide for random drugs testing within the military.

- Several amendments and new provisions in relation to the powers of punishment are made. Automatic reduction in rank on receipt of a custodial sentence or period of Service detention is removed. Limitations on the power of the Director of Service Prosecutions to substitute or add charges after election for trial by court martial has taken place, specifically in relation to those changes which require the written consent of the accused, have been amended slightly; while the regulations relating to election are placed in primary, as opposed to secondary legislation as is the case at present. Three new sections to *AFA06* relating to the enforcement of any financial penalties that may be imposed by Court Martial are also introduced, including fixed terms of imprisonment which may be imposed if a fine or Service compensation order is not paid.
- The Bill makes provision for the Service courts to make Service Sexual Offences Prevention Orders (Service SOPOs), designed solely for the protection of members of the Service community outside the UK, which will be very closely based on the civil equivalent introduced by the *Sexual Offences Act 2003*.
- The jurisdiction of the Service Civilian Court will be extended to the UK.
- The Director of Service Prosecutions will be able to appoint civilians to the Service Prosecuting Authority.
- In order to strengthen the independence and impartiality of service complaints procedures, the Bill introduces a number of amendments in relation to the composition of Service Complaints Panels. The requirement for one member of the panel to be a senior officer will be removed, while panels may comprise more than one independent member, as is the case at present. Those independent members may also be designated specific functions.
- New regulations, to be made by Royal Warrant, will apply relevant provisions of *AFA06* to protected prisoners of war, including bringing that group under the jurisdiction of the Service courts.
- Provision will be made in the *Visiting Forces Act 1952* for the Secretary of State to transfer any liability in respect of claim in tort against a member of a visiting force, to the Ministry of Defence. This will enable the Secretary of State to be substituted as a party in any litigation proceedings in the place of the Sending State.

## 1 Background

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>1</sup> 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. 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.

The last *Armed Forces Bill* received Royal Assent in November 2006. Under the *Armed Forces Act (Continuation) Order 2010* that legislation will remain in force until 8 November 2011. Therefore a new bill is required in the 2010-11 Parliamentary Session.

The purpose of the *Armed Forces Bill* is to provide the legal basis for the Armed Forces and the system of military law which exists in the UK. It also offers an opportunity to make any suggested or necessary amendments, such as those required by changes to civilian law in the UK<sup>2</sup> or as a result of cases brought before the European Court of Human Rights. The Bill also presents an opportunity to introduce any new measures relating to the Armed Forces that fall outside the traditional area of Service discipline.<sup>3</sup>

The *Armed Forces Act 2006* was considered a major watershed for the military disciplinary system in that it consolidated and modernised all of the previous *Service Discipline Acts*,<sup>4</sup> and replaced them with a single system of Service law applicable to all Service personnel wherever they 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>5</sup> The *Service Discipline Acts* were subsequently repealed when the *Armed Forces Act* was brought fully into force on 31 October 2009.<sup>6</sup>

Following the bringing into force of *AFA06* a new *Manual of Service Law* was produced to provide guidance and supplementary information to Armed Forces personnel on the new system of Service law.

## 2 Main Provisions of the Bill

The *Armed Forces Act 2006 (AFA06)* was extensive and amounted to a complete overhaul of the legislation relating to military law and Service discipline. This Bill provides an opportunity to make minor amendments or corrections to that legislation. It also contains a number of new provisions relating to Armed Forces discipline, and in common with previous

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<sup>1</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>2</sup> It is important to note the two ways in which the term 'civil law' is used. Within the UK justice system 'civil law' is used as a contrast to 'criminal law'. Within a military context, however, the term 'civil law' is used as an all encompassing term and as a contrast to 'military law'. The system of military law in the UK attempts to follow the legal provisions of the civil system, as far as is practical.

<sup>3</sup> In the 2006 bill, for example, a statutory pardon for World War One personnel who had been 'shot at dawn' was included in its provisions.

<sup>4</sup> The *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*.

<sup>5</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>6</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*.

bills of this nature, some proposals that fall outside of the bill's traditional sphere. As such, the contents of the Bill are wide ranging. However, there is nothing which is considered to be controversial in this Bill and therefore commentary on its provisions has, at the time of writing, been minimal.

The Bill contains nine groups of clauses as follows.

## 2.1 Renewal of the Primary Legislation

In line with constitutional requirements, the Bill makes provision for the continuation of *AFA06* for a further period of five years, ending no later than the end of 2016. The process of obtaining Orders in Council, by affirmative resolution in both Houses of Parliament, for each of the intervening years is also retained (**clause 1**).

## 2.2 The Military Covenant

The Military Covenant is an unwritten social and moral commitment between the State and Service personnel in the Armed Forces that has developed through long-standing convention and customs. Although it currently has no legal basis it implies that in return for the sacrifices that Service personnel make, the State has an obligation to recognise that contribution and retains a long term duty of care toward Service personnel and their families.

Over the last few years concerns have been consistently expressed that the Military Covenant was being undermined and that a social gulf between the Armed Forces and the general public was developing. In 2007 the Royal British Legion established its 'Honour the Covenant' campaign<sup>7</sup> which received widespread support and spearheaded a number of changes in welfare policies relating to service personnel, their dependants, and veterans. Most notably, the previous Labour government published a command paper entitled *The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans*,<sup>8</sup> which set out a series of measures on improved welfare provision and support. A report on progress in implementing the measures set out in that command paper is published annually.<sup>9</sup>

At the same time both the Conservative Party and the Liberal Democrats commissioned reports into the state of the Military Covenant,<sup>10</sup> with many of the recommendations subsequently forming key pledges in each parties' respective manifesto commitments ahead of the 2010 general election.<sup>11</sup> The new Coalition Government's *Programme for Government*, published in May 2010, subsequently outlined a commitment to "work to rebuild the Military Covenant", which would build on the measures set out in the 2008 command paper and include the writing of a new Tri-Service Covenant.<sup>12</sup> A new independent Task Force on the Military Covenant, chaired by Professor Hew Strachan, was established in summer 2010 to

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<sup>7</sup> Further information on the British Legion campaign is available at: <http://www.britishlegion.org.uk/campaigning/time-to-do-your-bit/honour-the-covenant> and in Library briefing paper SN/IA/4495, *The Military Covenant*, 2 November 2007

<sup>8</sup> Cm 7424, July 2008

<sup>9</sup> The latest annual report was published on 12 November 2010 and is available at: [External Reference Group Annual Report 2010](#)

<sup>10</sup> See Liberal Democrats, *No Choice but Change*, September 2008 and Conservative Party, *Restoring the Covenant*, September 2008

<sup>11</sup> *Conservative Armed Forces Manifesto 2010* and *Liberal Democrat Manifesto: Your World*

<sup>12</sup> Since taking office the Coalition government has already introduced several welfare measures including the doubling of the Operational Service Allowance; changes to the policy governing rest and recuperation for Service personnel deployed on operations; measures for university scholarships for children of Service personnel killed on active operations since 1990 and plans to encourage Service personnel leaving the Armed Forces to re-train as teachers. A report on mental health services for personnel and veterans, entitled *Fighting Fit*, was also published in October 2010, the recommendations of which are currently under review.

support taking that work forward. In June 2010 the Prime Minister also indicated that the Military Covenant would be enshrined in law for the first time.<sup>13</sup>

The *Report of the Task Force on the Military Covenant* was published on 8 December 2010, the same day that the *Armed Forces Bill* was presented to Parliament.<sup>14</sup>

In order to ensure that progress on rebuilding the Military Covenant is achieved year-on-year, the Armed Forces Bill makes provision for the Secretary of State to present an Armed Forces Covenant Report to Parliament every year on the effect of membership of the Armed Forces on Service personnel, their dependants and veterans in the UK (**Clause 2**). The effect on healthcare, education and housing are specifically listed for inclusion in that report, although the Bill does also provide for an examination of “such other fields as the Secretary of State may determine”.

This clause does not go as far as some commentators had considered it might. It does not explicitly state what welfare provisions must be provided for under the Military Covenant, such as priority healthcare, or any minimum standards of care. As outlined above, the Government had previously indicated that a new Tri-Service Covenant would be written. Such a document, and the subsequent introduction of any related welfare policies, would not require primary legislation.

### 2.3 Service and MOD Police

The Bill makes several new provisions in relation to both the Service Police and the Ministry of Defence Police.<sup>15</sup> **Clauses 3-5** deal with safeguarding the independence of the Service Police, while **clause 6** makes provision for improving the performance of the MOD Police.

#### ***Independence and Inspection of Service Police Investigations***

Investigations by the Service Police are carried out independently from the main service chain of command, while the Provost Marshal at the head of each of the Service police forces also has a direct duty to the Defence Council.

Since the *Human Rights Act* came into force in 1998, which gave effect to the European Convention on Human Rights, questions have inevitably been raised over the compliance of the Service disciplinary system with the rights and freedoms granted under that Convention. Various amendments to Service law have subsequently been made over the years as a result of cases brought before the European Court of Human Rights. Following the ECHR ruling in the case of *Grievs v. the United Kingdom* in December 2003, for example, which found that the Royal Navy court martial system was non-compliant with Article 6 (right to a fair trial), the *Naval Discipline Act 1957 (Remedial) Order* was brought into force. One of the main aims of *AFA06* was to ensure the compliance of Service law with the European Convention and that Act, therefore made a number of changes, such as making the right to elect trial by Court Martial universal.

In response to continuing questions over whether Service police investigations are independent for the purposes of the European Convention on Human Rights, the aim of **clauses 3 and 5** is to both highlight and safeguard that independence by adding new sections to *AFA06* which impose a duty on a Provost Marshal to ensure that investigations

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<sup>13</sup> MOD Press Release, “[Military covenant to be enshrined in law](#)”, 25 June 2010

<sup>14</sup> See also MOD Press Release, “[Government commits to progress on rebuilding Military Covenant](#)”, 8 December 2010

<sup>15</sup> Each of the Services has its own police force, such as the Royal Military Police, which consist of military personnel (Provost Officers) and are headed by a Provost Marshal. The MOD Police is a civilian force established under the *Ministry of Defence Police Act 1987* and each member is both a constable and a civil servant.

by the Service police are free from “improper interference”, in particular any attempt by an individual who is not a Service policeman to direct an investigation that is being carried out. In future the appointment of an individual to be Provost Marshal of a service police force may only be made by Her Majesty The Queen and only current Provost Officers will be eligible for appointment to that post.

Under **clause 4**, the independence and effectiveness of Service police investigations will also be subject to inspection by Her Majesty’s Inspectors of Constabulary, who already have statutory powers to inspect and report on Home Office police forces.<sup>16</sup> It should be noted, however, that those statutory powers will be more limited in respect to the Service police and will focus solely on the independence of investigations, their effectiveness and, where directed by the Secretary of State, on “a particular aspect of, or matter related to, such investigations”. HMIC will have the power to undertake as many inspections as they think appropriate and when; and to determine what aspects of a Service police investigation will be the subject of a particular inspection. The Bill would add a new section to *AFA06* requiring the Secretary of State to lay before Parliament any report made in this regard. Any material whose publication would be against the interests of national security or might jeopardise the safety of any person, may be excluded from that report. The MOD has acknowledged that additional costs will arise from the establishment of independent inspections by HMIC.<sup>17</sup>

### **Performance Guidelines for MOD Police**

Section 3A of the *Ministry of Defence Police Act 1987* confers power on the Secretary of State to make regulations for dealing with the misconduct of members of the Ministry of Defence Police (MDP). Such regulations are contained in the [Ministry of Defence Police \(Conduct\) Regulations 2009](#) and are similar to the regulations made under section 50 of the *Police Act 1996* in relation to misconduct by members of the Home Office police forces.

However, in contrast to those forces, underperformance on the basis of efficiency and effectiveness by members of the MDP is dealt with by internal civil service procedures<sup>18</sup> as opposed to statutory regulations. The purpose of **clause 6**, therefore, is to bring performance guidelines for the MDP into line with those for Home Office police forces under the *Police Act 1996*.

## **2.4 Entry, Search and Seizure**

The entry, search and seizure powers of the Service Police are closely based upon those available to the civil police under the *Police and Criminal Evidence Act 1984* (PACE).

### **Power of a Judge Advocate to Authorise Entry and Search**

In *AFA06* (section 83) provision was made for a Judge Advocate, in certain circumstances, to issue a search warrant authorising a Service policeman to enter and search “relevant residential premises”.<sup>19</sup> Such premises are defined as Service living accommodation, or the residence of a person subject to Service law, a civilian subject to Service discipline, or a person who is suspected of having committed an offence in relation to which the warrant is sought. That power was based on similar provisions set down in PACE that provided a Justice of the Peace with the authority to issue a warrant following application by a constable.

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<sup>16</sup> Under section 54 of the *Police Act 1996*

<sup>17</sup> The MOD has estimated that, in addition to the costs of defending claims transferred to the MOD under the *Visiting Forces Act* (see below), these costs will total approximately £270,000 per annum (see p.33-34 of the Explanatory Notes).

<sup>18</sup> Civilian Restoring Efficiency Procedures

<sup>19</sup> Those provisions largely re-enacted provisions that were already in the *Armed Forces Act 2001*. See p.20 of [RP05/86](#) for further detail.

PACE was amended in 2005 by the *Serious Organised Crime and Police Act*. With respect to search warrants, that Act introduced two changes to the legislation as it then stood. Specifically it enabled a constable to apply for an “all premises warrant” that would provide for the search of all premises occupied or controlled by a particular individual that could not practicably be identified at the time of the application; and for the issue of a warrant authorising entry and search of premises on more than one occasion: a “multiple entry warrant”.

*AFA06* as it stands is based upon the provisions in PACE that existed prior to the amendments introduced in 2005. Therefore, it does not currently provide a Judge Advocate with the capacity to issue “all premises warrants” and “multiple entry warrants”. **Clause 7** of this Bill essentially rectifies that situation. However, in line with the existing provisions in *AFA06* those warrants will still only apply to “relevant residential premises”, although the definition of Service living accommodation is amended under Schedule 3 of this Bill to include accommodation used by civilians subject to Service discipline. An “all premises warrant” will not, therefore, apply to premises which do not fall under the definition of “relevant residential premises”.

### **Access to Excluded Material**

Under provisions in PACE and *AFA06*<sup>20</sup> items subject to legal privilege, “excluded” material or “special procedure” material<sup>21</sup> are safeguarded in relation to the granting of search warrants. This continues to be reflected in **clause 7** of the new Bill. However, under both Acts the Secretary of State has the power to establish procedures enabling the Service Police to apply to a Judge Advocate for a warrant to access “excluded” or “special procedure” material that is held on any relevant premises. Those provisions are subsequently set down in Schedule 1 of the *Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009*.

However, none of the provisions in *AFA06* allows access to material held on premises other than “relevant residential premises”, thereby making Schedule 1 of the 2009 Order largely ineffective, as material which would qualify as “excluded” or “special procedure” material, such as bank records or social workers files, would by their very nature be held elsewhere. **Clause 8** of this Bill, therefore, amends section 86 of *AFA06* so as to allow the Secretary of State to also make provision for a Service policeman to obtain access to material, other than that subject to legal privilege, on premises which fall outside the definition of “relevant residential premises”. Instead of issuing a search warrant for such material, the Judge Advocate would be able to make a “production order” requiring the person believed to be in possession of the material to produce it to be taken away by a Service policeman, or to give a Service policeman access to it. Under clause 8, failure to comply with a production order will be treated as contempt of court.

## **2.5 Drug and Alcohol Testing**

The *Railways and Transport Safety Act 2003* provides for an alcohol and drugs testing regime that is applicable to both the maritime and aviation environments. The Armed Forces however, have Crown exemption from the provisions of that Act. *AFA06* introduced several provisions related to testing for drugs and alcohol which were intended to underpin the operation of the existing random drug testing programme operated by the military. Section 306 specifically provides for Service personnel and civilians subject to Service discipline to be tested for drugs or alcohol after a serious incident which they may have caused or

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<sup>20</sup> Section 86 of *AFA06* and Schedule 1 of PACE.

<sup>21</sup> The definition of such items is given in sections 10,11 and 14 of PACE.

contributed to.<sup>22</sup> In neither act is there provision for compulsory testing **before** an incident where it is suspected that a Serviceman may be under the influence of drugs or alcohol.

The intention of **clauses 9-11** of this Bill is to introduce a bespoke military scheme for the testing of Service personnel for alcohol and drugs, in line with the provisions of the *Railways and Transport Safety Act 2003*. It would not, however, remove the military's current exemption from that Act.

**Clause 9** amends the existing offence under Section 20 of *AFA06* of 'unfitness or misconduct through alcohol or drugs' to add a new subsection which determines that the test for unfitness of duty is whether a person's ability "to carry out the duty in question is impaired". This new wording will make *AFA06* consistent with section 4 of the *Road Traffic Act 1988*, which creates the offence of driving while unfit to do so because of alcohol or drugs.

**Clause 10** creates an entirely new offence within the legislation (section 20A) for Service personnel exceeding a specified limit of alcohol in a breath, blood or urine sample, either when carrying out a prescribed duty or when that person might reasonably be expected to carry out such a duty. The clause goes on to define a prescribed duty as a duty or description, to be specified by regulations, which if performed while the ability to do so is impaired by alcohol, would result in death, serious injury to any person or property, or serious environmental harm. Those regulations will be set down by the Defence Council and those specifically relating to aviation and maritime functions are expected to have strict limits imposed. An individual found guilty of an offence under this section would be liable to any punishment available at Court Martial (set down in section 164, *AFA06*), although any sentence of imprisonment must not exceed two years. This new clause does not apply to drugs.

**Clause 11** adds nine new sections to *AFA06* which set out the testing regime for alcohol and drugs on suspicion of an offence under sections 20(1) or 20A of *AFA06* (for Service personnel) or section 42 of *AFA06* with respect to the maritime and aviation offences under the *Railways and Transport Safety Act 2003* (for civilians subject to Service discipline). With respect to an offence under new Section 20 (1), a CO may only require preliminary testing if it is reasonably believed that performance of the duty while under the influence of alcohol or drugs would carry a risk of death, serious damage to any person or property, or serious environmental harm. In line with other sections in *AFA06*, Defence Council regulations may provide for the delegation of these powers by a Commanding Officer.<sup>23</sup>

Any individual that fails to comply with a requirement imposed under these new sections commits an offence, the punishment for which may be any available to a Court Martial (Section 164), although a sentence of imprisonment may not exceed a period of two years.

New Sections 93B-D which are introduced by clause 11 set out the different procedures for preliminary testing, which closely reflect the provisions for preliminary testing by Home Office police forces under section 6 of the *Road Traffic Act 1988*.

Where an offence, referred to above, is being investigated by the Service police, new Section 93E confers powers that impose a requirement for samples of breath, blood or urine to be provided for analysis. Failure to provide a sample will constitute an offence.

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<sup>22</sup> See p.49 of RP05/86

<sup>23</sup> For example the CO has the option of delegating to a subordinate commander, who is directly responsible to him, the power to investigate and deal summarily with charges within the CO's jurisdiction, albeit with a number of caveats, such as the punishments that can be awarded.

For those personnel being treated at a medical establishment as a patient, additional provisions are applicable (as set out in new Section 93H), including the ability of a medical professional to object to preliminary tests or the provision of samples on medical grounds.

In order to avoid overlap with the current regime for alcohol and drugs testing in relation to a serious incident that was set up in *AFA06*, section 306 of *AFA06* and related provisions in section 307 will be repealed. Section 305, which empowers a drug testing officer to require Service personnel to provide a sample for random drugs testing, is not affected by this change.

## 2.6 Powers of Punishment

One of the main outcomes of *AFA06* was the harmonisation of offences across all three Services, the harmonisation and modernisation of the disciplinary powers of Commanding Officers at a summary hearing and the powers of punishment available at Court Martial. It also introduced the universal right to elect trial by Court Martial.

**Clauses 12-17** of this Bill introduce amendments and new provisions in relation to those powers of punishment, including amendments to the power of a Commanding Officer to impose a punishment of Service detention on the lowest rank of non-commissioned officer.

The most notable provisions are as follows.

### ***Reduction in Rank***

Section 293 of *AFA06* provides for a warrant officer or non-commissioned officer to be automatically reduced in rank to the lowest rank to which he/she could be reduced as a punishment under section 164, where a custodial sentence or Service detention has been awarded. This reduction in rank applies not only when the individual is serving their sentence but is also applicable afterwards. Under **clause 13** of this Bill, that automatic reduction in rank on receipt of a custodial sentence or period of Service detention is removed with the repeal of section 293. However, given that a reduction in rank would normally be considered appropriate in such a situation, this clause also provides for amendment to section 138 to enable a Commanding Officer to combine the punishment of Service detention with a reduction in rank; while the Court Martial will retain the ability to combine custodial sentences with reduction in rank under its existing powers in section 164.

### ***Election for Trial by Court Martial***

Under *AFA06*, if the accused elects trial by Court Martial then the CO must refer the charge to the Director of Service Prosecutions (DSP). The DSP has the power to amend or substitute charges for the one on which trial by Court Martial was originally elected, bring additional charges or discontinue proceedings (a power defined in section 125 *AFA06*). However, under current Court Martial rules the DSP may not, without the written consent of the accused, substitute a charge for one that could not be dealt with at a summary hearing, or a charge which could not be heard summarily without the permission of a Higher Authority,<sup>24</sup> or by the CO himself if of the rank of Rear Admiral, Major General or Air Vice Marshal.<sup>25</sup> The DSP would also require the written consent of the accused to bring additional charges after an election for trial by Court Martial was made.

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<sup>24</sup> A Higher Authority is defined as the officer to whom the CO is next responsible in the disciplinary chain of command or any officer superior to him in that chain of command.

<sup>25</sup> Charges which can only be heard summarily with the permission of a senior officer, or the CO himself are those in relation to the offences listed in Part 2 of Schedule 1 of *AFA06*. For example assault occasioning actual bodily harm or fraud.

The maximum punishment, where trial by Court Martial is elected, is limited to that which a CO could have awarded if the offence had been dealt with summarily.<sup>26</sup> Under the *Court Martial Rules*, the Court is also required to pass a single sentence for multiple relevant offences, as a CO would have done at a summary hearing.<sup>27</sup>

**Clause 14** gives effect to **Schedule 1** of this Bill. This Schedule seeks to amalgamate the existing provisions of section 165 of *AFA06* (on the sentencing powers of a Court Martial where an individual has elected trial by that court instead of summarily by his/her CO), and Part 20 of the *Armed Forces (Court Martial) Rules 2009* on the consequences of election. This would become a new schedule (3A) to *AFA06*. Amalgamating Part 20 in this way places its provisions in primary, as opposed to secondary, legislation.

The provisions of schedule 3A remain largely unchanged from existing regulations, with the following exception.

**Paragraph 3 of new schedule 3A** defines a 'case B offence', for which an accused can be convicted at Court Martial, as one in which the original charge on which election for trial by Court Martial was based, was subsequently substituted by the DSP and did not need the written consent of the accused (see below for amendments to this provision which are introduced in the Bill); and the accused is convicted on the substituted charge.

Limitations on the power of the DSP to substitute or add charges after election has taken place, specifically in relation to those changes which require the written consent of the accused, are set down under a new section (130A) to *AFA06* that is introduced by **paragraph 9 of Schedule 3**.

The provisions in that paragraph largely mirror the provisions that had already been made in section 157 of the 2009 *Court Martial Rules*. Under the new section the written consent of the accused will still be required before a charge can be added, or a charge substituted which could not be heard summarily. Written consent will also still be required for the substitution of a charge that falls within section 54 of *AFA06* (ie. a charge that can only be heard summarily with the permission of a Higher Authority) except where the original charge, on which trial by Court Martial was elected, was also such a charge under this section which would have required Higher Authority permission in the first instance.

In making this change, the Explanatory Notes state:

The new rule is based on the assumption that an accused will not be deterred from electing by the risk of the Director's [DSP] taking a step which cannot be taken without the accused's consent.<sup>28</sup>

Given that a CO also has the power to amend, substitute or bring additional charges during a summary hearing (section 129 *AFA06*), **paragraph 7 of Schedule 3** to this Bill, also seeks to make clear that a right to elect trial by Court Martial must be re-offered to the accused if a charge is changed at any point after the first offer was made.

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<sup>26</sup> The objective was to ensure that summary hearings did not infringe on the right of the accused to a fair trial by an independent tribunal under the *Human Rights Act 1998*. The imposition of limitations on the punishment that can be awarded by the court in such instances therefore provides no incentive to refrain from exercising that right for fear of incurring a more severe punishment.

<sup>27</sup> Further detail on the Court Martial rules is available in Library Standard Note SN/IA/5095, *Secondary Legislation of the Armed Forces Act 2006: An Update*, 15 June 2009

<sup>28</sup> *Armed Forces Bill: Explanatory Notes* (Bill 122-EN), paragraph 126

### **Maximum Term of Detention for Certain Offences**

Under current regulations, failure to provide a sample for random drug testing under section 305 of *AFA06* constitutes an offence and can attract any punishment set out in section 164, although a sentence of imprisonment or Service detention must not exceed 51 weeks. The same punishment is also applicable to various offences set out in section 95 of the *Reserve Forces Act 1996*. **Clause 15** amends all of these provisions so that the maximum term of 51 weeks is applicable to a sentence of imprisonment only. The consequence is that, in line with other Service offences, the maximum term of Service detention that can be passed down by Court Martial is two years.

When Section 281 of the *Criminal Justice Act 2003* comes into force it will increase the maximum term of imprisonment for summary offences from six months to 51 weeks. Until then, the maximum term of imprisonment that may be imposed is six months. This is provided for in paragraph 4 to Schedule 2 the *Armed Forces Act 2006 (Transitional Provisions) Order 2009*. No related transitory provisions were made, however, with respect to offences under section 95 of the *Reserve Forces Act*. Therefore, subsection 2 (b) of clause 15 rectifies this situation.

### **Enforcement of Financial Penalties**

**Clause 16** of the Bill introduces three new sections to *AFA06* relating to the enforcement of any financial penalties that may be imposed by Court Martial. New section 269A requires the Court Martial, when imposing a fine on a person aged over 18, to fix the term of imprisonment which may be imposed if that fine is not paid and an enforcement order is made. The table in [section 139\(4\) of the Powers of Criminal Courts \(Sentencing\) Act 2000](#) sets out the maximum periods of imprisonment that may be fixed under this new section.

New section 369B also empowers the Court Martial, when making a Service compensation order against a person aged over 18, to specify the maximum term of imprisonment that may be imposed if the compensation is not paid, if it is felt that the usual default term is insufficient.<sup>29</sup> Again, the table in [section 139\(4\) of the Powers of Criminal Courts \(Sentencing\) Act 2000](#) sets out the maximum periods of imprisonment that may be fixed under this new section.

Under section 322 of *AFA06* regulations may be made for financial penalty enforcement orders, as a means of enforcing unpaid or un-recovered fines and compensation orders, to be enacted by a Magistrates' Court in England and Wales, the Sheriff Court in Scotland or the court of summary jurisdiction in Northern Ireland. In accordance with those regulations, an order made under new sections 269A and B will only take effect if the fine or compensation order is registered by a civil court in the United Kingdom or Isle of Man. Subsection 2 of clause 16 therefore amends section 322 of *AFA06* in order to reflect these new sections.

Under current legislation, where an offender is under the age of 18, is a civilian subject to Service discipline and has a parent or guardian who is subject to Service law, the Court Martial may order the parent or guardian to pay any fine or compensation awarded against the offender (section 268). New Section 269C, set out in the Bill, makes provision for orders made under 269A and B against the Service parent or guardian of an offender to be appealed at the Court Martial Appeal Court.

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<sup>29</sup> The default maximum is that which could otherwise be imposed by a Magistrate's Court in England and Wales.

### **Service Sexual Offences Prevention Orders**

The *Sexual Offences Act 2003* confers powers on both civilian and Service courts to make Sexual Offences Prevention Orders when dealing with an offender for certain sexual offences or offences of violence. However, those powers are limited to the protection of members of the public in the UK and do not apply to the large numbers of Service families living overseas. **Clause 17** of the Bill, therefore, introduces seven new sections to *AFA06* which will extend the powers of the Court Martial and the Service Civilian Court<sup>30</sup> so that they can make Service Sexual Offences Prevention Orders (Service SOPOs), which will be very closely based on their civil equivalent but designed solely for the protection of members of the Service community outside the UK.

Under these new sections, a Service SOPO may be made by the Service courts where a defendant is convicted of a civilian conduct (section 42) offence under *AFA06*<sup>31</sup> and the corresponding civilian offence is listed in Schedule 3 or 5 of the *Sexual Offences Act*, or where the court makes a finding of insanity or unfitness to plead in relation to a qualifying section 42 offence. Those orders can be applied to members of the Regular or Reserve forces, a civilian subject to Service discipline or an individual who the court is satisfied is intending to become, or is likely to become, a civilian subject to Service discipline.<sup>32</sup> Such orders will also have effect for a fixed period of no less than five years. The new power will sit alongside the existing provisions in part 2 of the *Sexual Offences Act*, thereby allowing a Service court to impose a SOPO and a Service SOPO at the same time.

New section 232B enables a defendant to appeal the making of such an order on the basis of insanity or unfitness to plead, to the Court Martial Appeals Court. This section would not apply to those orders made on conviction, as the right to appeal in such situations already exists under the *Court Martial Appeals Act 1968*.

An application to vary or revoke a Service SOPO, including extending it, can be made to the Court Martial by a Provost Marshal or by the person subject to the order. An extension to the term of the order, and additional prohibitions, can only be made by the Court Martial, however, if it is necessary for the purpose of protecting the Service community outside the UK from serious sexual harm by the person subject to the order. The Court Martial cannot revoke a Service SOPO before the end of the five-year period, without the consent of the person subject to the order and a Provost Marshal.

The default position is that a SOPO made by a Service Civilian Court or the Court Martial under the *Sexual Offences Act* may only be varied or revoked by the Crown Court in England and Wales (section 108 of *SOA03*). Where a Service court has imposed both a SOPO and a Service SOPO in relation to the same matter, the power to vary or revoke the SOPO is given to the Court Martial while the person subject to the orders is still part of the Service community. This change is intended to prevent applications being made in both the civilian and military jurisdictions, where one court may be unaware of the other court's decision.

Again, a person may appeal any variations to an order, or the refusal of the Court Martial to vary or revoke a service SOPO, to the Court Martial Appeal Court.

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<sup>30</sup> Further information on the Service Civilian Court is available in Section B11 of [RP05/86](#)

<sup>31</sup> Section 42 defines 'criminal conduct offences' as an offence under Service law which is also a criminal offence under the law of England and Wales or if done in England or Wales.

<sup>32</sup> For example, where the defendant is a member of a Service family who has returned to the UK, and is therefore no longer a civilian subject to Service discipline, but the court is satisfied that the defendant is intending or likely to rejoin their family outside the UK and will again become subject to Service discipline at some point in the future.

Where an individual is subject to a SOPO issued by a civilian court, the Court Martial is empowered under new section 232E to make an extended prohibition order, on application by a Provost Marshal, where the court is satisfied that there are members of the Service community outside the UK that would be protected by the SOPO were they in the UK. As such, an EPO can only include prohibitions which are substantially the same as those in the SOPO and it will only last until the expiry of the original SOPO. If a SOPO is varied or revoked, then the EPO will lapse. Appeal against the making of an EPO can be made to the Judge Advocate General. The grounds on which an appeal can be brought and the associated procedures and powers of the Judge Advocate General will be set down in subsequent regulations.

Breach of a Service SOPO or of an EPO without reasonable excuse, constitutes an offence and is punishable, in line with section 164, up to a maximum of five years imprisonment. This is the same maximum penalty as applies on indictment for breach of a SOPO under the *Sexual Offences Act*.

## 2.7 Miscellaneous Amendments to AFA06

The following set of clauses make minor amendments to existing provisions in AFA06, including extending the jurisdiction of the Service Civilian Court to the UK (clause 18);<sup>33</sup> allowing the Director of Service Prosecutions to appoint civilians with prescribed qualifications to the Service Prosecuting Authority (clause 21);<sup>34</sup> and enabling a CO to use administrative procedures to reduce a warrant officer or non-commissioned officer by more than one rank where the situation warrants it.<sup>35</sup>

The main provisions in this section of the Bill are as follows.

### ***Service Complaints Procedures***

AFA06 introduced several measures to improve the efficiency and independence of the Armed Forces' internal processes for the redress of grievances. Specifically, that legislation created Service Complaints Panels which would undertake the work of the Defence Council with respect to this issue. Cases that could not be resolved by the chain of command could be referred to that panel. The membership of the panel would come from outside the chain of command of the complainant and comprise at least two senior officers or civil servants.<sup>36</sup> One member of the panel must be a senior officer and in certain circumstances, such as complaints relating to bullying or harassment, an independent member would sit on the panel.<sup>37</sup> The Defence Council retained jurisdiction, however, over more serious Service complaints, and also had the power to authorise either the panel, or a specific person, to investigate a complaint on their behalf.<sup>38</sup>

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<sup>33</sup> Established under AFA06 to replace the Standing Civilian Court, the jurisdiction of the SCC is currently geographically limited to anywhere outside the UK, Channel Islands and Isle of Man.

<sup>34</sup> See Section 365 of AFA06 for relevant qualifications. Commencement of this provision would be subject to arrangements agreed with the Attorney General.

<sup>35</sup> All three Services also operate a formal system of administrative action, quite separate from the military disciplinary system, in order to deal with personnel who have displayed professional shortcomings or have failed to act in accordance with the values and standards expected of them. Sanctions can be awarded and are dependent upon rank and the type and level of misconduct. Under current regulations a warrant officer or non-commissioned officer can only be administratively reduced by one acting or substantive rank. This amendment will allow greater flexibility in cases which are not serious enough to warrant discharge but for which a reduction of one rank is insufficient.

<sup>36</sup> A senior officer is defined as an individual subject to Service law above the rank of Commodore, Brigadier or Air Commodore.

<sup>37</sup> An independent member must not be a member of the Armed Forces or a civil servant.

<sup>38</sup> Further information on the secondary legislation relating to the redress of grievances procedures, is available in Library briefing SN/IA/4342, *Secondary Legislation of the Armed Forces Act 2006*

**Clause 20** of the Bill introduces a number of amendments to section 335 *AFA06* on the role of the Defence Council in relation to Service Complaints Panels and section 336 on the composition of a panel. These are aimed at strengthening the independence and impartiality of Service complaints procedures.<sup>39</sup> Subsection 1 of clause 20 substitutes a new subsection in section 335 clarifying that the Defence Council must determine the size of a Service Complaint Panel, subject to the requirements set down in section 336(2) for a minimum of two members of a panel, and 336(6) as amended (see below).

This clause also makes amendments to section 336 of *AFA06*. Subsection 4 of clause 20 removes the requirement for one member of the panel to be a senior officer, while new subsections 4A-E, introduced by subsection 5 of clause 20, give the Defence Council the power to determine, in relation to a particular complaint or any complaint of a description to be determined by the Defence Council, that a Service Complaint Panel include a specified number of independent members (as opposed to one independent member in certain circumstances as is the case at present), and to determine which functions are to be exercised by those independent members. In line with existing legislation, the Defence Council may also delegate those functions to a civil servant or officer.

With respect to complaints of a prescribed description, amendments to subsection 6 of section 336 impose a number of new requirements on the composition of a service panel, namely that it include a prescribed number of independent members or be composed mainly or entirely of independent members, and that certain functions will be carried out by those independent members. Detail on those requirements and functions will be set down in regulations to be made by the Secretary of State.

Subsection 7 of clause 20 also introduces a new section to *AFA06* that gives the Secretary of State the power to make regulations placing a requirement on the Defence Council to delegate its functions in relation to “any service complaint of a prescribed description” where a majority, or all, of the members of the panel are required to be independent and/or where they require certain functions to be carried out by independent members.

### ***Civilians Subject to Service Discipline***

The categories of civilians subject to Service discipline, who therefore fall within the jurisdiction of the Service courts,<sup>40</sup> are set out in Part 1 of Schedule 15 of *AFA06*.<sup>41</sup> The main categories of civilian considered to fall within the scope of *AFA06* did not differ significantly from what had gone previously. However, provision was made in Schedule 15 for a wider range of civilians to be designated with the authorisation of the Defence Council where it is considered necessary, or by the Secretary of State through secondary legislation.

**Clause 22** of this bill makes several amendments to Schedule 15, because a number of paragraphs are considered to apply jurisdiction too broadly or excessively:

- With respect to Crown Servants working in support of the Armed Forces in a designated area,<sup>42</sup> the bill proposes to alter their status slightly so that they are only subject to Service discipline in the designated area in which they usually work or

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<sup>39</sup> In the October 2009 case *Crompton v. the UK* the European Court of Human Rights considered the compliance of the statutory complaints system with article 6 (right to a fair and public hearing within a reasonable time by an independent and impartial tribunal). The Court held the system to be compliant in relation to that particular case, but also stated that in some cases which turn on a question of fact, the availability of judicial review would be insufficient.

<sup>40</sup> The main jurisdiction under *AFA06* arises in relation to criminal conduct offences under section 42.

<sup>41</sup> For a discussion of the applicability of military law to certain civilians see Library Research Paper [RP05/75](#), section IA and [RP05/86](#), Section A.

<sup>42</sup> Areas are designated for the purposes of Schedule 15 by the *Armed Forces (Civilians Subject to Service Discipline) Order 2009*

when they are in another designated area but have gone there to work in support of the Armed Forces.

- With respect to individuals that are employed outside of the UK in a specified naval, military or air force organisation by reason of the UK's membership of that organisation, such as NATO, the Bill seeks to make a similar change. Subsection 3 of clause 22 limits jurisdiction to when those individuals are in a foreign country or territory where they usually work, or are in another foreign country or territory for the purposes of that work.
- Paragraph 6 of schedule 15 relates to members and employees of specified organisations, such as the Navy, Army and Air Force Institutes and the Soldiers, Sailors, Airmen and Families Association (SSAFA), whenever they are in a designated area. Clause 22 therefore makes a parallel change to their status as is applicable to Crown Servants.
- Paragraph 10 of Schedule 15 applies, generally speaking, to an individual who resides or stays with an employee of a specified military organisation. Again, clause 22 amends the applicability of Service discipline to a person who resides or stays with the employee in the country in which they normally work, or in a country to which that employee has travelled for the purpose of work.

### ***Protected Prisoners of War***

In order to comply with the obligations of Articles 82 and 102 of the [Geneva Convention Relative to the Treatment of Prisoners of War 1949](#), the UK is obliged to make prisoners of war who are detained by UK forces, subject to UK Service law and to the same courts and procedures as the Armed Forces. Those regulations are currently contained in a [Royal Warrant](#) from 1958, which includes the [Prisoners of War \(Discipline\) Regulations 1958](#) and are based on the [Army Act 1955](#), which has since been repealed by [AFA06](#).

The 1958 regulations are, therefore, out of date. Clause 23 seeks to rectify this situation by inserting a new section to [AFA06](#) that provides for new regulations, to be made by Royal Warrant, which will apply relevant provisions of [AFA06](#) to protected prisoners of war detained by UK forces,<sup>43</sup> or to allow provisions to be made which are equivalent to those that exist in [AFA06](#). Specifically, the new regulations will extend the jurisdiction of the Service courts to prisoners of war.

According to the Explanatory Notes, the only provisions of [AFA06](#) that are not relevant provisions for the purposes of this new section are those in Part 14 related to enlistment and terms of services, Part 15 on forfeitures and deductions and Part 16 related to Inquiries.

## **2.8 Amendments and Repeals to Other Legislation**

The final two groups of clauses amend or repeal other legislation, or introduce other supplementary provisions. Among those clauses are provisions enabling certain Judge Advocates to sit in Magistrates' Courts and the Crown Court in order to broaden their experience (**clause 26 and Schedule 2** which largely amend the [Senior Courts Act 1981](#), the [Courts Act 2003](#) and the [Criminal Justice Act 1967](#) to reflect this provision); the repeal of the [Naval Medical Compassionate Fund Act 1915](#) (**clause 27**); and **clauses 28-29** giving effect to Schedules 3, 4 and 5 of the Bill which outline minor amendments to existing Service legislation and the amendments and repeals that are required as a consequence of the provisions in this Bill.

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<sup>43</sup> As defined by section 7(1) of the [Geneva Conventions Act 1957](#)

The two most notable provisions under this section are as follows.

### ***Byelaws for Service Purposes***

The *Military Lands Act 1900* required the consent of the then Board of Trade if the Secretary of State wished to make byelaws for military purposes that may adversely affect any public right of navigation, anchoring, grounding, fishing, bathing, walking or recreation. Responsibility for each of these different uses of the sea and shore no longer rest with one body since the Board of Trade no longer exists and its responsibilities and functions have been transferred to other Government departments. Therefore **clause 24** proposes to remove this requirement for consent and instead adds a new section to that Act which imposes an obligation on the Secretary of State, before making any such byelaws, to consider those matters previously examined by the Board of Trade. Where the Secretary of State considers that any byelaw would adversely affect any of those public rights, he/she must be satisfied that restriction of that right is required for the safety of the public or for the military purpose of the affected area, and that any restrictions imposed are reasonable.

This clause also removes a section of the 1900 Act which makes provision for the giving of notice by, and the making of objections to, the Board of Trade. The Secretary of State's duty to provide an opportunity for objections, and to consider any objections made, is considered to already be provided for in section 17 of the *Military Lands Act 1892*.

### ***Visiting Forces/ NATO Status of Forces Agreement***

The NATO Status of Forces Agreement (SOFA) is an agreement between NATO member states which governs the status of their respective Armed Forces while in the territory of another NATO ally. The United States, for example, has approximately 9,500 personnel based in the UK under the NATO SOFA, which was given effect in UK statute by the *Visiting Forces Act 1952*.

Article VIII (5) of the NATO SOFA makes provision relating to certain types of claim, largely in relation to personal injury and damage to property, brought in participating States against members of a visiting force and their Sending States. The aim, in such cases, is for the host State to settle the claim and recover costs from the Sending State in accordance with the terms of the NATO SOFA, thereby preventing the Sending State from becoming entangled in litigation in the host country.

In the UK, those arrangements are provided for in section 9 of the *Visiting Forces Act 1952*. Under the provisions of that Act, if the Sending State is sued in the UK courts on these grounds, and the Secretary of State fails to settle that claim, then the Sending State has to become involved as party to the litigation as the Secretary of State has no powers to defend proceedings for a claim. According to the Explanatory Notes, the United States has consistently raised concerns about these arrangements as they do not fully prevent the US from becoming caught up in UK litigation proceedings.

**Clause 25** therefore seeks to remedy this situation by making provision in the *Visiting Forces Act 1952* for the Secretary of State to transfer any liability in respect of claim in tort which has failed to be settled, to the Ministry of Defence. This will then enable the Secretary of State to be substituted as a party in any litigation proceedings in the place of the Sending State. In doing so however, it has been acknowledged that the Ministry of Defence will incur additional costs.<sup>44</sup>

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<sup>44</sup> The MOD has estimated that, in addition to the costs of independent inspections of the service police forces (see above), these costs will total approximately £270,000 per annum (See p.33-34 of the Explanatory Notes)