

ARMED FORCES BILL

Memorandum from the Ministry of Defence to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Armed Forces Bill (“the Bill”). The Bill was introduced in the House of Commons on 14 January 2026. This memorandum identifies the provisions of the Bill that confer new or modified powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The primary purpose of this Bill is to renew the Armed Forces Act 2006 (“AFA 2006”) and, in so doing, continue in force the primary legislation governing the armed forces. The AFA 2006 provides nearly all the provisions for the existence of the service justice system, which enables Service personnel (and civilians in certain situations outside of the UK), to be held to account for both criminal offences and conduct and discipline offences wherever in the world they are serving. For constitutional and legal reasons, an Armed Forces Act is required every five years, a requirement which has its origins in the Bill of Rights 1688, which provides that the raising of a standing army is against the law unless Parliament consents to it.
3. Other key measures include those to improve the effectiveness and efficiency of the service justice system and modernise and improve victim support, provision to establish the Defence Housing Service, new powers for the prevention and detection of offences being committed with drones on Defence property, and provision to place the Armed Forces Covenant fully into law.

C. DELEGATED POWERS

Clause 1: duration of Armed Forces Act 2006

Power conferred on: His Majesty

Power exercised by: Order in Council

Parliamentary Procedure: Affirmative resolution procedure

Context and purpose of the power

4. This clause deals with the duration of the AFA 2006. This provision has its origins in the Bill of Rights 1688 which provides that a standing Army in peacetime is only lawful with the consent of Parliament. The principle of parliamentary consent for the armed forces is now given effect in the requirement for renewal of the AFA 2006; the legislation which enables the armed forces to be maintained as disciplined bodies. The practice of renewal involves Armed Forces Acts every five years; with annual Orders in Council made by the affirmative procedure in the intervening years.
5. Specifically, when originally enacted, section 382 of the AFA 2006 provided that the Act was to expire one year after having been passed; subject to a power to extend the Act for a further year at a time by Order in Council. Such Orders in Council are made under the affirmative procedure. They could not extend the life of the Act beyond the end of 2011. A further Armed Forces Act was therefore required to renew the AFA 2006 in 2011. The Armed Forces Acts in 2011, 2016 and 2021 substituted section 382 for a new provision which maintained the pattern of Orders in Council and Armed Forces Acts.
6. Clause 1 carries on this tradition by providing that – rather than expiring at the end of 2026 – the AFA 2006 expires one year after the Bill is passed. The AFA 2006 can be extended by Order in Council for a further year at a time. An Order in Council cannot extend the AFA 2006 beyond the end of 2031.

Justification for taking the power

7. The Order in Council process strikes the balance between providing an annual opportunity for Parliament to debate the continuation of the AFA 2006, while

removing the need for annual armed forces Acts of Parliament. Without the power to continue the AFA 2006, it would be necessary either to have annual armed forces legislation (which would be a significant burden on Parliament and the Government) or reduce the frequency with which Parliament considers the AFA 2006.

Justification for the procedure

8. The affirmative procedure is appropriate because it gives Parliament the opportunity to debate the continuation of the AFA 2006. This maintains the approach in the AFA 2006 and Armed Forces Acts in 2011, 2016 and 2021.

Clause 2: section 343AF of the Armed Forces Act 2006: Sections 343AZA and 343AZB: power to add etc persons and matters

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Draft affirmative resolution procedure

Context and purpose of the power

9. This clause implements the manifesto commitment to introduce legislation to bring the “Armed Forces Covenant fully into law”. This clause replaces the existing Covenant duty as set out in sections 343AA to 343AD, which currently applies only in relation to specified health care bodies, education bodies and local authorities when exercising specified statutory healthcare, education and housing functions respectively. The Secretary of State currently has the power, by way of regulations, to amend sections 343AA to 343AD by:
 - a. specifying additional functions in relation to the exercise of the Armed Forces Covenant duty;
 - b. specifying additional persons or bodies who are to be subject to the duty.
10. The new Covenant duty will require specified persons, when exercising public functions in relation to a matter which is a relevant matter for that person, to have due regard to the Armed Forces Covenant principles.

11. Clause 2(5) amends section 343AF of the Armed Forces Act 2006 to allow the Secretary of State by way of regulations to amend new sections 343AZA and 343AZB by:
- a. Adding, removing or modifying the description of a specified person to whom the duty in new section 343AZA applies;
 - b. Adding, removing or modifying the description of a matter in relation to which the duty in new section 343AZA applies;
 - c. Amend section 343AZA so as to change the matters that are relevant matters in relation to a specified person.

Justification for the power

12. While the matters and bodies currently within scope of the extended duty have been chosen carefully to ensure that the Armed Forces Covenant duty will not be overly onerous, but will be most effective for service personnel, veterans and their families, there is a recognition that there may be other public service areas in which members of the armed forces community experience disadvantage and where, in future, it may be desirable to add additional persons or additional matters. This power enables such areas to be added without the need for further primary legislation.
13. In addition, the power enables the Secretary of State to remove or modify the description of a specified person or matter in relation to which the duty in new section 343AZA applies. This is to allow the removal of defunct bodies from the list and/or reflect where there has been a change of name or transfer of functions and/or where it may be necessary to modify or remove a matter which is no longer of relevance to the armed forces community.
14. The delegated power is therefore an important tool to future-proof the legislation so that the scope of the duty can evolve to keep pace with changes to the armed forces landscape without needing further primary legislation on each occasion.

Justification for the parliamentary procedure

15. The power would be exercisable by the draft affirmative procedure and would only be available in areas of devolved competence after consultation with the

relevant devolved administration. This level of parliamentary scrutiny is considered appropriate given that one effect of any regulations is to add to or modify the list of specified persons or matters in scope of the duty. As Parliament would have approved the initial list of persons or matters as set out in the Bill, both Houses should be afforded the opportunity to debate and approve any additions or modifications to the list. The draft affirmative procedure is also apt given the Henry VIII nature of the power. The application of the draft affirmative procedure is consistent with the current delegated power to specify additional bodies, persons or relevant functions in section 343AF(1) of the Armed Forces Act 2006.

Clause 2: section 343AE of the Armed Forces Act 2006: section 343AZA: guidance

Power conferred on: Secretary of State

Power exercisable by: Guidance

Parliamentary procedure: None

Context and purpose of the power

16. This clause will provide the Secretary of State with a power to issue guidance relating to the Armed Forces Covenant duty. When specified persons exercise functions in relation to a relevant matter, they will be obliged to have regard to that guidance.
17. The Secretary of State already has a delegated power under s.343AE to issue guidance relating to the current Armed Forces Covenant duty as set out in s.343AA-AD. At present, the guidance must be laid before Parliament and comes into force on whatever day the Secretary of State may appoint by regulations, which are subject to the draft affirmative procedure (see further below).
18. The power is amended so that the Secretary of State has the power to issue guidance in relation to the new duty in s.343AZA. As such, this is not a new power to issue statutory guidance but an amendment of an existing power. Whilst not a power to make secondary legislation, the power to issue

guidance is included to give the Delegated Powers and Regulatory Reform Committee as complete a picture of the Bill as possible.

Justification for the power

19. The power to issue guidance is designed to assist the persons or bodies subject to the duty to identify the practical steps that those persons or bodies are expected to take to comply with the Armed Forces Covenant duty. The expectation is that the guidance will provide further information about: (a) the way in which the three Armed Forces Covenant principles may be considered and applied; (b) the types of disadvantage commonly suffered by service personnel, veterans and their families, for example, the requirement of mobility; (c) explaining the sort of practical steps public bodies may be expected to consider in having due regard to the Armed Forces Covenant duty. The MOD considers that these matters are matters which are suitable for guidance rather than primary or secondary legislation. It is therefore appropriate to maintain this power in this instance.

Justification for the parliamentary procedure

20. Specified public bodies will be required to have regard to the guidance rather than be bound by it. It is uncommon for statutory guidance of this nature to have a parliamentary procedure. In addition, section 343AE(5) contains a duty to consult the devolved administrations prior to issuing guidance insofar as it concerns devolved functions. Under section 343AE(4)(a), guidance may not be issued unless a draft has been laid before Parliament and the regulations specifying the date on which the guidance comes into force are subject to the negative resolution procedure. This provides sufficient safeguards for the nature of the guidance.

Clause 2: section 343AE of the Armed Forces Act 2006: section 343AZA: guidance

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

21. This clause will provide the Secretary of State with a power to specify the date on which the guidance relating to the Armed Forces Covenant duty comes into force.
22. As set out above, the Secretary of State already has a delegated power to issue guidance relating to the Armed Forces Covenant duty under s.343AE. Currently, the guidance comes into force on whatever day the Secretary of State may appoint by regulations, which are subject to the draft affirmative procedure.
23. Under clause 2(7), the regulations bringing guidance under section 343AE into force will no longer be subject to the draft affirmative procedure but instead will be subject to the negative resolution procedure. As such, this is not a new power but an amendment of an existing power.

Justification for the power

24. As set out above, the guidance is designed to assist the persons or bodies subject to the duty to identify the practical steps that those persons or bodies are expected to take to comply with the Armed Forces Covenant duty. The guidance will come into force on the date specified in regulations made by the Secretary of State. This is to provide additional parliamentary oversight.

Justification for the parliamentary procedure

25. Currently, the regulations specifying the date on which the guidance comes into force are subject to the draft affirmative procedure. The clause would amend this so that the regulations would be subject to the negative resolution procedure. The MOD considers this is appropriate to avoid issues with keeping the guidance updated.
26. As set out above, section 343AE(5) also contains a duty to consult the devolved administrations prior to issuing guidance insofar as it concerns devolved functions and under section 343AE(4)(a), guidance may not be issued unless a draft has been laid before Parliament. This provides sufficient safeguards for the nature of the guidance. It would be an inappropriate use of parliamentary time to debate such a short instrument that only deals with a

coming into force date, especially where updates might be undertaken quite regularly.

Clause 3 and Schedule 1: section 343E(2)(b) of the Armed Forces Act 2006 – power to confer functions on the Defence Housing Service by direction in writing

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary procedure: None

Context and purpose of power

27. Clause 3 and Schedule 1 establish the Defence Housing Service (“DHS”), a new non-departmental public body with the general function of improving the supply and quality of defence housing. Subsection (1) of new section 343E of the Armed Forces Act 2006 sets out all the core functions of the DHS. Under subsection (2)(b), further functions may be conferred on the DHS by way of a direction in writing given by the Secretary of State, where such functions are exercisable by a Minister of the Crown. Directions given under this section must be published in such manner as the Secretary of State thinks appropriate (s343E(7)).

28. In carrying out a function conferred by a direction given under this section, if or to the extent that the direction specifies, the DHS has the same immunities, privileges and exemptions as would apply to the Minister of the Crown in relation to the carrying out of that function (paragraph 1(3) of Schedule 11A).

Justification for the power

29. The power is necessary to retain an appropriate degree of ministerial oversight and control over the functions of the DHS. As an arm’s length body, the DHS will not be part of the Ministry of Defence but will nevertheless need to perform essential functions in connection with the defence housing estate. Therefore, the Secretary of State for Defence will have an interest in ensuring

the DHS's functions continue to align with ministerial priorities as the nature and scale of the defence housing estate evolves.

30. Further, while the DHS is to be established as an arm's length body, it will perform many of the functions that are currently performed by the Ministry of Defence and Defence Infrastructure Organisation. Thus, as it stands, those functions are carried out with the benefit of the immunities and privileges of the Crown. To ensure that the DHS can continue to fulfil these functions on behalf of the Ministry of Defence efficiently and effectively, it is necessary to include a mechanism that may confer those Crown immunities and privileges on the DHS where appropriate.

Justification for the parliamentary procedure

31. This power is not subject to any parliamentary procedure. This level of parliamentary scrutiny is considered appropriate because the power is narrowly drawn in that such a direction must pertain specifically to the functions of the DHS and cannot be used to alter the DHS's core functions set out in subsection (1), which will have been scrutinised by Parliament during the passage of the Bill. Furthermore, directions under this section will be required to be published to ensure that details of any further functions being conferred on the DHS via this mechanism are available to the public.

Clause 3 and Schedule 1: section 343E(5)(d) of the Armed Forces Act 2006 – duty to have regard to guidance issued by the secretary of State

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose of power

32. New section 343E(5)(b) of the Armed Forces Act 2006 provides that, in exercising its functions, the DHS must have regard to guidance issued by the Secretary of State for the purposes of new Part 16C of the Armed Forces Act 2006.

Justification for the power

33. The power is necessary to retain an appropriate degree of ministerial oversight and control over the DHS when it is exercising its functions. As an arm's length body, the DHS will not be part of the Ministry of Defence but will nevertheless perform vital functions in connection with the defence housing estate. Therefore, the Secretary of State for Defence will have an interest in ensuring the DHS exercises its functions in a manner that is aligned with ministerial priorities.

Justification for the parliamentary procedure

34. Guidance issued under this section will not be subject to any parliamentary procedure. This is considered appropriate as the guidance is intended to provide guidance to the DHS at an operational and administrative level. It may only include provision that is relevant to the exercise of the DHS's statutory functions and cannot materially affect the nature or scope of those functions, which are set down in primary legislation.

Clause 3 and Schedule 1: paragraph 1(6) of Schedule 11A of the Armed Forces Act 2006 – regulations to provide that property held by the Defence Housing Service to be treated as Crown land

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution procedure

Context and purpose of power

35. This paragraph will enable the Secretary of State to provide by way of regulations that any property held by the DHS for defence purposes is to be treated as if it were property of, or held on behalf of, the Crown for the purpose of the application of a particular enactment. Such provision may apply generally to property of the DHS or only to such descriptions of property

as specified in the regulations and may be subject to such conditions as set out in the regulations.

Justification for the power

36. As it stands, property held or managed by the Ministry of Defence and the Defence Infrastructure Organisation is Crown land and therefore benefits from the privileges and immunities that status brings. When the DHS is established, it will perform many of the functions that are currently performed by the Ministry of Defence and Defence Infrastructure Organisation. In order to ensure that the DHS can fulfil its statutory functions efficiently and effectively, it is necessary to include a mechanism in the legislation that will enable property that it holds to be treated as Crown property. For example, the inherently mobile nature of service life means that it is essential to the smooth running of the defence estate, and the operational effectiveness of the armed forces, that service personnel do not acquire security of tenure over their service living accommodation.

Justification for the parliamentary procedure

37. Regulations made under this provision will be subject to the negative resolution procedure. This level of parliamentary scrutiny is considered appropriate given regulations under this provision will not fundamentally alter the status of the DHS as a non-Crown non-departmental public body. Rather, the power may be used in a specific and limited way in order to treat property held by the DHS as Crown property where appropriate.

Clause 3 and Schedule 1: paragraph 22 of Schedule 11A of the Armed Forces Act 2006 – regulations may vary the effect of a relevant tax

Power conferred on: HM Treasury

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution procedure (Commons only)

Context and purpose of power

38. This clause permits the Treasury to make regulations making provision varying the way in which a “relevant tax” has effect in relation to anything transferred under a transfer scheme, or anything done for the purposes of, or in relation to, a transfer under such a scheme. A “relevant tax”, for this purpose, means income tax, corporation tax, capital gains tax, value added tax, stamp duty, stamp duty land tax or stamp duty reserve tax. A transfer scheme refers to such a scheme established under new section 343G of the Armed Forces Act 2006 and Part 2 of Schedule 11A of that Act (inserted by clause 3 and Schedule 1 of the Bill) and includes the transfer of property and staff.
39. Provision may in particular disapply a tax, or apply a tax with modifications, in relation to anything transferred; provide that anything transferred be treated in a specified way for the purposes of a tax provision; or permit or require the Secretary of State to determine, or specify the method of determining, matters that require determination for the purposes of any tax as it relates to anything transferred. “Tax provision” refers to any legislation about tax.

Justification for the power

40. The power is necessary to ensure that the DHS does not incur tax liabilities when acquiring property, rights or other interests, or transferring staff, under a transfer scheme established under section 343G of the Armed Forces Act 2006. While the DHS will be conducting certain specific activities for or on behalf of the Crown, it will not be a Crown body and in the absence of express provision in legislation it will incur taxes such as stamp duty land tax in the ordinary way. Were the DHS to be exposed to the full extent of applicable taxes under a transfer scheme, this would divert considerable resources away from DHS and undermine its ability to perform its statutory functions efficiently and effectively.

Justification for the parliamentary procedure

41. The power will be subject to the negative resolution procedure and will be Commons-only. This is consistent with similar powers such as that under section 53B of the Housing and Regeneration Act 2008 and as such the negative procedure is considered to afford sufficient parliamentary scrutiny.

The power is concerned solely with tax provision and therefore the choice of a Commons-only procedure is appropriate.

Clause 4: section 343J(4)(b) of the Armed Forces Act 2006 – to specify the minimum seniority of civilian personnel who can be responsible persons

Power conferred on: Secretary of State

Power exercisable by: A notice published by the Secretary of State

Parliamentary procedure: None

Context and purpose of power

42. An authorisation under the new authorisation regime must specify the minimum seniority of the person who is to act as the responsible person in relation to the specified defence area or defence property. Pursuant to section 343J(4)(b), where the authorising officer is a civil servant, that seniority must be specified in a notice published by the Secretary of State.

Justification for the power

43. The power is necessary to give effect to the intention that civil servants who can act as responsible persons are at least an equivalent rank to the rank of a member of His Majesty's Armed Forces specified in s.343J(4)(a). It is not considered appropriate to specify this on the face of the Bill as grades may change in the future. It is for this reason a delegated power has been taken for the Secretary of State to specify these details in a published notice.

Justification for the parliamentary procedure

44. Any notices issued under this section will not be subject to any parliamentary procedure, however the requirement that the authorising officer be a member of the Senior Civil Service is included on the face of the Bill. Further, the Bill imposes a statutory requirement for the notices to be published. The Department considers this to be a sufficient level of parliamentary scrutiny.

Clause 4: section 343J(7) of the Armed Forces Act 2006 – to specify “approved equipment”

Power conferred on: Secretary of State

Power exercisable by: Written notice

Parliamentary procedure: None

Context and purpose of the power

45. This measure permits an authorising officer to authorise the use of “approved equipment” for the purpose of preventing, detecting, or mitigating the risk of, the use of a drone in the commission of a relevant offence in relation to a defence area or defence property. “Approved equipment” means any equipment approved by notice in writing by the Secretary of State.

Justification for the power

46. The power is necessary to ensure that those granting authorisations under these provisions (the “authorising officers”) have notice of the types of equipment that have been approved by the Secretary of State for this purpose.

Justification for the parliamentary procedure

47. The power is not subject to any parliamentary procedure. For security reasons, it is essential that notices given under these provisions are not made public. It would therefore not be appropriate for the notices to be laid before Parliament and for their contents debated in any public forum. The notices are intended to provide necessary technical detail to operational professionals that require this information in order to effectively implement the process set down in these provisions from an operational perspective. It is for these reasons that the chosen level of parliamentary scrutiny is considered sufficient.

Clause 4: section 343J(7) of the Armed Forces Act 2006 – to specify the seniority of civilian personnel who can be authorising officers

Power conferred on: Secretary of State

Power exercisable by: A notice published by the Secretary of State

Parliamentary procedure: None

Context and purpose of power

48. An authorisation under the new authorisation regime can only be given by an “authorising officer”. Pursuant to section 343J(7), where the authorising officer is a civil servant, that individual must be a member of the Senior Civil Service and of a level of seniority specified in a notice published by the Secretary of State.

Justification for the power

49. The power is necessary to give effect to the intention that members of the Senior Civil Service that are authorised to give authorisations under these provisions must be of at least Director-General (Grade 2) level within the Senior Civil Service. It is not considered appropriate to specify this on the face of the Bill as grades may change in the future. It is for this reason a delegated power has been taken for the Secretary of State to specify these details in a published notice.

Justification for the parliamentary procedure

50. Any notices issued under this section will not be subject to any parliamentary procedure, however the requirement that the authorising officer be a member of the Senior Civil Service is included on the face of the Bill. Further, the Bill imposes a statutory requirement for the notices to be published. The Department considers this to be a sufficient level of parliamentary scrutiny.

Clause 4: section 343N(3)(b) of the Armed Forces Act 2006 – to specify the minimum seniority of civilian personnel who can be designated persons

Power conferred on: Secretary of State

Power exercisable by: A notice published by the Secretary of State

Parliamentary procedure: None

Context and purpose of power

51. An urgent authorisation under the new authorisation regime may be given by a person designated by an authorising officer. Pursuant to section 343N(3)(b),

an authorising office may only specify a person if they are of a minimum seniority specified in a notice published by the Secretary of State.

Justification for the power

52. The power is necessary to give effect to the intention that civil servants who can act as designated officer are at least an equivalent rank to the rank of a member of His Majesty's Armed Forces specified in s.343N(3)(a). It is not considered appropriate to specify this on the face of the Bill as grades may change in the future. It is for this reason a delegated power has been taken for the Secretary of State to specify these details in a published notice.

Justification for the parliamentary procedure

53. Any notices issued under this section will not be subject to any parliamentary procedure, however the requirement that the authorising officer be a member of the Senior Civil Service is included on the face of the Bill. Further, the Bill imposes a statutory requirement for the notices to be published. The Department considers this to be a sufficient level of parliamentary scrutiny.

Clause 4: section 343Q of the Armed Forces Act 2006 – to add or remove relevant offences from the list of offences set out in section 343Q

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Draft affirmative procedure

Context and purpose of the power

54. The new authorisation regime established by sections 343J-Q will allow an authorisation to be given where a relevant offence may be committed. The purpose of the power is to allow additional offences to be added or offences to be removed from the list of relevant offences.

Justification for the Power

55. It may be necessary to add further offences to the list of relevant offences. The current list sets out the most obvious offences that might be committed

using a drone. However, it may be that once the new regime is put into operation it becomes necessary to specify other offences.

Justification for the Parliamentary procedure

56. The power would be exercisable by the draft affirmative procedure. This level of parliamentary scrutiny is considered appropriate given that the effect of any regulations is to add to or modify the list of relevant offences in relation to which an authorisation can be given to use approved equipment to prevent, detect or mitigate the use of a drone in the commission of a relevant offence. As Parliament would have approved the initial list of offences as set out in the Bill, both Houses should be afforded the opportunity to debate and approve any additions or modifications to the list. The draft affirmative procedure is also apt given the Henry VIII nature of the power.

Clause 7 and Schedule 3: new section 236W(7) of the Armed Forces Act 2006 – power to create further notification requirement when making or varying a service domestic abuse protection order ‘SDAPO’ or service stalking protection order ‘SSPO’

Power conferred on: Secretary of State

Power exercisable by: Regulations by statutory instrument

Parliamentary procedure: Draft affirmative resolution procedure

Context and purpose of the power

57. This clause requires a person subject to a SDAPO or SSPO to supply certain information to the police and keep such information up to date. Failure to do so without reasonable excuse, or knowingly supplying false information, is an offence. The information required is the person's name and their home address. This will assist the police in monitoring the person's compliance with the provisions of the SDAPO and assessing the risk they may pose to the victim. New s236W(7) of the AFA 2006 enables the Secretary of State, by regulations, to specify further notification requirements which a court may impose when making or varying a DAPO or SSPO.

Justification for the power

58. The original Domestic Abuse Protection Order provided by the Domestic Abuse Act 2021 makes the same provision, after the Government had indicated in response to the domestic abuse consultation held prior to the

introduction of the Domestic Abuse Bill that “we will also enable the court to impose additional notification requirement on a case-by case basis...[and] will work with police and courts to make sure additional notifications are effective and will test this new approach through a pilot.”

59. This regulation making power will enable the list of notification requirements to be revised from time to time as may become necessary in the light of new evidence gathered through the pilots (which are ongoing), subsequent practical experience of operating these new orders and changing patterns of abuse.

Justification for the parliamentary procedure

60. The procedure suggested is in line with that adopted for section 41(7) of the Domestic Abuse Act 2021. The draft affirmative procedure is considered appropriate given that such regulations would enable the courts to impose additional notification requirements on persons subject to a SDAPO, which would not have been considered by Parliament, and which might be applied to individuals who might have not been convictions of any offence. Moreover, a failure to comply with any notification requirement, including any additional notification requirement, would constitute a criminal offence.

Clause 7 and Schedule 3: new section 236Y

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose of the power

61. This clause and its accompanying schedule make provision to enable the service police to apply to service courts for the making of a Service Stalking Protection Order (“SSPO”) or a Service Domestic Abuse Protection Order (“SDAPO”). These are civil protective orders designed to protect individuals (specified or otherwise) from harm associated with stalking and domestic violence. These orders can be applied for on a standalone basis or applied to those convicted or acquitted from offences associated with stalking and domestic abuse. They may require or prohibit an offender from doing anything specified in the order. The schedule also provides for the Provost Marshal’s

ability to vary, renew (in the case of an SSPO), discharge such orders and appeal a court's decision in respect of such an order. Interim orders are also specified in the schedule, the Service Domestic Abuse Protection Notice (SDAPN) which can be served by the service police on a perpetrator and is designed to prevent the risk of immediate domestic abuse for the 48 hours preceding an SDAPO application. An interim SSPO may also be applied for pending the final hearing and the Provost Marshal is able to discharge, vary, renew and appeal a court's decision in relation to the same.

62. New section 236Y of the Armed Forces Act 2006 will require the Secretary of State to issue guidance to Provost Marshals regarding the exercise of their powers in relation to:

- a. SDAPN which will be incorporated into the AFA 2006 at Chapter 1A of Part 3 sections 74A to 74D,
- b. SSPO which will be incorporated into the AFA 2006 at Chapter 8 of Part 8 sections 236N to 236V,
- c. SDAPO which will be incorporated into the AFA 2006 at Chapter 8 of Part 8 sections 236C to 236M, and
- d. Notification requirements in respect of SSPO and SDAPO at sections 236W to 236X.

63. It permits the Secretary of State, from time to time, to revise that guidance. The Secretary of State will be further required to arrange for any guidance issued or revised to be published in such manner as the Secretary of State considers appropriate. The guidance is intended to support Provost Marshals in adopting a consistent, proportionate, and effective approach to SSPO, SDAPO and SDAPN and to promote best practice and ensure consistency across the service justice system.

Justification for the Power

64. The purpose of any guidance issued under this provision will be to support the service police in the discharge of their functions in connection with these orders, ensuring that their responsibilities are carried out in a consistent and effective manner. The guidance is expected to cover such issues as the test for applying for a SDAPN, SDAPO or SSPO the appropriate prohibitions and

requirements to seek to attach to an order, the factors to be taken into consideration when doing so, and the process for applying for an order or for its variation or discharge and the administration of notification requirements to the service police. Including this level of operational detail in primary legislation would be inappropriate. There is a vast range of statutory guidance, such as this, issued each year and it is important that this guidance can be updated at pace to reflect operational best practice.

Justification for the Parliamentary procedure

65. Any guidance issued under this new section will not be subject to any parliamentary procedure on the grounds that it would provide practical advice to frontline practitioners on the discharge of their new functions under Chapter 8 of Part 8 and Chapter 1A of Part 3 in the AFA 2006. Further, the guidance will not be binding and the Secretary of State will be required to arrange for its publication. The approach that has been taken with these provisions is consistent with other legislative provisions providing for statutory guidance including that for the civilian equivalent orders under the Domestic Abuse Act 2021 and the Stalking Protection Act 2021.

Clause 7 and Schedule 3: new section 112(1)(za) of the Armed Forces Act 2006 – power to create further custody proceedings rules about custody on suspicion of breach of a Domestic Abuse Protection Notice

Power conferred on: Secretary of State

Power exercisable by: Regulations by statutory instrument

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

66. This clause enables Service Police to issue Service Domestic Abuse Protection Notices (“SDAPN”) prior to the application for a Service Domestic Abuse Protection Order which is to be made within 48 hours (subject to some exceptions). In line with the civilian equivalent, a power of arrest for breach of a notice has been created within a new section 308D of the AFA 2006. Breach of a SDAPN is not a criminal offence, it means that the person may forgo the opportunity to be at liberty prior to the hearing of the application for a DAPO.

Defence are amending Section 112 of the AFA 2006 to include a provision for custody on breach of SDAPN pending the hearing of a SDAPO application. This section provides for the ability to make custody rules in respect of both pre and post charge circumstances.

Justification of the Power

67. The fact that a breach of a SDAPN would not give rise to a charge for a service offence requires an additional power to enable the creation of custody rules in respect of SDAPN breach to accompany the new power of arrest.

Justification for the Parliamentary Procedure

68. Pursuant to section 373(4) AFA 2006, statutory instruments made under section 112 AFA 2006 are subject to the negative resolution procedure. This power concerns the issue of procedural rules, replicates existing provision in a different context, and therefore the negative procedure provides a sufficient level of parliamentary scrutiny for this measure.

Clause 11: new section 327B(1) of the Armed Forces Act 2006 – duty to issue code for victims in the service justice system

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose of power

69. This clause makes provision for victims in the service justice system. This includes the insertion of new section 327B(1) into the Armed Forces Act 2006, which requires the Secretary of State to issue the “code for victims in the service justice system”. This code will set out the services to be provided to victims of service offences by persons appearing to the Secretary of State to have functions of a public nature relating to victims of service offences, or any aspect of the service justice system.

70. In accordance with new section 327B(3) of the Armed Forces Act 2006, the code must make provision for services which reflect the principles that victims of conduct which constitutes a service offence require:

- a. Information to help them understand the service justice process;
 - b. Access to services which support them (including, where appropriate, specialist services);
 - c. The opportunity to make their views heard in the service justice process;
 - d. The ability to challenge decisions which have a direct impact on them.
71. New section 327C makes further provision about the application and subject matter of the code and new section 327D sets down procedural requirements. Notably, before issuing the code the Secretary of State is required to consult those persons listed in section 327D(1)(a)-(g).
72. Under new section 327D(3), the Secretary of State is empowered to revise the code from time to time, if satisfied that the proposed revisions would not result in a significant reduction in the quality or extent of the services provided in accordance with the code, or a significant restriction in the description of persons to whom services are provided in accordance with the code.
73. New section 327E deals with compliance. Pursuant to subsection (1), where the code makes provision about a service to be provided to victims of service offences by a person, the person must provide the service in accordance with the code unless the person has good reasons not to. Under subsection (2), organisations to which the code applies are required to put procedures in place for complaints regarding alleged failures to comply with that duty.
74. Under new section 327E(3)-(4), if a person fails to act in accordance with the code, the failure does not of itself make that person liable to criminal or civil proceedings but the code is admissible in evidence in criminal or civil proceedings, and a court may take into account a failure to act in accordance with the code in determining a question in the proceedings.

Justification for the power

75. In July 2021 the House of Commons Defence Committee published its report on Women in the Armed Forces¹. In response to findings contained in that

¹ See here ([Report: Protecting Those Who Protect Us: Women in the Armed Forces from Recruitment to Civilian Life - Committees - UK Parliament](#))

report, the MOD committed to align the victims' code for the service justice system with that which applies in the civilian criminal justice system.

76. As it stands, the armed forces victims' code (the "Armed Forces Code of Practice for Victims of Crime") is contained in secondary legislation: the Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015 ("the 2015 Regulations"), made under s.2(2) of the European Communities Act 1972. The 2015 Regulations give effect to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.
77. The code contained in the 2015 Regulations applies to service offences that are either committed in the European Union, or which are subject to service justice proceedings in the European Union. Complaints made outside the European Union in respect of crimes which took place outside the European Union, and for which proceedings are held outside the European Union, do not trigger entitlements under the code.
78. Now that the UK is no longer an EU member state, the code is of limited practical effect insofar as it no longer applies to victims of offences committed or prosecuted in the UK. In light of this, and considering the need to keep the code under review, update it periodically and keep pace with updates to the civilian victims' code, this measure in the Armed Forces Bill will create a new statutory framework for the armed forces code that addresses these matters.

Justification for the Parliamentary procedure

79. Any guidance issued under new section 327B(1) of the Armed Forces Act 2006 would not be subject to any parliamentary procedure. While section 3 of the Victims and Prisoners Act 2024 requires the civilian victims' code to be laid before Parliament and brought into force via regulations, this would not be an appropriate process for the code of practice for victims in the service justice system because it is far narrower in its application in that it will apply only to service proceedings. The Secretary of State will, however, be required to consult those persons listed in section 327D(a)-(g) before issuing or revising the code. That list includes key operational stakeholders such as the Provost Marshals for each of the service police forces, the Service Police

Complaints Commissioner, the Director of the Military Court Service, the Director of Service Prosecutions and the Commissioner for Victims and Witnesses and other interested stakeholders as the Secretary of State considers appropriate. The approach taken in new section 327E regarding compliance with the code is consistent with that for the civilian victims' code (see section 5 of the Victims and Prisoners Act 2024).

80. Furthermore, new section 327B(3) sets down in primary legislation the required content of the code and further provision about what the code must include is to be made via secondary legislation under the power in section 327B(4), so there is sufficient parliamentary oversight of the content of the code. It is for these reasons that the Government considers it appropriate that the guidance is not subject to any parliamentary procedure.

Clause 11: new section 327B(4) of the Armed Forces Act 2006 – power to make further provision about the code of practice for victims in the service justice system

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution procedure

Context and purpose of power

81. As set out under the previous heading relating to this clause, new section 327B(1) of the Armed Forces Act 2006 will require the Secretary of State to issue the “code of practice for victims in the service justice system” and new section 327B(3) prescribes the matters in relation to which the code must make provision.
82. Section 327B(4) provides that the Secretary of State may by regulations make further provision about the code, including about matters that the code must include. That power is subject to the requirements of section 327B(5), which provides that the Secretary of State must be satisfied that provision made in the code in compliance with any such regulations would not result in (a) a significant reduction in the quality or extent of the services provided in

accordance with the code; or (b) a significant restriction in the description of persons to whom services are provided in accordance with the code.

Justification for the power

83. The power in section 327B(4) is intended to enable the Secretary of State to supplement the key principles contained in section 327B(3), thereby providing further parliamentary oversight of the content of the code. This power is likely to be used to specify further detail as to how those key principles are to be given effect, and may also be engaged to add further principles at secondary legislation level in future.

84. The detail set out in regulations made under this new power is likely to need to be updated more frequently than the key principles in section 327B(3), for example in response to future developments in the provision of victim services. This provides the Secretary of State with a power in relation to the armed forces code that is equivalent to that afforded to the Secretary of State in connection with the civilian victims' code under section 2(4) of the Victims and Prisoners Act 2024 and will allow parity to be maintained between the two codes, as appropriate.

Justification for the Parliamentary procedure

85. The regulations will be subject to the negative resolution procedure. The Government considers this to be an appropriate level of scrutiny as the regulations cannot amend or depart from the key principles which will be set out in primary legislation and this is consistent with the power under s.2(4) of the Victims and Prisoners Act 2024. The use of the regulation-making power is limited by the restriction in new section 327B(5) of the Armed Forces Act 2006, which provides that the Secretary of State can only make regulations under that section if satisfied that provision made in the code in compliance with the regulations would not result in a significant reduction in the quality or extent of the services provided under the code or a significant restriction in the description of persons to whom services are provided in accordance with the code.

86. In addition, once the code is reissued, the statutory requirements in relation to the code itself are such that the Secretary of State cannot make changes to

the code itself which would lead to a reduction of this kind (new section 327D(4)). The regulations operate to add yet a further level of parliamentary scrutiny, thus enhancing overall accountability. In light of this, it is considered that the negative resolution procedure is appropriate.

Clause 11: new section 327F(1) of the Armed Forces Act 2006 – duty on the Secretary of State to issue guidance about specified victims support roles

Power conferred on: Secretary of State

Power exercisable by: Guidance

Parliamentary procedure: None

Context and purpose of power

87. New section 327F(1) makes provision for the Secretary of State to issue guidance about specified victim support roles. “Victim support role” is defined in new section 327F(2) as a role performed by individuals which involves the provision of support to victims of service offences. The victim support roles to which the guidance relates are to be specified in regulations.
88. Any person who has functions of a public nature relating to victims of service offences, or any aspect of the service justice system, where they are exercising such a function and the guidance is relevant to the exercise of that function (with the exception of those acting in a judicial capacity), is required to have regard to the guidance.
89. The matters which the guidance must include provision about are set out in new section 327F(4). The guidance is required to cover (a) the support to be provided in connection with the role; (b) the training and qualifications for individuals who perform the role; (c) how individuals who perform the role, and other persons who have functions relating to victims of service offences or any aspect of the service justice system, work together.
90. The guidance will highlight and promote best practice amongst these roles, encouraging consistency and better collaboration across agencies, while allowing flexibility and innovation.

Justification for the power

91. It is considered that guidance issued by reference to a statutory duty will have greater weight than other forms of guidance, and the additional duty to have regard to that guidance will ensure greater consistency and awareness thus improving the support provided to victims of service offences. However, it will remain advisory in nature rather than stipulating specific requirements, which could have adverse consequences and potentially destabilise the professions that the Government is aiming to support and strengthen.

Justification for the Parliamentary procedure

92. The guidance will not prescribe eligibility for or create new legal responsibilities for specified victim support roles or for others working with them. It will recommend and share best practice and expectations for these groups. The Department therefore does not consider it is necessary for the guidance to be subject to parliamentary procedure or a statutory requirement to consult. Whilst a person who has functions of a public nature relating to victims of service offences, or any aspect of the service justice system, will be required to have regard to the guidance, the guidance will not be binding. This approach is consistent with other recent statutory guidance, for example, that provided in section 16 of the Victims and Prisoners Act 2024.

93. However, the intention is that relevant stakeholders and practitioners will be consulted before the guidance is issued, in order to provide scrutiny and challenge. During passage of the Bill, updates on the details of guidance and/or a draft of this guidance are intended to be published to enable Parliamentary consideration.

Clause 11: new section 327F(2) of the Armed Forces Act 2006 – power to specify victim support roles in regulations

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument Parliamentary

procedure: Negative resolution procedure

Context and purpose of power

94. As set out above, new section 327F(2) provides that the victim support roles for which guidance must be issued are to be specified by way of regulations. New section 327(3) provides that a victim support role may be specified by reference to (a) the circumstances in which the role is performed; (b) the type of support provided in connection with the role; (c) the type of conduct which constitutes a service offence in relation to which such support is provided.

Justification for the power

95. While the intention is primarily to issue guidance in relation to Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs), naming these particular roles on the face of the Bill could be misinterpreted as the Government prioritising these roles above others. Instead, the more flexible mechanism afforded by regulations to set out the relevant roles for which guidance must be issued future-proofs the legislation.

96. It further aligns with the approach adopted in section 16 of the Victims and Prisoners Act 2024. As such, if further victim support roles were specified via regulations for the purposes of victims in the civilian justice system, the power would allow similar provision to be made for victim support roles in relation to victims of service offences, without the need for further primary legislation.

Justification for the Parliamentary procedure

97. The regulations are subject to the negative resolution procedure. This follows the approach taken in relation to the power in section 16 of the Victims and Prisoners Act, which this measure replicates in relation to victims of service offences.

Clause 11: new section 115B of the Armed Forces Act 2006 – service policing protocol

Power conferred on: Secretary of State

Power exercisable by: Protocol

Parliamentary procedure: Not applicable – non-legislative power

Context and purpose of power

98. This clause inserts a new section 115B into the Armed Forces Act 2006, which requires the Secretary of State to issue a service policing protocol. This protocol will make provision about how various “relevant persons” within Defence exercise their functions in order to ensure that investigations by the service police are free from improper interference, and to improve ways of working between those persons. The relevant persons – the Secretary of State, Defence Council, each service police force and the tri-service serious crime unit – must have regard to the service policing protocol in exercising their functions.
99. The service policing protocol is non-legislative in nature. It does not curtail or extend the powers or functions of any of the relevant persons, nor does it impose or alter any obligations as between the persons.
100. The provision is modelled closely on section 79 of the Police Reform and Social Responsibility Act 2011 (PRSRA 2011), which requires the Secretary of State (in practice, the Home Secretary) to put in place a policing protocol that governs the exercise of functions between various bodies involved in civilian policing.

Justification for the power

101. The power is necessary in order to ensure that a service policing protocol is put in place that clearly outlines the roles and responsibilities of the relevant persons, without which there may be conflicts or ineffective working relationships between the relevant persons.
102. While it would have been possible to issue such a protocol without the requirement to do so being set out in primary legislation, the view of the Department is that having the obligation on the face of the Bill is a powerful signal as to the importance of the protocol and underlines the Department’s commitment to service policing as an crucial element of the service justice system. In particular, the operational independence of the service police forces and tri-service serious crime unit is recognised as vital to the effectiveness of the service justice system, and the statutory obligation to issue the protocol makes this clear.

103. On the other hand, it would not be suitable for the content of the protocol to be set out on the face of the Bill. It would be too detailed and would remove the flexibility that the provisions give the Secretary of State to vary or replace the protocol after consultation with the relevant persons.

Justification for the Parliamentary procedure

104. Given that this power is exercisable by the Secretary of State and applies only to persons within the Ministry of Defence, the Department does not consider that Parliamentary scrutiny is required. The power to issue a protocol does not alter the functions or status of any of the persons, nor does it impose obligations other than that of having regard to the protocol; the protocol will clarify the working arrangements as between the persons to whom it relates.
105. The Department notes that policing protocols issued under section 79 PRSRA 2011 are made by order and laid before Parliament under the negative resolution procedure. However, the Department considers that the context of service policing, particularly that all relevant persons form part of Defence, sufficiently differentiates the service policing protocol from the civilian policing protocol made under section 79 PRSRA 2011, where some of the relevant persons are entities independent of the Home Office.

Clause 14(4): Power to make provision as to access to excluded material etc

Power conferred on: Secretary of State

Power exercisable by: Order

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

106. This clause amends an existing power in section 86 AFA 2006 (power to make provision as to access to excluded material etc). Currently under that section, the Secretary of State may by order make provision to enable the service police to access excluded or special procedure material on relevant residential premises, or to access any material (other than items subject to legal privilege) on premises other than relevant residential premises, by making an application to a judge advocate. Access is granted by way of production order. “Items subject to legal privilege”, “excluded material” and

“special procedure material” have the meanings given (respectively) by sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984.

107. The amendments made by this clause will empower the Secretary of State to make such provision in respect of such material on “relevant premises”. “Relevant premises”, for this purpose, includes service living accommodation (e.g. military housing) and any premises occupied or controlled by a person subject to service law or civilian subject to service discipline, or a person who is suspected of having committed an offence in relation to which the warrant is sought. It replaces the concept of “relevant residential premises”, which required such premises to be occupied as a residence.

Justification for the power

108. The power is necessary to prescribe specific procedural rules and safeguards relating to access to these types of material on relevant premises. The existing procedures set down in Article 6 and Schedule 1 of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 relate only to “relevant residential premises”. The amendments to section 86 brought forward by this clause will enable the Secretary of State to update that 2009 Order to reflect the enhanced powers of the service police to access material on relevant premises.

Justification for the parliamentary procedure

109. The existing power under section 86 AFA 2006 is subject to the negative resolution procedure. It is therefore considered appropriate that the power as amended by this clause will continue to be subject to the negative resolution procedure.

Clause 16: new section 104(1)(aa) of the Armed Forces Act 2006 – power to create regulations to deal with the delegation of the Provost Marshal’s functions under sections 98 to 102

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

110. This clause extends the power to authorise pre-charge detention to the Provost Marshals of the three service police forces and the Provost Marshal of the Defence Serious Crime Unit (together, the 'service police forces') after arrest for certain offences. At present, Part 4 Chapter 1 of the AFA 2006 permits only the person's commanding officer to authorise pre-charge detention. The amendment to sections 98 to 101 (inclusive) enables the service police to authorise pre-charge detention and apply to a judge advocate for an extension of custody to carry out further investigations. As part of this, there is an amendment to the regulation making power in section 104 to permit the delegation by the Provost Marshal of their power to authorise pre-charge custody.

Justification of the Power

111. The Department is seeking to enhance operational efficiency and align military detention procedures more closely with civilian police practices for more serious crimes enabling the improved efficiency of investigations and preserving the independence of service police decision making during investigations into serious criminal offences. Section 104(1)(a) provides for the delegation by the commanding officer's functions in relation to pre-charge custody. Defence are seeking to extend authorisation of pre-charge custody to Provost Marshal for each service police force and they need to be able to delegate that function to suitably qualified service police members. Suitably trained officers are service police personnel, who are independent of the investigation and not below the rank of OF-3, namely Lieutenant Commander, Major and Squadron Leader across the single Services by the insertion of a new section 104(1)(aa).

Justification for the Parliamentary Procedure

112. The regulations are subject to the negative resolution procedure which is the approach taken in relation to the existing power in section 104(1)(a) regarding the delegation of the commanding officer's functions. The negative procedure is considered a sufficient level of scrutiny for this purpose, the delegation itself, is essentially a matter of internal process, in which the

Provost Marshal of each force will identify suitably qualified individuals to carry out the function of authorising pre-charge detention.

Clause 22: new section 109A of the Armed Forces Act 2006 – power to impose post-charge conditions on persons not in service detention

Power conferred on: Secretary of State

Power exercisable by: Rules

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

113. This clause amends section 112 AFA 2006 to extend the Secretary of State's power to make custody proceeding rules in cases where an application is made under new section 109A AFA 2006.

114. The rules may include provisions relating to:

- a. Arrangements preceding the proceedings,
- b. Representation of the individual subject to the proceedings,
- c. Evidence, including rules on admissibility,
- d. Attendance of witnesses,
- e. Immunities and privileges of witnesses,
- f. Oaths and affirmations,
- g. Circumstances under which reviews under sections 108(1), 110(4), 111(4), or 171(2) may be conducted without a hearing,
- h. Use of live television or telephone links, or similar arrangements, including where such methods satisfy statutory requirements for a person to appear before a judge advocate,
- i. Appointment of individuals to carry out administrative functions under the rules.

Justification for the Power

115. The power to make rules is necessary to ensure that applications under section 109A are dealt with consistently across the service justice system. These rules will set out the procedural and operational details required for

judge advocates to effectively exercise their functions under the new section. Including this level of detail in primary legislation would be inappropriate.

Justification for the Parliamentary procedure

116. By virtue of section 373(4) AFA 2006, statutory instruments made under section 112 AFA 2006 are subject to the negative resolution procedure. This procedure is considered appropriate for rules made in relation to section 109A, as they concern procedural matters. The negative procedure provides a sufficient level of parliamentary scrutiny for this purpose.

Clause 23: section 163 Armed Forces Act 2006 – Court Martial rules

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument Parliamentary procedure: Negative resolution procedure

Context and purpose of power

117. The civilian criminal justice system makes provision for the dismissal of charges in cases which are equivalent to cases allocated for trial by a Court Martial. An application for dismissal of the charges may be made by the accused at any time after they are served with copies of the documents containing the evidence on which the charges are based and before they are arraigned. In such cases, the judge must dismiss the charge if it appears to them that the evidence against the accused would not be sufficient for them to be properly convicted (see paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 and rule 3.20 of the Criminal Procedure Rules 2025 (SI 2025/909)). Where charges have been dismissed in this way, they cannot be brought again without the consent of a high court judge (voluntary bill of indictment procedure).
118. A voluntary bill of indictment in this context is one preferred with the consent of a judge of the High Court (section 2(2)(b) Administration of Justice (Miscellaneous Provisions) Act 1933). Principles established in case law provide that such consent will only be given in exceptional cases (significant new evidence, basic and substantive error of law or serious procedural irregularity).

Justification for the power

119. This provision is necessary to enable the Court Martial rules to mirror existing provision in the civilian justice system. The rules will provide clarity to prosecutors and defendants on procedural matters, and will replicate existing statutory requirements.

Justification for the Parliamentary procedure

120. By virtue of section 373(4) AFA 2006, statutory instruments made under section 163 AFA 2006 are subject to the negative resolution procedure. This procedure is considered appropriate for Court Martial rules, as they concern procedural matters. The negative procedure provides a sufficient level of parliamentary scrutiny for this purpose.

Clause 26: new section 320D(1) of the Armed Forces Act 2006 – duty to issue guidance on concurrent jurisdiction

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose of power

121. This clause inserts new section 320D into the Armed Forces Act 2006. It provides, at subsection (1), that the Secretary of State must issue guidance about the exercise of concurrent jurisdiction in respect of alleged conduct constituting an offence that is triable in either a service court or in a civilian court. Subsection (2) of new section 320D provides that the guidance must include provision explaining the similarities and differences between proceedings in a service court and in a civilian court and may include provision about any other matters in respect of the exercise of concurrent jurisdiction that the Secretary of State considers appropriate.
122. Pursuant to new section 320D(3), any person who has functions of a public nature relating to victims of alleged conduct of the kind mentioned in subsection (1), or any aspect of the criminal justice system, must have regard to the guidance where the person is exercising such a function and the guidance is relevant to the exercise of that function. Subsection (4) provides

that the duty to have regard does not apply to anything done by a person acting in a judicial capacity, or on the instructions of or on behalf of such a person; nor any person acting in the discharge of a prosecution function if that function involves the exercise of a discretion.

123. Under subsections (5) and (6), before issuing or revising the guidance the Secretary of State must consult those persons listed in subsections (5)(a)(k). Subsection (7) requires the Secretary of State to publish the guidance issued pursuant to these provisions.

124. Due to the operation of section 42 of the Armed Forces Act 2006, a state of concurrent jurisdiction arises as, pursuant to that section, any act committed by a person subject to service law or civilian subject to service discipline² that is punishable by the law of England and Wales (or if done in England and Wales would be so punishable) may be tried as a service offence in the service justice system. Under Chapter 3A of Part 13 of the Armed Forces act 2006, prosecutors are required to agree protocols regarding the exercise of concurrent jurisdiction in the UK. As part of the processes and procedures set down in the protocols, prosecutors will take into account the views of the victim when determining the jurisdiction in which a given case is to proceed³. The guidance is intended to equip relevant agencies to be able to assist victims in this process.

Justification for the power

125. The power is necessary to ensure that victims in the service justice system can give an informed view on the jurisdiction in which they feel their case should proceed. While it is ultimately a decision for prosecutors as to whether a case should be disposed of in the service or civilian systems, the victim is at the heart of this process and must fully understand the implications of their case proceeding in either system.

126. Further, the new guidance will be vital in ensuring that relevant agencies are consistent in their approach. Currently, there are no written policies available to relevant agencies to guide them on the nature and timing of

² As to “persons subject to service law”, see ss.367 to 369 of the Armed Forces Act 2006; as to “civilians subject to service discipline”, see Schedule 15 of the Armed Forces Act 2006.

³ <https://www.cps.gov.uk/publication/protocol-regarding-exercise-criminal-jurisdiction-england-and-walesbetween-director>

conversations with the victim about concurrent jurisdiction. As a result, there is insufficient understanding of the concept which can mean victims not receiving the right information at the right time during the course of an investigation. Thus, relevant agencies will be required to have regard to the guidance when exercising functions relevant to its subject matter.

Justification for the Parliamentary procedure

127. Any guidance issued under these provisions will not be subject to any parliamentary procedure. This is on the grounds that the guidance will provide practical advice to frontline practitioners on the discharge of their functions in connection with concurrent jurisdiction and would be developed in consultation with the police and other interested stakeholders.

Clause 31: Provision to extend the remit of the Armed Forces Commissioner to cover the Royal Fleet Auxiliary

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Draft affirmative resolution procedure

Context and purpose of power

128. This clause inserts new provisions into the Armed Forces Act 2006, which expands the Armed Forces Commissioner's functions to include members of the Royal Fleet Auxiliary. Paragraph 3(1) of new Schedule 14ZB creates a power for the Commissioner to conduct investigations into general RFA welfare matters. Subject to the following, the Bill provides that a "general RFAS welfare matter" is a matter which in the Commissioner's opinion arises in connection with the ongoing employment of RFA members with the RFA and may materially affect the welfare of those persons. Paragraph 3(4) provides a list of matters that must be excluded. Sub-paragraph (4)(d) then provides that this list includes any other matter falling within paragraphs 5(a) to (e) of section 3401A AFA 06, which contains further provision stating that the list of excluded matters includes such other matters as may be specified by regulations made by the Secretary of State. The effect of clause 34 is therefore to slightly expand this existing delegated power.

Justification for the power

129. MOD anticipates that certain defence matters should not be within the remit of the Commissioner's thematic reports. However, due to the evolving (and sometimes urgent) nature of UK defence, there is a need to preserve the ability to respond and update the remit regularly and quickly. It is therefore not considered appropriate to provide full detail on the face of the Bill and it would run the risk of becoming quickly outdated.

130. However, the regulation-making power will continue to be limited by section 340IA(7) AFA 06, which states that any such matter may only be one in which the Secretary of State considers would impinge on national security or might jeopardise the safety of any person. This narrowing of the power ensures minimal restriction (generally or in a particular case) of the Commissioner's discretion to launch investigations into a wide range of matters and thus supports their independence whilst providing that there are appropriate safeguards in place.

Justification for the Parliamentary procedure

131. Given the potential for any regulations made under the power in section 340IA(5)(e) to contain important limits to the scope of the Commissioner's investigations (a fundamental power in the exercise of their functions), it is considered appropriate to ensure that they receive a high degree of scrutiny and therefore should be subject to the affirmative procedure.

Clause 32: new section 4(2A) of the Reserve Forces Act 1996 – power to provide for transfer from regular forces to the volunteer reserve forces

Power conferred on: Defence Council

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and Purpose of the Power

132. This clause inserts a new section 4(2A) into the Reserve Forces Act 1996 (RFA 96). The purpose of the power is to create the ability to transfer from the volunteer reserve forces into a regular service.

Justification for the power

133. There is no mechanism by which a member of the volunteer reserve can transfer directly into a regular force at present. This power ensures that there is a seamless transition from the volunteer reserve into a regular force which will assist Defence in the creation of flexible careers in the Armed Forces.

Justification for the parliamentary procedure

134. The transfer between forces is regarded as an issue requiring the specific input of the military chain of command. It is for this reason that the regulations are to be made by the Defence Council in line with the ability of the Defence Council to make regulations relating to the transfer from the regulars to the regular reserve. As the regulations will set down matters about the authorisation of transfer to a regular service, it is considered appropriate that the regulations should be made by statutory instrument subject to affirmative resolution.

Clause 32: new section 331(5) of the Armed Forces Act 2006 – power to provide for transfer from regular forces to the volunteer reserve forces.

Power conferred on: Defence Council

Power exercisable by: Regulations by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose of the power

135. This clause inserts new section 331(5) into the AFA 2006. The purpose of the power is to create the ability to transfer from the regulars to the volunteer reserve forces without the need to leave the regulars and re-join/reattest into the volunteer reserves.

Justification for the Power

136. There is no mechanism by which a member of the regulars can transfer straight into the volunteer reserves at present. This power will ensure that there is a seamless transition which will serve to retain the skills of regulars on an active basis beyond the point that they wish to leave the regular service.

Justification for the Parliamentary procedure

137. The transfer between forces is regarded as an issue requiring the specific input of the military chain of command. It is for this reason that the regulations are to be made by the Defence Council in line with the ability of the Defence Council to make regulations relating to the transfer from the regulars to the regular reserve. As the regulations will define the eligibility criteria and application process, it is considered appropriate that the regulations should be made by statutory instrument subject to the affirmative resolution procedure.

Clauses 33 and 34: call out for permanent service and recall for service

Power conferred on: Secretary of State

Power exercisable by: Order

Parliamentary procedure: None

Context and purpose of the power

138. Clauses 33 and 34 amend the Reserve Forces Act 1996 (RFA 96) in relation to call-out and recall. Currently, the RFA 96 allows for a call-out or recall order to authorise the call-out or recall of certain individuals when the relevant criteria are met. An order made by the Secretary of State can also extend maximum duration of service under call-out or recall. These orders must be signed and reported forthwith to each House of Parliament. The effect of these clauses, to the extent that they amend these existing powers, is therefore to slightly expand their scope, including in relation to the ability to disapply aggregate service in certain circumstances (relevant for the calculation of maximum duration of service). The effect of clause 33, to the extent that it provides for an ability to recall certain individuals when warlike preparations are in progress, is to create a new power to make a recall order for this purpose.

Justification for the Power

139. This approach is required to give effect to the changes that are being made to the existing process for call-out and recall, which is based on the making of relevant orders which are reported to Parliament. The new power to recall individuals when warlike preparations are in progress is similarly based on this framework and ensures that recall is possible when these circumstances arise. Due to the evolving (and sometimes urgent) nature of UK defence combined with the length of time that any such orders can remain in force, there is a need to preserve the ability to tailor the relevant orders regularly and quickly. It is therefore not considered appropriate to provide for this on the face of the Bill.

Justification for the Parliamentary procedure

140. As above, due to the evolving (and sometimes urgent) nature of UK defence combined with the length of time that any such orders can remain in force, there is a need to preserve the ability to tailor the relevant orders regularly and quickly. It would therefore not be appropriate for these orders to be subject to a Parliamentary procedure however they must be reported to each House of Parliament to ensure a sufficient level of Parliamentary oversight is retained.

Clause 36: transitional classes for clauses 32 and 33

Power conferred on: The Defence Council

Power exercisable by: Regulations by statutory instrument

Parliamentary procedure: Negative resolution procedure

Context and purpose of the power

141. Clause 36 introduces Schedule 5 in the Bill which amends section 129, and Schedule 9 to, the RFA 96. The effect of Schedule 5 is to make transitional provision in connection with the amends to call-out and recall under clauses 33 and 34. Under paragraphs 38(3) and 49(2) of the new Part 5 and 7 of Schedule 9 RFA 96, elections may be made in the prescribed time period and manner, and under paragraphs 39(2) and 50(2) in the prescribed manner. For the purposes of new Part 5, “prescribed” continues to have the meaning in section 127 – prescribed by orders or regulations under section 4. For the purposes of new Part 7, “prescribed” continues to have the meaning in

section 77 RFA 96 – prescribed in regulations made by the Defence Council. The effect of this clause is therefore to slightly expand these existing delegated powers in relation to the new transitional classes that are being made. The approach taken to these transitional provisions replicates that which was taken to amend call-out powers introduced in the Defence Reform Act 2014 (DRA 14).

Justification for the Power

142. This power will allow further provision to be made by the Defence Council in relation to how elections for the new transitional classes are to be made and, additionally, for paragraphs 38(3) and 49(2), in what timeframe. Due to the procedural aspect of this information, the number of cohorts engaged by the transitional provisions in clause 35 and Schedule 5 and the need to ensure different provision can be made for different cases, it is not considered appropriate to provide full detail on the face of the bill. Due to the temporary nature of the election period (where applicable), it would also run the risk of becoming outdated. Finally, it is considered beneficial to replicate the approach taken to the amendments to call-out powers in the DRA 14 (and the transitional classes created at this point in time), to ensure consistency and ease of access to the relevant information.

Justification for the Parliamentary procedure

143. The rules and procedures governing the reserve forces and relatedly, liability for call-out and recall with the ability to exempt or relax that liability is regarded as an issue requiring the specific input of the military chain of command. It is for this reason that the regulations are to be made by the Defence Council. As the regulations will deal with the procedural aspects of making an election, it is considered appropriate that the regulations should be made by statutory instrument subject to the negative resolution procedure, as is the case with the existing transitional classes.

Clause 43: Governance and administration of Ministry of Defence Police

Power conferred on: Secretary of State

Power exercisable by: Regulations by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose of the power

144. Subsection (1) of this clause amends power in section 3A of the Ministry of Defence Police Act 1987 to make regulations in relation to members of the Ministry of Defence Police. The existing power enables provision to be made relating to the conduct, efficiency and effectiveness of member of the force and the maintenance of discipline. The change expands the power so that regulations can also be made in relation to the governance and administration of the force.

145. The expansion of the existing power is considered necessary to ensure that the Secretary of State can make similar provision for the Ministry of Defence Police as can be made by the Secretary of State in relation to territorial police forces in England and Wales under section 50(1) of the Police Act 1996 (other than in relation to conditions of service). Section 50(1) contains a power to make regulations “as to the government, administration and conditions of service of police forces”. Subsection (2) then sets out various matters in respect of which provision can be made, including “the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline” as well as “the suspension of members of a police force from membership of that force and from their office of constable”. By contrast, section 3A(1) of the Ministry of Defence Police Act 1987 only allows regulations to be made that relate to (a) conduct, efficiency or effectiveness of the maintenance of discipline and (b) the suspension from duty of members of the Ministry of Defence Police.

Justification

146. To ensure that there are lawful procedures to deal with officers that might not relate to conduct, efficiency or effectiveness or the maintenance of discipline, this expansion of the existing power to make regulations is needed to ensure that similar provision can be made for members of the Ministry of Defence Police as can be made for members of territorial police forces. Further, where they can be suspended from duty under statutory procedures, it is necessary to ensure that they can also be suspended from their office of constable under those procedures, to ensure public confidence in the police.

Clause 45: amendment to section 2 of the Police (Property) Act 1897

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose of power

147. This clause expands the power in section 2 of the Police (Property) Act 1897 that enables regulations to be made in respect of unclaimed property in the possession of the police to make provision for the retention of property for use by the Ministry of Defence Police for their purposes, by specifying the Secretary of State as the relevant body for the force.

Justification

148. The current power enables regulations to be made so that the Ministry of Defence Police as well as other police forces in England and Wales and National Crime Agency can dispose of property in their possession. Regulations can also be made so that property can be retained for the use of the territorial police forces in England and Wales and the National Crime Agency where the relevant body consider that it can be used for police or Crime Agency purposes. The amendment will enable regulations to be made so that property can be retained for use for Ministry of Defence Police purposes where the relevant body for the Ministry of Defence Police, the Secretary of State, considers that it can be so used.

Clause 54: Extent in the Channel Islands, Isle of Man and British overseas territories

Power conferred on: His Majesty

Power exercised by: Order in Council

Parliamentary Procedure: None

Context and purpose of the power

149. This clause provides that changes that the Bill makes to AFA 2006:

- a. may be extended to the Channel Islands by Order in Council under section 384(1) of the AFA 2006. If such an order is made, it can modify those changes (so that the law of the Channel Islands is not the same as that of the United Kingdom);
 - b. extend directly (i.e. without the need for an Order in Council) to the Isle of Man and the British Overseas Territories (except Gibraltar), but an Order in Council may be made under section 384(2) of the AFA 2006 to modify the Act in its application to any of those territories.
150. Similarly, this provision allows for clause 30 and Schedule 4 of the Bill to be extended, with or without modifications, to the Isle of Man and any of any of the British Overseas Territories (except Gibraltar) by Order in Council.
151. Changes made by the Bill to the Reserve Forces Act 1996 (“RFA 1996”) may be extended to the Channel Islands or the Isle of Man (with or without modifications) by Order in Council using the power in section 132(3) of the RFA 1996.
152. The amendments made by this Bill to the Visiting Forces Act 1952 may be extended to the Channel Islands, Isle of Man and all colonies by Order in Council under the power in section 15(1) if that Act.
153. Amendments made by this Bill to paragraph 8 of the Schedule to International Headquarters and Defence Organisations Act 1964 may be extended to the Channel Islands, Isle of Man and any colony under section 2(1) of that Act.

Justification for the power

154. This clause modifies existing powers to make Orders in Council in relation to the Isle of Man, the Channel Islands, the British Overseas Territories (except Gibraltar) and colonies. The clause is designed to ensure that those powers are available in relation to that legislation as amended by this Bill. Without making this provision, the existing powers to make Orders in Council would only be available in relation to the unamended versions of the relevant Acts. The fact that these Acts extend, or can be extended, to these

territories reflects the UK's continuing defence responsibilities for those places. It is a longstanding feature of armed forces legislation.

Justification for the parliamentary procedure

155. The power to make such Orders in Council is exercisable by statutory instrument but such Orders are not subject to Parliamentary procedure. Providing that the making of such Orders is not subject to Parliamentary procedure reflects the particular constitutional status of the relevant territories.

Clause 55: Commencement and transitional provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and purpose of the power

156. This clause enables the Secretary of State to bring into force by regulations the provisions in the Bill, except for the provisions which come into force on Royal assent and 2 months after Royal Assent. It also confers the standard powers to appoint different provision for different days and to make transitional, transitory or saving provisions.

Justification for the power

157. The MOD considers that it is appropriate for the Secretary of State to determine the appropriate time to bring provisions of the Bill into force. It is also considered appropriate for the Secretary of State to have the power to make transitional, transitory or saving provision to ensure smooth commencement of the measures contained in the Bill.

Justification for the procedure

158. As is usual with commencement and transitional powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Schedule 6, paragraph 1: Paragraph 14(1) of new Schedule 4A of the Reserve Forces Act 1996 – power to specify areas of the UK

Power conferred on: Defence Council

Power exercisable by: Regulations

Parliamentary procedure: No procedure

Context and purpose of power

159. The RFCA must establish a regional council for each area of the United Kingdom specified in regulations made by the Defence Council. The regional councils are committees that the RFCA must establish to ensure that the RFCA remains connected to regional volunteer, reserve and cadet communities when delivering functions.

Justification for the power

160. It is not appropriate to set out the extent of each of those areas on the face of the Bill due to the potential for local Government reorganisation.

Justification for the parliamentary procedure

161. The Regulations made under this power will not be subject to any parliamentary procedure. The Department does not consider there to be a need for parliamentary scrutiny regarding matters relating to the internal structure of the RFCA.

Schedule 6: Paragraph 14(4) of new Schedule 4A of the Reserve Forces Act 1996 – membership and other matters relating to the regional councils

Power conferred on: Defence Council

Power exercisable by: Regulations

Parliamentary procedure: No procedure

Context and purpose of power

162. The composition of the members of each of the regional councils for each area of the United Kingdom, the function that can be delegated to the councils, and the rules relating to the delivery of those functions must be specified in regulations made by the Defence Council.

Justification for the power

163. It is not appropriate to set these matters out on the face of the Bill due to (i) the regional differences that impact composition and ii) the need to have flexibility as to the specific functions that can be delegated, and associated rules as to the delivery of those functions.

Justification for the parliamentary procedure

164. The Regulations made under this power will not be subject to any parliamentary procedure. The Department does not consider there to be a need for parliamentary scrutiny regarding these matters as they relate to the internal structure of the RFCA and its regional councils.

Schedule 6, paragraph 4(5): amendment of section 113A Reserve Forces Act 1996 (annual report on the state of the volunteer reserves)

Power conferred on: Secretary of State

Power exercisable by: Arrangements

Parliamentary procedure: No procedure

Context and purpose of power

165. The new paragraph (1A) allows the Secretary of State to enter into arrangements with a body to deliver the reporting function rather than the RFCA. This enables the Secretary of State to identify another body who may be better suited to carry out this function and to enter into arrangements with them for its delivery.

Justification for the power

166. The need for flexibility means that it is not possible to set out the identity of a body who may be better placed to carry out this function. Also, it allows a new body, which does not yet exist, to be identified in the future.

Justification for the parliamentary procedure

167. The Department does not consider there to be a need for parliamentary scrutiny of the body who may take over this function.

Schedule 6, para 4(6): minor amendments to the power in s.117 RFA96 to make regulations for the associations

Power conferred on: Defence Council

Power exercisable by: Regulations

Parliamentary procedure: None

Context and purpose

168. These are consequential amendments, as a result of the associations being abolished and the RFCA being set up, to ensure that the Defence Council can make provision in regulations for the RFCA that relate to its functions, in the same way it has for the associations.

Justification of power

169. The regulations cover matters that are not appropriate to be dealt with on the face of the Bill.

Justification of parliamentary procedure

170. Regulations made under this power do not follow any parliamentary procedure, and the Department considers that this remains appropriate in relation to regulations for the RFCA.