EXPLANATORY MEMORANDUM TO

THE ARMED FORCES PENSION SCHEMES AND EARLY DEPARTURE PAYMENTS SCHEMES (AMENDMENTS RELATING TO FLEXIBLE WORKING AND MISCELLANEOUS AMENDMENTS) REGULATIONS 2018

2018 No. 1111

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 Flexible working arrangements under the provisions of the Armed Forces (Flexible Working) Act 2018 will be introduced for regular members of the Armed Forces from April 2019. The main purpose of the statutory instrument is to amend the Armed Forces' pension and early departure schemes so that when calculating pensions and other types of payments made after leaving service or on death in service, they will take account of periods of part-time service and restricted separation service, where appropriate. Other changes have been made to keep the schemes up to date with caselaw, to take account of current policy and to otherwise amend rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The main purpose of this instrument is to effect policy change, but it does correct an error in in the Armed Forces Pension Regulations 2014 (S.I. 2014/2336). The SI Registrar has been consulted and the Department has decided that the procedure for free issue should not apply to this instrument, as the vast bulk of the instrument contains new provisions.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is to members of the regular forces, the reserve forces and the non-regular permanent staff wherever they are in the world.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The terms of service for enlisted members of the regular Armed Forces (the Royal Navy, the Royal Marines, the Army and the Royal Air Force) are set out in regulations made under section 329 of the Armed Forces Act 2006 ("the AFA 2006"). The Armed Forces (Flexible Working) Act 2018 amended section 329 of the AFA 2006 to: (a) include a new power to make regulations enabling part-time service; and (b) expand the existing power to restrict service to a particular area to enable service to be restricted geographically in other ways. There is a separate affirmative statutory instrument, under this amended power, which amends the four existing sets of Terms of Service regulations. This introduces a new procedure to enable enlisted service personnel to apply to serve part-time and for service to be restricted on a geographical basis for defined periods of time.

6.2 The introduction of flexible working requires changes to be made to the pension and early departure payments schemes for the armed forces. These changes are made under existing primary legislation, namely the Public Service Pensions Act 2013 and the Armed Forces (Pensions and Compensation) Act 2004.

6.3 There are five separate Armed Forces' pension schemes for regular service personnel set up under a range of statutory and prerogative powers. The schemes are set out in:

- The Army Pensions (Armed Forces Pension Scheme 1975 and Attributable Benefits Scheme) (Amendment) Warrant 2010 (and the two equivalent schemes for the RAF and for the Royal Navy and the Royal Marines) (AFPS 75),
- The Armed Forces Pension Scheme Order 2005 (SI 2005/438) (AFPS 05),
- The Armed Forces Pension Scheme Regulations 2014 (SI 2014/2336) (AFPS 15).

6.4 There are also two other schemes which provide benefits, including a lump sum payment where a member leaves service on the grounds of incapacity for service as a member of the armed forces, and an early departure payment comprising a lump sum payment and regular monthly payments. The early departure payment is payable where a regular service person leaves service on or after the age of 40, but before reaching the normal pension age, and has served for a prescribed period of time. The early departure payment schemes recognise that it is not possible for most service personnel to serve in the armed forces to normal retirement age. These schemes are set out in:

- The Armed Forces Early Departure Payments Scheme Order 2005 (SI 2005/437) (EDP 05), and
- The Armed Forces Early Departure Payments Scheme 2014 (SI 2014/2328) (EDP 15).

7. Policy background

What is being done and why?

Flexible Service – AFPS 05, EDP 05, AFPS 15 and EDP 15

7.1 Service personnel are currently required to serve 24 hours a day, seven days a week, 365 days a year. Subject to a few exceptions, they can be deployed anywhere in the world without notice. A new form of flexible service for members of the regular

Armed Forces will be introduced from 1 April 2019. This will allow regular service personnel to apply to reduce their usual high levels of commitment by permitting two new types of flexible service, which may be used independently or simultaneously. Regulars who serve part-time will place an agreed restriction on their liability for duty as compared to full-time regulars. Regulars who serve on a restricted separation basis will be able to restrict the number of days on which they can be required to serve away from their home or duty station

7.2 Regular service personnel will be permitted to serve flexibly for a maximum single period of 1,095 consecutive days (approximately three years) or a maximum of 1,460 days (approximately four years) in any twelve-year period.

7.3 Regular service personnel who opt to take a period of flexible service, will have a proportionate reduction in their earnings. A similar reduction is required to their pension and other payments due after service has ended or on the death of the service person. The rules of the Armed Forces' pension and early departure schemes do not currently provide for such forms of service. Therefore, this statutory instrument amends, where necessary, the rules of the AFPS 05, EDP 05, AFPS 15 and EDP 15 schemes to enable proportionate adjustments to be made to benefits to reflect periods of flexible service, where appropriate.

AFPS 05 – other amendments

7.4 Following the judgment of the Supreme Court in Walker v Innospec1, the rules of the AFPS 05 are amended to ensure that surviving same sex spouses and civil partners are entitled to the same benefits as opposite sex spouses under the scheme.

7.5 On 1 April 2015, all members of AFPS 05 who would not turn 55 by 1 April 2022 were transferred to AFPS 15. Those who were members in AFPS 05 retain accrued rights in that scheme. The Public Service Pensions Act 2013 which provided for the closure of the old schemes and transfer to the new, also provided for a final salary link where the original pension was a final salary pension scheme. In the case of AFPS 05, this ensures that the accrued AFPS 05 pension is calculated using the final salary at the end of service in AFPS 15. However, some individuals who have left the Armed Forces subsequently re-join on a lower salary which can, in some cases, result in their accrued AFPS 05 pension being calculated by reference to the lower salary when they discharge from the lower paid service. AFPS 05 is amended to ensure that the AFPS 05 pension in such cases will be calculated by reference to final pensionable earnings in their last three years of reckonable service in AFPS 05, where these are higher than their final pensionable earnings in AFPS15.

Death in Service Benefits (Nominations) – AFPS 05 and AFPS 15

7.6 Members of AFPS 05 and AFPS 15 may nominate a person or an organisation to receive a death in service lump sum on their death. This lump sum is four times the member's final pensionable earnings. As currently drafted, a nomination remains valid even if the member subsequently marries or enters into a civil partnership. The amendment will ensure that if a member marries or enters into a civil partnership after making a nomination, that nomination is automatically revoked. The effect of this is that the surviving spouse or civil partner will normally receive the death in service benefit, unless the member makes a further nomination in favour of someone else.

[1] Walker-v-Innospec Limited and others [2017] UKSC 47

Forfeiture – AFPS 15

7.7 This amendment corrects an error in the scheme rules by substituting the correct cross-reference.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 There are no plans to consolidate the regulations at present, but we will keep this under review.

10. Consultation outcome

10.1 A consultation is required for changes made to a scheme created under the Public Service Pensions Act 2013. This applies to AFPS 15 and EDP 15. Two consultations have been carried out.

10.2 The first consultation related to the proposed changes to the rules necessitated by the introduction of flexible service. As a result of the interlinking nature of these changes, the consultation included all the Armed Forces' pension and early departure payments schemes. The consultation was sent to key stakeholders and published on www.gov.uk. It ran between 16 March 2018 and 13 April 2018, with two responses received. Neither response objected to the proposals. The government response was published at https://www.gov.uk/government/consultations/armed-forces-pension-consultation-regarding-new-flexible-service-opportunities.

10.3 The second consultation concerned the other changes to the AFPS 15 scheme contained in this instrument. This consultation was circulated to stakeholders and published on www.gov.uk. The consultation ran from 29 June 2018 to 27 July 2018. We received three responses and a formal response was published in September 2018 at https://www.gov.uk/government/consultations/armed-forces-pension-consultation-regarding-amendments-to-the-armed-forces-pension-scheme-2015?987. No objections to the proposals were received.

11. Guidance

11.1 Updated guidance to the scheme rules will be issued in due course which will be made available on www.gov.uk and the Department's internal intranet site.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because there is no significant impact on business, charities, voluntary bodies and the public sector.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 These provisions are subject to continued monitoring and review as required.

15. Contact

15.1 Kevin Pitt at the Ministry of Defence, telephone: 0207 218 7573 or email: AFpension-Policy@mod.gov.uk can answer any queries regarding the instrument.

15.2 Commodore (RN) James Macleod at the Ministry of Defence, telephone: 0207 807 8311 or email: AFpension-Policy@mod.gov.uk can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Tobias Ellwood MP, Minister for Defence People and Veterans, has confirmed that this Explanatory Memorandum meets the required standard.