EXPLANATORY MEMORANDUM TO

THE ARMED FORCES ACT (CONTINUATION) ORDER 2019

2019 No. [XXXX]

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.

2. Purpose of the instrument

2.1 The instrument provides for the continuation in force of the Armed Forces Act 2006 ("the 2006 Act"), which would otherwise expire at the end of 11 May 2019. The instrument provides for the 2006 Act to continue in force for a further year, until the end of 11 May 2020.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited by the Act or by the instrument.

4. Extent and Territorial Application.

4.1 The territorial extent of this instrument is the United Kingdom, the Isle of Man and the British Overseas Territories except Gibraltar.

4.2 The territorial application of this instrument is worldwide. This instrument continues in force the 2006 Act, which applies to members of the armed forces wherever they are in the world and applies to civilians subject to Service discipline in certain areas outside the United Kingdom or on Service ships or aircraft. Civilians subject to Service discipline are defined groups (the groups are defined in Schedule 15 to the 2006 Act) principally of persons who work or reside with the armed forces in certain areas outside the United Kingdom or are travelling on Service ships or aircraft.

5. European Convention on Human Rights

5.1 The Rt Hon Tobias Ellwood MP, Minister of State for Defence People and Veterans, has made the following statement regarding Human Rights:

"In my view the provisions of the Armed Forces Act (Continuation) Order 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 As originally enacted, section 382 of the 2006 Act provided that the Act would expire one year after it received Royal Assent, unless renewed by Order in Council approved by each House of Parliament. It provided that the Act could be continued in force by such an Order for up to a year at a time (and such Orders were made), but not beyond the end of 2011.

6.2 Section 1 of the Armed Forces Act 2011 substituted a new section 382, which provided that the 2006 Act would expire a year after the 2011 Act received Royal Assent, unless renewed by Order in Council approved by each House of Parliament. It provided that the 2006 Act could be continued in force by such an Order for up to a year at a time (and such Orders were again made), but not beyond the end of 2016.

6.3 Section 1 of the Armed Forces Act 2016 substituted a new section 382, which provides that the 2006 Act will expire a year after the 2016 Act received Royal Assent, unless renewed by Order in Council approved by each House of Parliament. It provides that the 2006 Act may be continued in force by such an Order for up to a year at a time, but not beyond the end of 2021.

6.4 The 2016 Act received Royal Assent on 12 May 2016. The 2006 Act has since been renewed by Order in Council twice, most recently by the Armed Forces Act (Continuation) Order 2018 (S.I. 2018/519) which provided for the 2006 Act to continue in force from the end of 11 May 2018 to the end of 11 May 2019. This instrument provides for the 2006 Act to continue in force from the end of 11 May 2019 to the end of 11 May 2020.

7. Policy background

What is being done and why?

7.1 The 2006 Act (which came into force on 31 October 2009) established a single system of Service law that applies to the personnel of all three Services wherever in the world they are operating. The Act provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice. It covers matters such as offences, the powers of the Service police, and the jurisdiction and powers of commanding officers and of the Service courts, in particular the Court Martial. It also contains a large number of other important provisions as to the armed forces, such as provision for enlistment, pay and redress of complaints.

7.2 Under section 382 of the 2006 Act (as most recently amended by section 1 of the Armed Forces Act 2016), the 2006 Act would cease to have effect one year from 12 May 2016 (the date of Royal Assent to the 2016 Act), but for the fact that Her Majesty has power to make Orders in Council, each extending the life of the 2006 Act for one year. The Armed Forces Act (Continuation) Order 2018 (S.I. 2018/519) extended the life of the 2006 Act from the end of 11 May 2018 to the end of 11 May 2019. If this instrument is not made by the end of 11 May 2019, the 2006 Act will automatically expire.

7.3 The requirement for annual renewal of the 2006 Act (under section 382 of that Act) is based on the assertion in the Bill of Rights 1688 that the Army (and by extension now the Royal Air Force and the Royal Navy) may not be maintained within the Kingdom without the consent of Parliament.

7.4 The central effect of expiry of the 2006 Act would be to end the provisions which are necessary to maintain the armed forces as disciplined bodies. Crucially, the 2006 Act confers powers and sets out procedures to enforce the duty of members of the armed forces to obey lawful commands. The obligation of members of the armed forces is essentially a duty to obey lawful commands. They have no contracts of employment, and so no duties as employees. Without the 2006 Act, the powers and procedures under which the duty to obey lawful commands is enforced would no longer have effect. Commanding officers and the Court Martial would have no powers of punishment in respect of a failure to obey a lawful command or any other form of disciplinary or criminal misconduct. Members of the armed forces would still owe allegiance to Her Majesty, but the power of enforcement would be removed.

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 This instrument does not amend any other legislation so no consolidation is needed.

10. Consultation outcome

10.1 There has been no formal consultation on this instrument, but consultation has been carried out on the legislation that it continues in force. A memorandum about consultation on the 2006 Act was submitted in written evidence to the Select Committee on the Armed Forces Bill and published on 9 May 2006 in the Committee's Special Report of Session 2005-06 (HC 828). The memorandum explained how stakeholder consultation had been carried out and listed the individuals and organisations consulted.

10.2 Statutory instruments made under the 2006 Act have been the subject of consultation with a range of stakeholders (including the Ministry of Justice, the Judge Advocate General, the Military Court Service, the Service police forces and the Services themselves) to ensure that the policy goals have been achieved and that the provisions of each instrument will work in practice. Consultation with these and new stakeholders, including some Service charities, continued as part of work to prepare for the Armed Forces Act 2011 (and the statutory instruments made under that Act) and the Armed Forces Act 2016.

11. Guidance

11.1 The Manual of Service Law provides guidance and supplementary information to armed forces personnel on the single system of Service law established under the 2006 Act. The first volume of the Manual, which is intended for commanding officers and those who administer the Service justice system, mentions the need for the legislation to be renewed by primary legislation every five years. The Manual of Service Law is available to the public at the following address: https://www.gov.uk/government/collections/manual-of-service-law-msl.

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, or no significant, impact on business.

13. Regulating small business

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

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the 2006 Act is subject to quinquennial review. Its provisions were subjected to a review as part of work to prepare for the Armed Forces Acts of 2011 and 2016.

15. Contact

15.1 Tracy Sexton at the Ministry of Defence (telephone: 020 7218 0564 or email: tracy.sexton743@mod.gov.uk.) is the point of contact regarding this instrument.

15.2 David Howarth, Head of People Secretariat at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Tobias Ellwood MP, Minister of State for Defence People and Veterans at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.