EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (SPECIFIED AVIATION AND MARINE FUNCTIONS) REGULATIONS 2018

2018 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 A commanding officer ("CO") has powers under section 93A(3A) and (3B) of the Armed Forces Act 2006 ("the AFA 2006") to require a person subject to service law or a civilian subject to service discipline[1] to cooperate with preliminary alcohol, impairment and drug tests if there is an accident involving an aircraft or ship. The requirement can only be imposed if the person was carrying out a specified aviation function relating to that aircraft or a specified marine function relating to that ship before or at the time of the accident. This instrument specifies those aviation and marine functions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory

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 Department has reached this view because the powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is that the regime for preliminary alcohol, impairment and drug tests under Chapter 3A of the AFA 2006 applies to members of the armed forces and civilians subject to service discipline wherever they are in the world.

5. European Convention on Human Rights

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

[1] A civilian subject to service discipline is defined by section 370 of, and Schedule 15 to, the AFA 2006 and SI 2009/836. It includes those travelling in aircraft and ships being used for the purposes of the armed forces, Crown servants in designated areas working in support of the armed forces, and persons designated by the Defence Council.

"In my view the provisions of the Armed Forces (Specified Aviation and Marine Functions) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument supplements section 93A(3A) and (3B) of the AFA 2006. Section 93A is part of Chapter 3A of the AFA 2006, which deals with testing for alcohol and drugs in connection with a suspected offence or accident (Chapter 3A was inserted by the Armed Forces Act 2011 ("AFA 2011") and amended by the Armed Forces Act 2016 ("AFA 2016")). Section 93A gives COs powers to require various persons to cooperate with preliminary alcohol, impairment and drug tests. Refusing to cooperate is a service offence carrying a penalty of up two years imprisonment (see section 93A(6)).

6.2 The powers of COs under section 93A are as follows. Under section 93A(1) or (3) a CO can impose a requirement to cooperate with tests if the CO suspects certain offences have been committed (e.g. the offence under section 20A of the AFA 2006 of exceeding the alcohol limit for prescribed safety-critical duties). Section 93(3A) to (3C) give a CO the power to impose a requirement to cooperate with tests if there is an accident: this instrument relates to the powers under section 93A(3A) and (3B) which CO's may use if the accident involved an aircraft or ship.

6.3 Section 93A(3A) allows a CO to require a person subject to service law or a civilian subject to service discipline to cooperate with a preliminary test if they were carrying out an "aviation function" in relation to the aircraft or a "marine function" in relation to the ship when the accident happened.

6.4 Section 93A(3B) allows a CO to impose the same requirement if the person concerned was carrying out the relevant "aviation function" or "marine function" before the accident. But the power under section 93A(3B) may only be used if it is possible that the carrying out of the function may have caused or contributed to either the occurrence of the accident, any death, injury or damage resulting from the accident or any risk of death, injury or damage created by the accident.

6.5 This instrument concerns the "aviation functions" and "marine functions" which determine the scope of section 93A(3A) and (3B). These are defined in section 93AA(2) as any role or activity in connection with aviation or ships which is specified in regulations made by the Defence Council. A role or activity may be specified if it would be dangerous to carry out it out whilst impaired by alcohol or drugs (i.e. it would result in a risk of death, serious injury, serious damage, serious environmental harm). Linked roles or activities may also be specified, for instance if they are undertaken to prepare for a role it would be dangerous to carry out whilst impaired.

6.6 The instrument, made under section 93AA(2) specifies those "aviation functions" and "marine functions" in order to establish the scope of the powers of CO's under section 93A(3A) and (3B) and to enable those powers to be used.

7. Policy background

What is being done and why?

7.1 Alcohol and substance misuse by service personnel is incompatible with the demands of life in the UK armed forces and is regarded as a significant threat to operational effectiveness of those forces. The UK armed forces deal with alcohol and substance

misuse through a variety of mechanisms, including through testing and service offences relating to such behaviour under the AFA 2006. In particular, under section 20(1)(a) the AFA 2006, service personnel commit a service offence where they are unfit to perform their duty due to alcohol or drugs.

7.2 The AFA 2011 amended the existing regime under the AFA 2006 drawing on aspects of the civilian regime for alcohol and substance misuse in an aviation and shipping context under Parts 4 and 5 of the Railways and Transport Safety Act 2003 ("RTSA 2003"). Firstly, the AFA 2011 introduced strict alcohol limits for certain duties via a new offence under section 20A AFA 2006 of performing safety critical duties whilst over a set alcohol limit (these duties and limits must be set out in secondary legislation: see SI 2013/2787). This is wider in scope than the offences under Part 4 and 5 of the RTSA 2003, reflecting the range of safety critical activities carried out by the armed forces on training and operations.

7.3 The AFA 2011 in addition inserted a testing regime in Chapter 3A in Part 3 of the AFA 2006 to better enable the offences under section 20(1)(a)[2] and 20A of the AFA 2006 and Part 4 and 5 of the RTSA 2003 to be detected and prosecuted. COs who suspect a person of these offences can require that person to cooperate with preliminary breath, impairment or drug tests. The service police may also require blood, urine and breath specimens when investigating such offences.

7.4 The AFA 2016 expands the suite of testing powers in Chapter 3A of the AFA 2006 to allow for preliminary post-accident testing for alcohol or drug use roles without the need for COs to suspect an offence has been committed. The results of preliminary tests can be used in support of any type of investigation arising from the accident. This will improve the ability of the armed forces to obtain evidence in the immediate aftermath of an accident.

7.5 Under the expanded testing powers there is a more stringent regime for testing those carrying out aviation or marine functions relating to aircraft or ships involved in accidents to reflect the particular level of risk in those environments. This instrument specifies the relevant aviation and marine functions. The specified functions are based in part on the prescribed safety critical duties it is an offence to perform whilst over a set alcohol limit (see section 20A AFA 2006 and SI 2013/2787); these already cover a range of key activities relevant to aircraft or ships. This instrument also specifies additional functions to capture other aviation and shipping activities (e.g. fuelling or loading aircraft) that might be linked to accidents.

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 These are the first regulations made under section 93AA(2) of the AFA 2006 so there have not yet been any amending regulations which might be incorporated into a consolidated version.

[2] This is only where the section 20(1)(a) offence relates to a person's fitness to perform a duty the CO believes to be safety critical.

10. Consultation outcome

10.1 This instrument has been the subject of informal consultation with the Defence Safety Authority, the Service police forces and the Services themselves to ensure that the policy goals have been achieved and that the provisions of the instrument will work in practice.

11. Guidance

11.1 A Joint Service Publication on alcohol and substance misuse and testing sets out the policy for the testing for alcohol and drugs pursuant to offences under the Armed Forces Act 2006. This will be updated to reflect the requirement to cooperate with preliminary alcohol, impairment and drug tests if there is an accident.

11.2 Guidance on the alcohol and drug testing regime is contained in the Manual of Service Law, which provides guidance and supplementary information to armed forces personnel on the single system of Service law established under the AFA 2006. The first volume of the Manual is intended for COs and those who administer the Service justice system; it covers the Service justice system generally and includes a wide range of matters such as jurisdiction, arrest, custody, investigation, charging and mode of trial, summary hearing, review and appeal. The Manual of Service Law will be updated to provide commanding officers with guidance on the requirement to cooperate with preliminary alcohol, impairment and drug tests if there is an accident. 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 the SI relates to investigations and discipline in the armed forces and there is no impact on business, charities or voluntary bodies.

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 part of the quinquennial review of the AFA 2006. The AFA 2006 (which provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice) must be kept in force by an annual continuation order (the most recent order is SI 2018/519). In addition, the AFA 2006 has required a further Act of Parliament at least every 5 years to keep it in force. The last such Act was the Armed Forces Act 2016. The provisions of the AFA 2006, including Chapter 3A which provides for the preliminary testing for alcohol and drugs, are subject to review as part of work to prepare for the next 5-yearly Act which must be passed before the end of 2021. The content of these regulations will be kept under review to ensure the functions remain relevant to the armed forces.

15. Contact

15.1 Tracy Sexton at the Ministry of Defence, telephone: 0207 218 0564 or email: tracy.sexton743@mod.gov.uk. is the point of contact regarding this instrument.

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

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