EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (TERMS OF SERVICE) (AMENDMENTS RELATING TO FLEXIBLE WORKING) 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 This instrument introduces new types of flexible working for those serving in the regular Armed Forces, that is, the Royal Navy, the Royal Marines, the Army and the Royal Air Force. The instrument does so by amending existing regulations which deal with the terms of service for enlisted service personnel (personnel who are not commissioned officers).

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 either by the Act or by the instrument.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is to members of the regular Armed Forces 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:

"In my view the provisions of the Armed Forces (Terms of Service) (Amendments relating to Flexible Working) Regulations 2018 are compatible with the Convention rights."

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. This is the first use of the amended power.

6.2 The regulation-making power is exercisable by the Defence Council, which is the highest level of military command and administration under Her Majesty. In response to the report of the House of Lords Delegated Powers and Regulatory Reform Committee during the passage of the Armed Forces (Flexible Working) Bill [1st Report of Session 2017-19], the Government accepted an amendment to the Bill to make regulations under the new and amended powers in the Bill subject to the affirmative procedure.

6.3 The existing terms of service for enlisted members of the regular Armed Forces are contained in four sets of regulations: the Royal Navy Terms of Service (Ratings) Regulations 2006 (S.I. 2006/2918); the Royal Marines Terms of Service Regulations 2006 (S.I. 2006/2917); the Army Terms of Service Regulations 2007 (S.I. 2007/3382); the Royal Air Force Terms of Service Regulations 2007 (S.I. 2007/650). These regulations were made under section 2 of the Armed Forces Act 1966, but now have effect as if made under the power under section 329 of the AFA2006.

7. Policy background

What is being done and why

Flexible Service

7.1 At present, service in the regular Armed Forces involves an unlimited commitment for duty at any time, in any location, which is enforced by Service law. This means that such service personnel are either on duty or liable to be called up for duty all day, every day. Subject to a few limited exceptions, they may be required to serve anywhere in the world without notice. This unique way in which members of the Armed Forces serve has been established to support the overriding imperative of the defence of the country at home and abroad.

7.2 The 2015 Strategic Defence and Security Review recognised the need to "make the changes necessary to enable our Armed Forces to work flexibly, reflecting the realities of modern life". This acknowledged that members of the Armed Forces, like their civilian counterparts, want to have more control over how they run their lives by better balancing work and home life. Unlimited control is not possible in a disciplined Armed Force, but increasing such control where possible is seen as an important way of improving recruitment and retention in the Armed Forces. This instrument pursues this objective by expanding opportunities for flexible working.

7.3 There are significant differences between service in the Armed Forces and civilian employment that have necessarily influenced the arrangements prescribed in this instrument. Service must always support the overriding imperative of the defence of the country at home and abroad and the operational effectiveness of the Armed Forces, which requires certain limitations on flexible working, and the ability to recall service people where necessary. Service personnel in the regular Armed Forces must

also remain subject to service law at all times under the AFA2006. This instrument ensures that flexible working is compatible with those important principles.

7.4 The instrument introduces two new types of flexible working (known collectively as "flexible service") that may be used independently or at the same time (with one exception).

- Part-time service. This will enable enlisted members of the regular Armed Forces to apply to serve part-time for a specified period of time, up to a prescribed maximum. The effect of this arrangement, if agreed by their Service, is that there will be agreed times (measured in whole days) when they are not required to be available for duty. Part-time service is defined in the instrument by reference to full-time service: the reference to full-time service refers to the current unlimited commitment of those regulars who serve with no restrictions on the times that they can be required to be available for duty (colloquially known as the 24/7/365 commitment).
- Service on a restricted separation basis enables enlisted members of the regular Armed Forces to have restrictions placed on the number of days that they can be required to perform duties away from a specified place. The effect of this type of arrangement is that they must spend at least part of every day on which they are required to perform duties at their duty station or residence, except for a maximum number of 35 days per year when they may be required to serve away from those places. Where the flexible service period is less than a year, or where the individual is also serving on a part-time arrangement, the 35-day maximum will reduced on a pro rata basis. A person serving on a restricted separation basis will also be able to volunteer to serve away from their duty station or residence for more than the maximum number of days.

7.5 Flexible service is designed to provide temporary relief from some of the exigencies of service life, while not undermining Defence need which generally requires regular service to be a full-time, unlimited commitment. Flexible service will only be available for relatively short periods across a Service person's career. Flexible service arrangements under the instrument will therefore be time-limited to a maximum of 1,095 consecutive days (roughly 3 years) or a total of 1,460 days (roughly 4 years) in any 12-year period.

7.6 Flexible Service arrangements will be authorised by the competent authority for the service concerned. The competent authority for each Service is defined in the relevant regulations and is, broadly, the body or person for that Service which is already charged with the administration of the Armed Forces terms of service. The instrument provides that enlisted members of the regular Armed Forces may apply to their competent authority to be permitted to serve flexibly. That authority decides whether to approve the application, either on the terms proposed by the service person, or by proposing different terms, which must be accepted by the service person. These provisions ensure that enlisted members of the regular Armed Forces cannot be required to serve on flexible terms, against their wishes.

7.7 The instrument also sets out the circumstances in which flexible service arrangements may be varied, suspended or terminated. These provisions provide a degree of certainty to enlisted members of the regular Armed Forces about their flexible service arrangements. At the same time, they safeguard the overriding imperative of Defence need. So, in broad terms, the competent authority may vary, suspend or terminate a flexible arrangement with immediate effect whenever it considers it necessary to do

so on the grounds of operational effectiveness of the Armed Forces. The competent authority may also suspend or terminate after giving at least 90 days' notice to the person serving on a flexible arrangement. A person serving on a flexible arrangement may terminate it by giving at least 90 days' notice to the competent authority. The arrangement may also be varied or suspended where the competent authority and the person agree to do so.

7.8 The instrument also ensures that flexible service does not interfere with the exercise of service discipline. The instrument gives a commanding officer ("CO") the power to suspend a flexible service arrangement to give full effect to any punishment under the AFA2006. For example, one punishment available to a CO after a summary hearing or Court Martial is a restriction of privileges order. This means that the CO is responsible for assigning the offender extra duties outside of normal working times, which might be on days which were normally non-duty days for a person serving part-time. The CO could therefore suspend a flexible service arrangement in order to impose extra duties on what would otherwise be a non-duty day. However, the CO has no power to suspend an arrangement as a punishment, because the power is only available to facilitate the giving of other punishments. A flexible service arrangement is also suspended on any day that the enlisted member of the regular Armed Forces is in service custody.

7.9 The instrument provides that enlisted members of the regular Armed Forces will be able to apply to the competent authority for reconsideration of certain decisions. Where the member of the regular Armed Forces remains unhappy following that reconsideration, they will be able to make a service complaint under the procedure in Part 14A of the AFA2006.

7.10 Enlisted members in the regular Army can already restrict their service to a particular area by enlisting to serve on a local service engagement (an existing form of geographically restricted service). Such individuals will be able to apply to serve part-time, but will not be able to serve on a restricted separation basis. Some consequential changes to the local service engagement terms of service have been made in this instrument to enable enlisted members of the regular Army who are serving on a local service engagement to also serve part-time.

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 public consultation has not been undertaken on this instrument. The policy was however publicly debated in Parliament during the passage of the Armed Forces (Flexible Working) Act 2018. The instrument has also been the subject of extensive discussions between the Ministry of Defence and the Services who will be responsible for implementing the instrument. This has included informal consultation between the Services and service personnel.

11. Guidance

11.1 Detailed policy guidance will be published in an internal Joint Service Publication (JSP), which will be available to all service personnel and to administrators. The JSP will be published before this instrument comes into force. The MOD will also provide written guidance to COs and unit staffs who will administer Flexible Service. In addition, a comprehensive communications campaign is underway, and will continue, directed at Service personnel, to spread awareness about Flexible Service and its availability.

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 The approach to monitoring of this legislation is that the Ministry of Defence and the Services will monitor and review the effectiveness and impact of the new arrangements following their introduction in April 2019. The Defence Secretary has also committed to reporting on the impact of the measures in forthcoming Armed Forces Covenant annual reports. Additionally, the Armed Forces Act 2006 is subject to quinquennial review.

15. Contact

15.1 William Lyn at the Ministry of Defence, telephone: 0207 218 0409 or email: william.lyn720@mod.gov.uk can answer any queries regarding the instrument.

15.2 Richard Vincent at the Ministry of Defence, telephone: 0207 218 3584 or email: Richard.vincent963@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.