

ARMED FORCES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 17: Service sexual offences prevention orders

Service sexual offences prevention orders

60. Large numbers of service families live outside the United Kingdom, especially on bases in Germany and Cyprus. Part 2 of the Sexual Offences Act 2003 (“SOA 2003”) gives both civilian and service courts the power to make sexual offences prevention orders (“SOPOs”) when dealing with an offender for certain sexual offences or offences of violence. Such orders are to protect members of the public generally, or any particular members of the public, from serious sexual harm from the defendant. But this protection can only be made for members of the public in the United Kingdom. Section 17 extends the powers of the Court Martial and the Service Civilian Court (the “service courts”) so that they can make service sexual offences prevention orders (“service SOPOs”), which are very closely based on SOPOs but are for the protection of members of the service community outside the United Kingdom. *Subsection (1)* inserts new sections 232A to 232G into AFA 2006.
61. The new section 232A(1) enables the service courts to make a service SOPO where a defendant is convicted of an offence under section 42¹ of AFA 2006 and the corresponding civilian offence is listed in Schedule 3 or 5 to SOA 2003 (which list the offences in relation to which a SOPO may be imposed). As with a SOPO, the Court Martial can make a service SOPO where it makes a finding of insanity or unfitness to plead.
62. New section 232A(3) provides that a service SOPO (like a SOPO) may prohibit the defendant from doing anything described in it and lasts for a fixed period of at least 5 years. The order can only be made for the purpose of protecting members of the service community outside the United Kingdom from serious sexual harm from the defendant. This is defined in section 232A(6)(a) as protecting the service community outside the United Kingdom, or particular members of that community, from serious physical or psychological harm caused by the person committing a serious sexual offence. The new power sits alongside the existing provisions in Part 2 of SOA 2003, so that a service court can impose a SOPO and a service SOPO at the same time.
63. Service SOPOs are only available against the persons listed in section 232A(2): principally members of the armed forces, those civilians who under AFA 2006 are “subject to service discipline” (see the note on section 22) and persons who, a service court is satisfied, are intending or likely to become such civilians. Accordingly a service court can make a service SOPO in respect of a person who is not for the time being a civilian subject to service discipline, but is going to become a civilian subject to service discipline at a later stage. An example would be where the defendant is a member of a service family who has returned to the United Kingdom (and so is no longer a civilian

¹ Section 42 of AFA 2006 makes it an offence under service law to do anything which is a criminal offence under the law of England and Wales or which would be if done in England or Wales.

*These notes refer to the Armed Forces Act 2011 (c.18)
which received Royal Assent on 3 November 2011*

subject to service discipline). If the court is satisfied that the defendant is intending or likely to rejoin his family outside the United Kingdom and so become a civilian subject to service discipline again, it may make a service SOPO if this is necessary for the protection of the service community outside the United Kingdom.

64. Under new section 232A(4) the prohibitions within the order must be necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the defendant. Prohibitions could include, for example, preventing a defendant from having any contact directly or indirectly with a named person or persons, or preventing a defendant from being in the home of any female under the age of 16 if that person is there.
65. New section 232B enables a defendant to appeal to the Court Martial Appeal Court where the Court Martial makes a service SOPO following a finding of insanity or unfitness to plead. It does not deal with cases where the order is made on conviction, since a right of appeal in such cases already exists under the Court Martial Appeals Act 1968.
66. New section 232C(1) provides for variation and revocation of service SOPOs. An application to vary or revoke a service SOPO can be made to the Court Martial by a Provost Marshal (the Provost Marshals are the heads of the service police forces: see the note on section 3) or by the person subject to the order. For these purposes “variation” includes extending the order. However, the term of the order may be extended, and additional prohibitions may be imposed by the Court Martial when varying an order, only if this is necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the person subject to the order.
67. The default position is that a SOPO made by the Service Civilian Court or the Court Martial under SOA 2003 may only be varied or revoked by the Crown Court in England and Wales (section 108 of SOA 2003). However, it is important that, if a service court has imposed a SOPO and a service SOPO in respect of the same matter (the same conviction or the same finding of insanity or unfitness to plead), the SOPO should not be varied or revoked without regard to the service SOPO, while the person subject to the orders is still part of the service community. Accordingly, in certain circumstances new section 232C(2) and (3) (read together with the amendment made to section 108 of SOA 2003 by *subsection (2)* of section 17) give control over the variation or revocation of such associated SOPOs and service SOPOs to the Court Martial, instead of the Crown Court. Under new section 232C(2) and (3), where a service court has made a SOPO and an associated service SOPO, the power to vary or revoke the SOPO is given to the Court Martial while the person subject to the orders is subject to service law or a civilian subject to service discipline or where an application to vary or revoke is made in respect of both orders.
68. *Subsection (2)* (by amending section 108 of SOA 2003) removes the power of the Crown Court to vary or revoke a SOPO where new section 232C(3)(a) applies. This prevents applications being made in both the civilian and service jurisdictions, where one court may be unaware of the other court’s decision.
69. Where the person subject to both a SOPO and a service SOPO is no longer subject to service jurisdiction, an application to vary or renew the SOPO can be made to the Crown Court in England and Wales under section 108(1) of SOA 2003. An application to vary or revoke both orders can only be made to the Court Martial under section 232C(3)(b).
70. Section 232D enables a person to appeal against the variation or revocation of a service SOPO or the refusal of the Court Martial to vary or revoke a service SOPO. Appeals lie to the Court Martial Appeal Court.

Extended prohibitions orders

71. As explained above, the new section 232A empowers a service court to make an order (a service SOPO) related to the protection of the service community outside the United Kingdom when it makes a SOPO for the protection of the public within the United Kingdom. This does not allow a risk to the service community outside the United Kingdom to be dealt with where the offender has been dealt with by a civilian court, as a civilian court can only impose a SOPO. Nor does it deal with the situation where a service court has imposed a SOPO and it subsequently becomes apparent that the offender may be a danger to members of the service community outside the United Kingdom.
72. In response to this problem, section 17(1) also adds a new section 232E to AFA 2006. The new section empowers the Court Martial to make extended prohibitions orders (“EPOs”) in respect of members of the armed forces or civilians subject to service discipline. The orders can be made where such a person is subject to a SOPO, whether this has been made by a civilian or service court. In these circumstances the Court Martial’s discretion is limited. On application by a Provost Marshal the Court Martial must make the EPO if it is satisfied that the person is subject to a SOPO and that there are members of the service community outside the United Kingdom who would be protected by the SOPO if they were in the United Kingdom. The EPO can then only include prohibitions which are substantially the same as those in the SOPO, subject only to such modifications as are necessary to secure that the prohibitions work for the protection of relevant persons outside the United Kingdom.
73. An EPO is a mirror order which stands or falls with the SOPO. It lasts until the expiry of the SOPO; if the SOPO is varied or revoked, the extended prohibitions order lapses.
74. Section 232F provides for an appeal against the making of an EPO. The section enables the Secretary of State to make provision by order governing the powers of the Judge Advocate General in respect of these appeals. As the EPO largely stands or falls with the SOPO, and a SOPO can be appealed against, it is envisaged that the right of appeal against an EPO will be limited to matters specific to it, such as whether the court was right to be satisfied that there were members of the service community outside the United Kingdom who would be protected by the SOPO if in the United Kingdom. This would not, for example, be the case if the SOPO was made to protect only a particular person, and that person has not left the United Kingdom.
75. Under section 232G a breach of a service SOPO or of an EPO without reasonable excuse is a service offence punishable with five years’ imprisonment. This is the same maximum penalty as applies for conviction on indictment for breach of a SOPO (section 113 of SOA 2003).