# EXPLANATORY MEMORANDUM TO

# THE ARMED FORCES (EVIDENCE OF ILLEGAL ABSENCE AND TRANSFER TO SERVICE CUSTODY) REGULATIONS 2009

**2009 No. 1108**

**And**

# THE ARMED FORCES (WARRANTS OF ARREST FOR SERVICE OFFENCES) RULES 2009

**2009 No. 1110**

**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 instruments

2.1 These instruments are made under Chapter 3 of Part 13 of the Armed Forces Act 2006 ("the Act") which deals with arrest and detention of service personnel by civil authorities.

2.2 The first instrument makes provision for dealing with suspects who are brought before a summary court in the United Kingdom or British overseas territories where the suspect admits to being illegally absent or where the court has evidence of the suspect's absence and for a certificate to be supplied where persons who have been held by the civil authorities have been transferred to service custody or conditional release.

2.3 The second instrument allows a judge advocate to issue a warrant for the arrest of a person subject to service law or service discipline, who is reasonably suspected of having committed a service offence and to issue a warrant for the arrest of a person subject to service law, who is reasonably believed to be illegally absent and who has previously been released by a civilian policeman or court of summary jurisdiction under condition that he reports to a specified person or place at a specified time, and who has failed to comply with those conditions.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 An order under section 380 of the Act has been made which modifies the enabling powers for these instruments to enable the transitional provisions to be made.

## 4. Legislative context

4.1 Chapter 3 of Part 13 of the Act largely replicates provisions of the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 ("the service discipline Acts") which deal with miscellaneous matters connected to illegal absence.

4.2 Section 316(3) of the Act requires a civilian court to transfer to service custody, or to release with conditions, a person subject to service law and who is believed to be illegally absent, provided that such a person either admits to being subject to service law and being illegally absent or the court has evidence of a description provided for in these regulations. The Regulations specify the documents that would constitute such evidence and include certificates issued by the commanding officer of a person subject to service law or other documents issued by service authorities.

4.2 Section 319(1) of the Act provides that the Secretary of State may require a certificate to be issued by a court of summary jurisdiction or a civilian policeman when a person subject to service law who is suspected of having been illegally absent is transferred into service custody or is released with the condition to report to a specified place or person to be taken into service custody. The Regulations detail the information that is to be contained in such certificates, who may sign such certificates, the form of such certificates and who may receive any fees for their production.

4.3 Sections 313 and 317 are concerned with the issue of arrest warrants where a person is suspected of being illegally absent or has failed to comply with conditions of release. The Secretary of State may make rules governing the practice and procedure to be followed in issuing and executing such warrants.

## 5. Territorial extent and application

5.1 These instruments extend to the United Kingdom, the Isle of Man and British overseas territories and apply to persons subject to service law wherever they are in the world.

## 6. European Convention on Human Rights

6.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

## 7. Policy Background

7.1 Save in respect of who is the appropriate person to issue warrants of arrest where a person is suspected of illegal absence, it is considered that the arrangements under the service discipline Acts work well in practice. The provisions of the Act therefore continue the existing practices. The only significant difference from the current position is that under the service discipline Acts warrants for the arrest of persons suspected of an offence under service law may be issued by certain officers, usually the commanding officer of the person to be arrested. This is not considered satisfactory in terms of safeguarding the rights of the suspect as it is considered to be more appropriate that a member of the judiciary decides whether issuing a warrant is justified on the evidence presented.

7.2 Warrants of arrest under the Act may only be issued by a judge advocate who is satisfied by evidence given on oath that there are reasonable grounds for suspecting that a person has committed or is committing an offence. The

application for an arrest warrant may be made by a commanding officer, a service policeman or the Director of Service Prosecutions.

## 8. Consultation outcome

8.1 A memorandum about consultation on the Armed Forces Act 2006 primary legislation was submitted in written evidence to the Select Committee on the Armed Forces Bill and published on 9 May 2006 in its Special Report of Session 2005-06 (HC 828-II, page Ev 136). This memorandum explained how stakeholder consultation had been carried out and listed the individuals and organisations consulted. The individual instruments under the 2006 Act have been the subject of rigorous consultation with relevant stakeholders (such as the Services, the Service police, the Judge Advocate General and the Military Court Service) over a period of many months, to ensure that the policy goals have been achieved and that the provisions of each instrument will work in practice.

## 9. Guidance

9.1 A new Manual of Service Law will provide guidance and supplementary information to Armed Forces personnel on the single system of Service law established under the Act. The first volume of three within the Manual, which is intended for commanding officers and those who administer the Service justice system, includes a chapter on custody. A training version of the Manual of Service Law will be available in time to allow Service personnel to be trained ahead of full implementation of the Act and will subsequently be available to the general public on the internet. Guidance will be promulgated to judge advocates through the Judge Advocate General's practice memoranda.

## 10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for these instruments.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring and review

12.1 The Armed Forces Act 2006 is subject to quinquennial review. Following full implementation of the Act in October 2009 its provisions and its subordinate legislation will be monitored and reviewed leading up to the first quinquennial review in 2011.

## 13. Contact

13.1 Mr Nick Shaw at the Ministry of Defence, telephone 020 7218 0564 or email nick.shaw460@mod.uk, is the point of contact regarding this instrument.