EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (MINOR PUNISHMENTS AND LIMITATION ON POWER TO REDUCE IN RANK) (AMENDMENT) REGULATIONS 2023

2023 No. 1151

AND

THE ARMED FORCES (DISPOSAL OF PROPERTY) REGULATIONS 2023

2023 No. 1152

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

2.1 The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) (Amendment) Regulations 2023 enable a commanding officer to impose a deprivation order in combination with one of the prescribed minor punishments (a stoppage of leave order, restriction of privileges order or an admonition) to allow them to impose the most appropriate sentence for a service offence.

2.2 The Armed Forces (Disposal of Property) Regulations 2023 make provision regarding the disposal of property which has come into the possession of the service police or a person's commanding officer in connection with the investigation of a service offence. They also make provision for the disposal of property where a deprivation order has been imposed following conviction for a service offence by a judge advocate or, following a finding that the charge has been proved, by a commanding officer if the service offence was dealt with at a summary hearing.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Joint Committee on Statutory Instruments reported regulation 3(1) of the Armed Forces (Disposal of Property) Regulations 2009 [SI 2009/1923] ("the 2009 Regulations") for defective drafting in their 24th report of the 2008-09 session and the Department promised to make an amendment to clarify the wording at the next opportunity. Those regulations are replaced by the Armed Forces (Disposal of Property) Regulations 2023, and the clarification has been made in the equivalent regulation.

4. Extent and Territorial Application

4.1 The extent of these instruments (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom, the Isle of Man and the British overseas territories (except Gibraltar).

4.2 The territorial application of these instrument is worldwide. They apply to members of the armed forces wherever they are in the world and apply 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 Armed Forces Act 2006), 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 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Armed Forces Act 2021 (Commencement No.7) Regulations 2023, laid on 23 October 2023, will inter alia commence section 14 of the Armed Forces Act 2021 on 22 November 2023. This section inserts a new punishment for a service offence – a deprivation (of property) order - into sections 132 and 164 of the Armed Forces Act 2006. Both the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) (Amendment) Regulations 2023 and the Armed Forces (Disposal of Property) Regulations 2023 are needed as a consequence of the introduction of this new punishment.

6.2 Section 132 and 164 of the Armed Forces Act 2006 set out the punishments that are available to the Court Martial and commanding officers respectively when an offender has been convicted of a service offence or the charge has been found proven. The more serious punishments are set out in the Act, but the prescription of the minor punishments is left to regulations to be made by the Defence Council. These are set out in the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2023 [SI 2023/869] ('the main regulations'). These Regulations also set out permitted combinations of punishments. The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) (Amendment) Regulations 2023 amend the main Regulations to permit deprivation orders to be imposed in combination with each of the minor punishments.

6.3 Insofar as the Armed Forces (Disposal of Property) Regulations 2023 enable the disposal of property that has come into the possession of Service police or a person's commanding officer in connection with the investigation of a service offence, they replace the 2009 Regulations. Insofar as they enable the disposal of property that has come into their possession after a deprivation order has been made, this is the first exercise of the new power in section 94A of the Armed Forces Act 2006.

7. Policy background

What is being done and why?

7.1 The Armed Forces Act 2006 created a common disciplinary system for the three Armed Forces, with common offences and common punishments. The Armed Forces

(Minor Punishments and Limitation on Power to Reduce in Rank) (Amendment) Regulations 2023 allow deprivation orders to be imposed in combination with one (or more) of the minor punishments already prescribed (i.e. stoppage of leave orders, restriction of privileges orders and admonitions). Commanding officers will therefore have the same flexibility when sentencing to now deprive an offender of rights to property e.g. a knife used to graffiti property, as currently exists in the civilian criminal system in England & Wales. Around 450 minor punishments were imposed by commanding officers in 2022 and we expect deprivation orders to be used in relatively few of such cases. There has been little public interest in the policy itself to date.

7.2 During the investigation of a service offence, property may be seized as evidence by the service police or a commanding officer. The owner may wish to seek the return of that property or the service police or commanding officer in possession may be uncertain how to deal with it after it is no longer required for the purpose it was seized. The Armed Forces (Disposal of Property) Regulations 2023 provide a mechanism whereby a judge advocate or a commanding officer can order (or "determine" in the case of a commanding officer) that the property is delivered to the owner or is otherwise disposed of. This is the same mechanism as in the 2009 Regulations with a few additional administrative rules.

7.3 The Regulations also include a similar mechanism where a deprivation order has been made in respect of that property by the Court Martial or a commanding officer. In such circumstances the property may not be delivered to the owner where they consented to the offender's possession of it, unless they did not know, and had no reason to suspect, that the property was likely to be used to commit a service offence.

7.4 In consolidating the regulations, we have made a number of changes to the original rules that are intended to improve the process for disposing of property. This includes a new rule that a commanding officer or the service police in possession of the property must be invited to make representations before orders for delivery of the property to the owner or its disposal are made. There is a similar rule where a commanding officer is asked to make a determination to invite representations from the service police in possession. The rules have been added because, as part of their investigation, the service police or a commanding officer might hold information as to the ownership of the property and may have other information that is relevant. We have also enabled commanding officers in possession of property to make applications to a judge advocate where they are in possession of the property. Under the 2009 Regulations, only a service police officer can make such an application, even if the commanding officer is in possession. This allows a commanding officer to apply without having to ask the service police to make an application.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union

9. Consolidation

9.1 The Armed Forces (Disposal of Property) Regulations 2023 is a consolidating statutory instrument. This is due to the scale of amendments required to the 2009 Regulations to make the necessary changes in respect of deprivation orders, to clarify the defective drafting, and to make improvements to the original regime established in the 2009 Regulations.

10. Consultation outcome

10.1 The regulations have been the subject of rigorous consultation with relevant stakeholders including the single Services, the service police, the Judge Advocate General, the Service Prosecuting Authority and the Association of Military Court Advocates. Consultation occurred over three phases spanning just over seven weeks in total: (1) 19 May to 2 June; (2) 8 June to 22 June; and (3) 3 to 28 August. This was to ensure that the policy goals have been achieved and that the regulations will work in practice.

10.2 Of the 15 responses received, all were supportive of the changes made in the Armed Forces (Disposal of Property) Regulations 2023 regulations. Stakeholders, for example, agreed:

- with the inclusion of the new regulations that deal with the disposal of property where a deprivation order has been imposed by the Court Martial or a commanding officer;
- the Service police must be invited to make representations in respect of any order concerning delivery of the property or disposal;
- commanding officers in possession of property should be able to make applications to the Court Martial for a disposal order.

10.3 Some suggestions were made as to how we might further reform the Disposal of Property Regulations. These suggestions were well beyond the scope of our policy to make deprivation orders available in the service justice system. In some cases, the requisite regulation-making powers are not available in the Armed Forces Act 2006 to deliver these suggestions e.g. in respect of the disposal of perishable property. However, we propose to keep these suggestions under consideration were we to pursue further reform of primary and secondary legislation in this area in future.

10.4 In the light of a concern raised by the Association of Military Court Advocates, we will provide guidance to commanding officers to assist them in identifying when it would be proportionate to impose a deprivation order in combination with a minor punishment. The guidance will initially be provided through a Defence Instruction and Notice before then being incorporated into the next version of the Manual of Service Law.

11. Guidance

11.1 A Defence Instruction and Notice will provide guidance and supplementary information to Armed Forces personnel including the service police in respect of deprivation orders, when it would be proportionate to impose them, disposal of property where deprivation orders apply, and other changes made in the Disposal of Property Regulations. This will then be reflected in the next update to the Manual of Service Law in due course.

12. Impact

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

12.2 There is no significant impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no impact on business is foreseen. Deprivation orders and the disposal of property regulations

apply in respect of property associated with offences committed by persons subject to service law.

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 the quinquennial review of the Armed Forces Act 2006, which provides the vast majority of the primary legislation relating to the service justice system. This Act must be kept in force by an annual continuation order and requires a further Act of Parliament at least every 5 years to keep it in force. The last such Act was the Armed Forces Act 2021. The service justice system is subject to review as part of work to prepare for each 5-yearly Act and the next such Act must be passed before the end of 2026. The rules of court for the service courts are also kept under regular review to ensure the provisions remain relevant to the Armed Forces.

15. Contact

15.1 Richard Bishop at the Ministry of Defence, email: richard.bishop114@mod.gov.uk - can be contacted with any queries regarding the instrument.

15.2 Caron Tassel, Deputy Director for Conduct, Equity and Justice, at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt. Hon. Dr. Andrew Murrison MP at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.