EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (ALIGNMENT OF SERVICE DISCIPLINE ACTS) ORDER 2007

2007 No.

1. This explanatory memorandum has been prepared by the Ministry of Defence.

2. Description

2.1 This Order amends the Service Discipline Acts (the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957) to remove the current restriction on the number of civilians who may sit as lay members of courts-martial when trying a civilian accused. The Order provides that Courts-Martial Rules made under the Service Discipline Acts may provide for the entire lay panel to be made up of civilians when the defendant is a civilian. In doing so, the Order aligns the Service Discipline Acts with provisions in the Armed Forces Act 2006.

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

3.1 This Order is made under section 381(1) of the Armed Forces Act 2006 (alignment of the SDAs etc with this Act) and is therefore subject to the affirmative resolution procedure, pursuant to section 373(3) of that Act.

4. Legislative Background

4.1 The Armed Forces Act 2006 ("the 2006 Act") received Royal Assent on 8 November 2006. Full implementation of the 2006 Act is scheduled for January 2009 and until that time the three Service Discipline Acts remain in force.

4.2 Section 381 of the 2006 Act provides the Secretary of State with a power to amend specified enactments dealing with the armed forces (including the three Service Discipline Acts) in order to align them with the effect of the 2006 Act. This is to facilitate a smooth transition between the "old" and "new" systems of Service law.

4.3 The Order makes amendments to section 209 of the Army Act 1955 and the Air Force Act 1955 and section 118 of the Naval Discipline Act 1957.

5. Extent

5.1 The Service Discipline Acts apply to members of the armed forces wherever they are in the world, and to civilians in specified circumstances. The rules that will be made pursuant to these amendments will apply to the court-martial of civilians who are so subject, wherever that court-martial is held.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Defence has made the following statement under section 19 of the Human Rights Act 1998:

In my view the provisions of the Armed Forces (Alignment of Service Discipline Acts) Order 2007 are compatible with the Convention rights.

7. Policy background

7.1 The amendments to the Service Discipline Acts were made necessary by the judgment of the European Court of Human Rights ("ECtHR") in the case of *Martin v UK* (2006, Application Number 40426/98). In that judgment the ECtHR stated that the determination of a charge against a civilian by a military tribunal would only be compatible with Article 6 of the European Convention on Human Rights in "very exceptional circumstances".

7.2 The amendments will allow for rules to permit all civilian lay membership of courts-martial when trying civilian accused. The Department considers that this, together with the fact that the judge advocates who preside at courts-martial are civilian judges, means that courts-martial of civilians will no longer be "military tribunals" and will be compatible with Article 6 of the European Convention on Human Rights.

7.3 Provisions already exist in the 2006 Act to allow for rules to provide for all civilian lay membership of the Court Martial. In view of the ECtHR judgment, however, the Department has taken action to introduce these changes before the 2006 Act comes into force in January 2009.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is expected to be nil.

9. Contact

9.1 **Mrs S J McIntosh** at the Ministry of Defence (telephone: 020 7218 0564) can answer any queries regarding the instrument.