EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (CIVILIAN COURTS DEALING WITH SERVICE OFFENCES) (MODIFICATION OF THE CRIMINAL JUSTICE ACT 2003) REGULATIONS 2009 NO XXXX

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 These Regulations are made under section 271(2) of the Armed Forces Act 2006 ("AFA 06"). The Regulations set out the extent to which the Criminal Justice Act 2003 ("the 2003 Act") is modified when a civilian court sentences an offender for a Service offence. The modifications will enable civilian courts to take account of Service specific factors and ensure that a person convicted of a Service offence is treated, in so far is reasonable practicable, in a comparable manner with any other type of accused who is convicted by the civilian court.

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

3.1 Section 271 allows the Secretary of State to make regulations which modify any provision of Chapter 1 of Part 12 of the Criminal Justice Act 2003 (the 2003 Act) in its application to a civilian court dealing with an offender for a service offence. It also allows for modification by the Regulations of any enactment which confers a sentencing function on a civilian court in its application to a civilian court dealing with an offender for a Service offence.

3.2 The Regulations modify sections 143 and 240 of the 2003 Act. Section 143 falls within Chapter 1 of Part 12 of the 2003 Act and although section 240 is located in Part 12 of the 2003 Act, it does not fall within Chapter 1 of Part 12. Section 240 is considered for these purposes to be an enactment conferring functions on sentencing courts.

3.3 As the Regulations will modify the 2003 Act, they are to be made by affirmative resolution.

4. Legislative Context

4.1 The Regulations modify the 2003 Act in its application to a civilian court dealing with a Service offence in two respects. Service offences are listed at section 50(2) of AFA 06. The sections of the 2003 Act which are modified are 143 and 240 of the 2003 Act. For the sake of clarity each of modifications is dealt with separately in this memorandum.

4.2 Section 143 of the 2003 Act Section 143 of the 2003 Act provides that when sentencing an offender, the civilian courts must treat as an aggravating factor the fact that an offender committed the offence whilst on bail. An offender cannot be placed on bail under AFA 06: the closest Service equivalent to being on bail is being released post-charge from Service custody. The modification of s143 ensures that when a

civilian court sentences an offender for a Service offence, it must regard as an aggravating factor the fact that an accused committed the offence whilst charged with a Service offence and released from Service custody.

4.3 Section 240 of the 2003 Act When a civilian court sentences an offender to imprisonment, s240 of the 2003 Act requires the court to direct that any time spent on remand in connection with that offence (or a related offence) is to count as time served by him as part of the sentence. The modification of s240 will ensure that when a civilian court sentences an offender to imprisonment for a Service offence, the court is required to make a direction that any time spent in post charge custody will count as time served.

5. Territorial extent and application

5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories and applies to persons subject to Service law wherever they are in the world.

6. European Convention on Human Rights

6.1 The Under Secretary of State for Defence has made the following statement regarding Human Rights:

In my view, the provisions of the Armed Forces (Civilian Courts Dealing with Service Offences) (Modification of the Criminal Justice Act 2003) Regulations 2009 are compatible with the Convention rights.

7. Policy Background

7.1 The circumstances when a civilian court deals with and offender for a Service offence will be rare. However where this does occur, it is intended that wherever practicable an offender is sentenced in a comparable manner to any offender who is sentenced by the civilian courts for a non Service offence *and* any offender who is sentenced by his commanding officer or a Service Court for a Service offence. The modifications to s143 and 240 ensure this will occur.

8. Consultation Outcome

8.1 Given the nature of the Regulations, the Ministry of Justice has been consulted. The Ministry of Justice is content with modifications made to the 2003 Act and with the effect the Regulations will have on the way the civilian courts fulfil a sentencing function.

9. Guidance

9.1 There is no requirement to provide guidance to those involved in the Service Discipline System as the regulations have no application to a Commanding Officer or a Service Court. Because the Regulations merely modify the normal arrangements which apply when the civilian courts sentence an offender, it is considered unnecessary to provide guidance to magistrates and judges. The Regulations and the explanatory note, provide sufficient information to all those who carry out a sentencing function.

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 This legislation does not apply to small business.

12. Monitoring and Review

12.1 The Armed Forces Act 2006 is subject to a requirement for renewal each year by Order in Council (approved in draft by both Houses of Parliament) and renewal by Act of Parliament every five years. In response to these requirements the Act and the provisions made under it will be subject to continuing monitoring and a general review will conducted in order to provide for the Act of Parliament which will be required 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 information.