EXPLANATORY MEMORANDUM TO THE

ARMED FORCES (COURT MARTIAL) RULES

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 This instrument sets out rules governing the Court Martial which is a standing court established under the Armed Forces Act 2006 ("the 2006 Act"). The Rules cover a wide range of matters from administrative procedures to aspects of the law of evidence such as hearsay, bad character and special measures.

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

3.1 These Rules make provision with regard to the constitution of the Court Martial under section 155 of the 2006 Act and the powers of the court on election under section 165 of the Act; therefore, by virtue of section 373(3)(f) of the Act this instrument must be subject to the affirmative resolution procedure.

4. Legislative Context

4.1 Section 154 of the 2006 Act establishes a standing Court Martial replacing the *ad hoc* courts-martial convened under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

4.2 At present each of the services has its own Courts-Martial Rules (Courts-Martial (Army) Rules 2007 SI no. 3442, the Courts-Martial (Royal Navy) Rules 2007 SI no. 3443, and the Courts-Martial (Royal Air Force) Rules 2007 SI no. 3444), which will be revoked upon repeal of the current primary legislation under which they are made. This instrument provides one set of rules applicable to the Court Martial.

4.3 An order has been made under section 380 of the 2006 Act (S.I. 2009/1059) that makes provision for transitional arrangements and modifies certain enabling provisions in the 2006 Act under which this instrument is made allowing for some of the transitional provisions in the instrument to have full effect.

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 or civilians subject to Service discipline 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 under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Armed Forces (Court Martial) Rules 2009 are compatible with the Convention rights.

7. Policy background

7.1 When the 2006 Act was being drafted it was decided that rather than continuing with the system of *ad hoc* courts-martial that are convened as and when it is necessary to hold a trial, there should be a standing court. High level provision about the Court Martial is contained in Part 7 of the 2006 Act but much of the detail had to be left to secondary legislation. These Rules provide the majority of the detail for the law, practice and procedure of the court (although further matters – for example, the application of provisions of the Youth Justice and Criminal Evidence Act 1999 (c. 23) – are dealt with in separate statutory instruments to be laid before Parliament as part of the 2006 Act implementation process).

7.2 As far as practicable, these Rules have been modelled on Crown Court practice as regulated by the consolidated Criminal Procedure Rules 2005. However, where there are good operational reasons for departing from this (for example, being able to sit *in camera* if information that might be useful to an enemy could be disclosed), or where the peculiarities of the Service system demand it (such as provision regarding sentencing by judge advocates and lay members), then these Rules depart from civilian practice.

8. Consultation outcome

8.1 A memorandum about consultation on the 2006 Act 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.

8.2 This instrument has been the subject of rigorous consultation with relevant stakeholders (such as the Services, the Director of Service Prosecutions, the Judge Advocate General and the Military Court Service), over a period of two years, to ensure that the policy goals have been achieved and that the provisions of the 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 2006 Act. The second volume of three within the Manual, which is intended for lawyers and those who administer the Service justice system, includes a chapter on Court Martial proceedings. 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 2006 Act on 31 October 2009 and it 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. The Department has additionally held briefing talks for defence advocates.

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 this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & 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 instrument.