EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (PART 5 OF THE ARMED FORCES ACT 2006)

REGULATIONS 2009

2009 No.

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 make provision supplemental to Part 5 of the Armed Forces Act 2006 ("the Act"). They relate in particular to the investigation of offences under the Act and the referring of cases and charges to the Director of Service Prosecutions (the DSP) and to commanding officers. They lay down the procedure for bringing charges under the Act and for the exercise of related powers to amend, substitute or add charges.

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

3.1 For most purposes this instrument shall come into force on 31 October 2009. However, for the purpose of enabling (a) a Service policeman to report to a commanding officer that he is either aware or not aware of circumstances of a description (prescribed in regulation 5) that would require the case to be referred directly to the DSP; and (b) a commanding officer to delegate the functions he has (under Part 5 of the Act) to a subordinate commander, it shall come into force on the day after the day on which this instrument is made.

4. Legislative Context

4.1 Part 5 of the Act provides the framework within which Service disciplinary offences are to be investigated, charged and allocated for trial. These Regulations supplement Part 5 of the Act. Much of the regulations themselves and the provisions of the Act to which they relate are entirely new. There is no equivalent provision in or under the Armed Forces legislation (which is replaced by the Act). Regulation 3 prescribes, for the purposes of section 114, the circumstances in which commanding officers are required to ensure that the Service police are aware of certain matters. Regulation 5 prescribes the circumstances, for the purposes of section 116, in which the Service police are required to refer certain cases to the DSP. The Regulations also specify (i) the procedures to be followed for referring cases and charges, and for the bringing, amendment and substitution of charges; (ii) the information to be provided to the DSP and to commanding officers when cases or charges are referred; (iii) the persons who are to be notified of prescribed matters (the accused or his legal adviser, for example, when proceedings on a charge are discontinued); and (iv) the form and content of charges. The Regulations also provide for the delegation of the commanding officer's functions in Part 5 of the Act.

4.2 Section 373(3) of the Act provides that regulations which govern the referral of cases or charges, the notification of prescribed matters or the provision of prescribed

documents (for the purposes of section 118(2)(b) of the Act) require the approval by resolution of both Houses of Parliament. It was considered expedient and helpful to all those affected by Part 5 to include all the regulations which supplement it in a single statutory instrument. All of these Regulations are therefore to be made by affirmative resolution.

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 and civilians subject to Service discipline wherever they are in the world.

6. European Convention on Human Rights

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

In my view, the provisions of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 are compatible with the Convention rights.

7. Policy background

7.1 Under the Armed Forces legislation which is replaced by the Act, it is for the relevant commanding officer to decide whether to ensure that the Service police are aware of a matter which needs investigating and to decide whether a charge should be referred for possible court-martial. These Regulations and Part 5 of the Act provide a new framework governing these issues. They aim to ensure that cases which should reach the DSP do so, and do so promptly, while keeping the commanding officer at the centre of the disciplinary process.

7.2 As part of the framework to achieve these aims, the Act requires commanding officers to ensure that evidence of offences by those under their command is appropriately investigated. In addition to this general duty, the Act provides that commanding officers must ensure that evidence of certain very serious offences (listed in Schedule 2 to the Act) is brought to the attention of the Service police. Additionally, the Act in conjunction with regulation 3 of these Regulations requires COs to ensure that the Service police are aware of evidence that certain circumstances have arisen. These circumstances are those which may make an offence (though not listed in Schedule 2) more serious, for example where an offence may have been committed by a superior while carrying out his duties or where the victim was especially vulnerable (for example, someone undergoing training or being held in Service custody).

7.3 Regulation 5 sets out the circumstances in which the Service police must refer the case direct to the DSP for him to decide what charge, if any, should be brought. The main aim is to ensure that such a case is considered by the DSP and that this consideration is not delayed by the case having to be considered first by the commanding officer.

7.4 The regulations also set out the procedure for bringing a charge under the Act and ensure that essential information about what is happening after a charge has been brought is provided promptly to the accused and other interested parties.

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 (in this case principally the Services and the Service police) 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 Armed Forces Act 2006. 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 the investigation, charging and mode of trial of Service disciplinary offences. 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 and will subsequently be available to the general public on the internet.

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 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 Nick Shaw at the Ministry of Defence, telephone 020 7218 0564 or email nick.shaw460@mod.uk, is able to answer any queries regarding the instrument.