EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (POWERS OF STOP AND SEARCH, SEARCH, SEIZURE AND RETENTION) ORDER 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 This Order brings within a single Order the supplementary arrangements provided for in Part 3 of the Armed Forces Act 2006 in relation to stop and search, search, seizure and retention of property in the course of investigations of offences. It addresses the powers of Service policemen and of those acting on the orders or with the authority of a station commander. It sets out the safeguards that must be complied with and, in particular, addresses the review by judge advocates of seizures in the course of searches authorised by commanding officers and the right of persons having an interest in seized property to apply for its return.

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

3.1 None

4. Legislative Context

4.1 The Order is made under powers in Part 3 of the Armed Forces Act 2006 ("the Act") most of which are re-enactments of powers in the Armed Forces Act 2001 (2001 c.19). The Order makes provision, much of which is equivalent to that contained in specified sections of the Police and Criminal Evidence Act 1984 (c. 60), in relation to the stop and search of persons and vehicles, the search of premises, the seizure and retention of property, the granting of search warrants and associated matters. It also makes provision with respect to reviews by judge advocates of searches authorised by a commanding officer in which property was seized.

4.2 Part 3 of the Order, made under section 323 of the Act, makes provision equivalent to that contained in Part 2 of the Criminal Justice and Police Act 2001 (c.16)**.** The power to seize property for later sifting and the provisions as to applications for the return of seized property are applied to searches conducted by Service policemen subject to limited necessary adaptations of language. The power to seize property for later sifting is not extended to persons undertaking a search on the authority of a commanding officer. Applications for the return of property seized during a search, whether the application is made during review of a commanding officer authorised search or by application under article 28, are made to a judge advocate. The other safeguards in the 2001 Act are also applied subject to minor amendment. The Order lists the Service offences during the investigation of which a search warrant or, exceptionally, a commanding officer's authority or order to search may be granted.

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

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

In my view the provisions of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 This Order fulfils the policy requirement to bring all secondary legislation relating to searches of persons, vehicles and other premises within a single comprehensive Order. It is considered important that service personnel and others affected by such searches should have substantially similar legal safeguards to those enjoyed by persons affected by equivalent searches conducted by the UK civilian police. This has been achieved by repeating, subject to minimal necessary adaptation, the safeguards contained in the civilian legislation.

7.2 Thus, where, in accordance with the Act, a search is conducted on the authority of a commanding officer, the arrangements relating to the review of that search by a judge advocate contain similar safeguards to those provided for when a person applies for the return of property seized during a search that was authorised by warrant issued by a judge advocate. Equally, the seize and sift powers contained may not be exercised during searches authorised by commanding officers. This means that property that may be sensitive in nature and of complex legal status can only be seized in the course of a search conducted by a Service policeman.

7.3 The broader policy purpose reflected in this Order is to ensure that, subject only to necessary Service requirements, Service personnel enjoy substantially the same rights as a civilian person would have in the course of a criminal investigation.

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, the Service police, the Service legal branches and the Office of the Judge Advocate General) 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 entitled: "Arrest and search, stop and search, entry search, and seizure and retention". 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 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 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, 0207 218 0564, email nick.shaw460@mod.uk is the point of contact regarding this instrument.