EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (RETRIAL FOR SERIOUS OFFENCES) ORDER 2013

2013 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 The purpose of this instrument is to enable persons acquitted of certain serious offences by a service court (for example the Court Martial) to be retried in the service justice system if new and compelling evidence comes to light in relation to those offences.

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

3.1 None.

4. Legislative Context

4.1 Section 323 of the Armed Forces Act 2006 ("the 2006 Act") enables the Secretary of State to make provisions, in relation to the Armed Forces, equivalent to criminal justice enactments in England and Wales. Section 94 of the Criminal Justice Act 2003 ("the 2003 Act") extends the order making power in section 323 to cover the provisions in Part 10 of the 2003 Act. Part 10 of the 2003 Act reforms the law on double jeopardy by permitting retrials in serious cases where a person is acquitted of an offence but where new and compelling evidence subsequently comes to light against the acquitted person.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories. It applies to persons subject to service law wherever they are in the world and also to persons subject to service discipline, namely to persons who are not subject to service law but who satisfy the requirements of any paragraph of Part 1 of Schedule 15 to the 2006 Act.

6. European Convention on Human Rights

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

> In my view the provisions of the Armed Forces (Retrial for Serious Offences) Order 2013 are compatible with the Convention rights.

7. Policy background

7.1 Part 10 of the 2003 Act reformed the law relating to double jeopardy, by permitting retrials in respect of a number of very serious offences where new and compelling evidence has come to light. Previously, the law did not permit a person who had been acquitted of an offence to be retried. The impetus for the reform of the law in the civilian justice system was the Macpherson Report produced in 1999 following the murder of Stephen Lawrence in 1993. The report recommended that the double jeopardy rule should be abrogated in murder cases to allow a retrial in the light of new and compelling evidence. The new law came into force in 2005 and was subject to a good deal of media attention.

7.2 The 2003 Act, referred to in paragraph 4 above, does not apply to the service justice system arrangements. This instrument therefore makes equivalent provision, with some modifications, for retrial in the service justice system of persons previously acquitted in the service justice system of a "qualifying" offence. The instrument applies to acquittals which have occurred before or after it comes into force. Matters covered by the instrument include the arrangements governing the reinvestigation, charging, and application for a retrial of an acquitted person for a qualifying offence.

7.3 Qualifying offences include certain criminal conduct offences which are charged under section 42 of the 2006 Act, for example murder, manslaughter and rape. These mirror the offences that an acquitted person might be retried for in the criminal justice system. Qualifying offences also include some service offences which are not criminal in character but which are commensurate in seriousness to the qualifying criminal conduct offences, for example: assisting the enemy, and obstructing operations.

7.4 This instrument also imposes certain safeguards. For example, the instrument provides that the service police may not investigate the commission of a qualifying offence by an

acquitted person unless the Director of Service Prosecutions (DSP) consents or unless urgent investigative steps are required to avoid the investigation being substantially and irrevocably prejudiced. Similarly, an acquitted person may only be arrested for a qualifying offence where a judge advocate has issued a warrant for that person's arrest. As only commanding officers may charge persons with offences in the service discipline system, this instrument sets out the process by which an acquitted person might be charged with a qualifying offence for which he or she was previously acquitted. Thus, where an investigation has been conducted and the acquitted person has been arrested, a senior service policeman may refer the case to the DSP if he or she considers that there is sufficient evidence to charge that person with a qualifying offence. Once the case has been referred to the DSP, the DSP may direct the person's commanding officer to charge that person with a qualifying offence.

7.5 The instrument enables a prosecuting officer (with the consent of the DSP) to apply to the Court Martial Appeal Court (CMAC) for an order for retrial of the acquitted person for a qualifying offence. After hearing the application, the CMAC must make the order if satisfied that (a) there is new and compelling evidence against the acquitted person and (b) it is in the interests of justice for the court to make the order. In all other cases the CMAC must dismiss the application. The decision made by the CMAC may be appealed to the Supreme Court. As a further safeguard, this instrument provides that where the CMAC had ordered the retrial of an acquitted person, that person must (unless the CMAC gives permission to do otherwise) be arraigned on the charge specified by the CMAC within 2 months of the CMAC order.

7.6 To prevent unfairness arising in the retrial of any acquitted person, this instrument empowers the CMAC to make orders restricting the publication of material which might otherwise prejudice the administration of justice. Furthermore, this instrument makes it an offence for a person and some organisations to contravene such orders. The instrument also enables the acquitted person to be detained in custody whilst awaiting retrial.

8. Consultation outcome

8.1 No public consultation has been undertaken in connection with the retrial for serious offences order; however the order has been subject to rigorous consultation with the Service Prosecuting Authority, the office of the Judge Advocate General, the Services and the Service police.

9. Guidance

9.1 The Manual of Service Law provides guidance and supplementary information to Armed Forces personnel involved in the administration of the single system of Service law established under the 2006 Act and is available on the internet at https://www.gov.uk/government/publications/joint-services-publication-jsp-830-manual-of-service-law-msl. The Service Police Codes of Practice are laid before Parliament and are issued to provide guidance to the service police. In addition, the Service Prosecuting Authority, the Office of the Judge Advocate General and the Military Court Service will issue their own guidance as necessary.

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 This instrument will be reviewed in the light of any changes made to Part 10 of the Criminal Justice Act 2003 and as a part of the quinquennial review of armed forces legislation relating to the service justice system.

13. Contact

13.1 In the event of any inquiries about this instrument, please contact Humphrey Morrison of Central Legal Service of the Ministry of Defence, telephone number 0207 807 8291; email: humphrey.morrison577@mod.uk