EXPLANATORY MEMORANDUM TO

ARMED FORCES (SERVICE COMPLAINTS MISCELLANEOUS PROVISIONS) REGULATIONS

2015 No. [XXXX]

1. This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument forms part of a package of five statutory instruments required to implement a new service complaints system for the armed forces provided for in new section 365B and Part 14A of the Armed Forces Act 2006 ("the 2006 Act"), as inserted by sections 1 to 3 of, and the Schedule to, the Armed Forces (Service Complaints and Financial Assistance) Act 2015 ("the 2015 Act").

2.2 A member or former member of the armed forces has the right to make a service complaint if he or she thinks himself or herself wronged in a matter relating to his or her service, including if he or she alleges bullying, harassment or discrimination, or biased or dishonest behaviour. This instrument provides for:

- the matters about which a person may not make a service complaint;
- persons who may not be appointed to decide a service complaint or an appeal or re-consideration of one;
- the circumstances which require the Defence Council to appoint at least one independent person on an appeal or re-consideration;
- the events which require the appropriate officer in the service complaints system to notify the new Service Complaints Ombudsman following a complaint which was made after an initial referral from him or her.

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

3.1 The JCSI may wish to be aware that, in relation to the exclusions provided for in regulation 3(2)(h) and (i) of this instrument – which capture decisions made under the existing system on whether a complaint was brought in time or was about an excluded matter – the Defence Council Regulations referred to in section 4 below are going to make provision for an alternative remedy for complainants here. This will operate by providing such complainants with an extended time limit (3 months) to apply to the Ombudsman for a binding review of such a decision which, if successful, will enable a complaint to be brought under the new service complaints system.

4. Legislative Context

4.1 Along with four other statutory instruments, this instrument enables the implementation of a new system to deal with complaints by members or former members of the armed forces under Part 14A of 2006 Act, as amended. The other statutory instruments are:

- Defence Council Regulations about the procedure for making and dealing with a service complaint. These Regulations will provide for: how a service complaint is to be made, how decisions on the admissibility of a complaint are to be made, appointments of decision makers on service complaints and what those decisions need to cover. Time limits in respect of the internal process will also be provided for in these Regulations;
- Secretary of State Regulations on the procedure to be followed in an investigation by the Service Complaints Ombudsman under new section 340H(1) of the 2006 Act, including application requirements and time limits;
- Secretary of State Regulations on the transitional, transitory and savings provisions to make clear what is to happen in respect of all pre-commencement complaints which are still being considered in the existing system on the commencement of the new system;
- Secretary of State Regulations commencing sections 1 to 3 of, and the Schedule to, the 2015 Act.

Collectively, these five instruments will make clear how both the new internal redress system and the new Ombudsman investigation procedures are to operate. The powers under which this instrument is made are being used for the first time. All of the other instruments are subject to the negative procedure and will be laid by early December 2015.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State Minister for Defence Personnel and Veterans has made the following statement regarding Human Rights:

In my view the provisions of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 Members of the armed forces have no contract of employment and no system of collective bargaining. Disobedience to lawful commands are offences under the 2006 Act, pay and other benefits are determined and altered unilaterally, and historically the rights of service personnel to bring legal claims against the Crown are also limited. It has therefore long been recognised that members of the armed forces should have some other effective way of obtaining redress for grievances.

7.2 Currently, under the 2006 Act the Service Complaints Commissioner is required to report annually on whether the current system for handling service complaints under the Act is fair, efficient and effective. The first Commissioner, Dr Atkins, frequently criticised the system as ineffective, overloaded and beset by delay. In her annual report on service complaints for the year 2013 the Service Complaints Commissioner said she could not provide an assurance that the current system was working and was critical of how long it took to resolve complaints particularly those relating to bullying and harassment. She also raised the issue of the level of manpower needed to support the system. The House of Commons Defence Committee had also taken a close interest in these matters and published a report on the work of the Service Complaints Commissioner on 12 February 2013. This report raised concerns about the workings of the complaints system and recommended the creation of an Armed Forces Ombudsman.

7.3 The Government worked with Dr Atkins to consider the most appropriate way to reform the service complaints system. The Government's intentions for reform were set out in a written ministerial statement made on 13 March 2014. The subsequent Armed Forces (Service Complaints and Financial Assistance) Bill received Royal Assent on 26 March 2015. It introduces a more streamlined internal service complaints process and creates a new Service Complaints Ombudsman with powers to investigate service complaints and review certain procedural decisions taken during the internal process.

7.4 The regulations in this instrument have the following aims:

- the rules on who cannot be appointed to deal with a service complaint are intended to prevent conflicts of interest and ensure fairness;
- by excluding matters from being raised as a service complaint, the intention is to prevent repeat complaints, and challenges to decisions made in the internal system or by the Ombudsman, and otherwise to exclude complaints where adequate alternative remedies are available;
- the rules on when to involve an independent member are required as a matter of policy on certain matters in connection with disputed behaviours, again to ensure fairness and provide some measure of external oversight within the internal system; and
- the matters to be reported to the Service Complaints Ombudsman are there to ensure that he or she is notified, and can keep people informed, of progress.

8. Consultation outcome

8.1 There has been no formal consultation on this instrument. A draft was published for introduction of the Bill in June 2014 and was revised when the Bill entered the House of Commons in December 2014.

9. Guidance

9.1 Guidance will be set out in a Joint Service Publication for anyone involved in a service complaint such as a complainant or a respondent and for those involved in delivering the service complaints process. A Joint Service Publication is an authoritative set of rules or guidelines specific to, and applicable across, the Ministry of Defence. Internal communications will also describe the main changes, ahead of and following implementation.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

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 and the other associated instruments for implementing the new system are intended to assist with the fairness, effectiveness and efficiency of the system and that will be reviewed annually by the Ombudsman in her annual report which is laid before Parliament. Monitoring and reviewing the success of this instrument will be done as part of the Ministry of Defence's response to those reports and the issues the reports highlight in relation to the procedures set out in the instrument.

13. Contact

Tracy Sexton (0207 218 0564; tracy.sexton743@mod.uk) at the Ministry of Defence is the point of contact regarding this instrument.